

**ALLEGHENY COUNTY COMMON PLEAS COURT
CRIMINAL DIVISION**

COMMONWEALTH OF PENNSYLVANIA Plaintiff-Respondent,)	
)	
v.)	CP-02-CR-0003178-2007
)	
ROBERT KENNEDY Defendant-Petitioner.)	
)	

PCRA Petition

Defendant-Petitioner, Robert Kennedy, through counsel, Craig M. Cooley, respectfully files his *PCRA Petition* which is presented in good faith and based on the following facts and authorities.

PROCEDURAL HISTORY

On May 16, 2007, the Commonwealth filed an *Information* against Robert Kennedy alleging multiple counts of rape, sexual assault, and indecent assault in connection with a sexual assault that allegedly occurred during the early morning hours of December 16, 2006. Tracy Lynn McCloskey was the accuser who alleged she had been sexually assaulted on this date.

Mr. Kennedy pleaded not guilty and waived his right to a jury trial, but on August 27, 2008 the Honorable John A. Zottola found him guilty of (1) rape of an unconscious victim (18 Pa. C.S. § 3121(a)(3)), (2) rape – forcible compulsion (18 Pa. C.S. § 3121(a)(1)), (3) sexual assault (18 Pa. C.S. § 3124.1) (4) indecent assault of an unconscious person (18 Pa. C.S. § 3126(a)(4)), and (5) indecent assault – without consent (18 Pa. C.S. § 3126(a)(1)). Carl Marcus represented Mr. Kennedy before Judge Zottola. On November 11, 2008, Judge Zottola sentenced Mr. Kennedy to 60 to 120 months for the rape of an unconscious victim conviction and 66 to 132 months for the rape by forcible compulsion conviction and ran the sentences consecutively for an aggregate total sentence of 126 to 252 months in prison. Judge Zottola issued no further penalty for the remaining convictions.

On December 3, 2008, after retaining appellate counsel, Mr. Kennedy filed his post-sentencing motions (“PSM”), which he amended on March 16, 2009. His PSM raised several trial counsel ineffectiveness claims. On April 30, 2009, Judge Zottola held a PSM hearing, and on May 4, 2009 he denied the PSM.

Mr. Kennedy appealed (934 WDA 2009), but the Superior Court affirmed on June 15, 2010. Mr. Kennedy did not seek discretionary review from the Pennsylvania Supreme Court, making his conviction final on July 15, 2010.

On September 27, 2010, Mr. Kennedy filed a timely *pro se* PCRA petition.

On October 14, 2010, Judge Zottola appointed Charles Pass, but on November 30, 2010, only six weeks later, Mr. Pass filed a no-merits/*Finley* petition and a motion to withdraw, which Judge Zottola granted on December 1, 2010, before dismissing Mr. Kennedy's PCRA petition on January 5, 2011. Mr. Kennedy did not appeal this dismissal.

On July 9, 2014, Mr. Kennedy filed a second PCRA motion, which Judge Zottola dismissed without a hearing on September 29, 2014.

STATEMENT OF FACTS

A. Therece "Trayce" McCloskey's criminal history, dishonesty, and chronic addiction to drugs

While the claimed sexual assault in this case allegedly occurred during the early morning hours of December 16, 2007, events prior to this date are relevant to the issues before the Court, namely Therece "Trayce" McCloskey's credibility.

In October 2006, a year before the alleged sexual assault, McCloskey worked as a minutes clerk for the Honorable Richard E. McCormick of the Westmoreland Common Pleas Court. She had worked for Judge McCormick since 2004. As part of her job, McCloskey was responsible for locking away evidence introduced during legal proceedings before Judge McCormick.

On October 3, 2006, though, McCloskey deviated from her evidence preservation duties.¹ On that day, Judge McCormick presided over a jury trial in *Commonwealth v. Robert E. Chambers*, 2698-2005. It was a drug trial which started and ended that day. During the *Chambers* trial, the Commonwealth introduced “bags of powdered and crack cocaine.” After the *Chambers* trial concluded, it was McCloskey’s responsibility “to collect all of the evidence,” which would have included the bags of cocaine, and to “lock” the cocaine “in a safe in Judge McCormick’s office.”²

McCloskey did not place the cocaine into the safe. Instead, she secretly and criminally placed the drugs in her desk drawer. When investigators reviewed the Westmoreland County Courthouse sign-in sheet for the night of October 3, 2006, they learned McCloskey had signed in at 7:40 p.m. and signed out at 7:55 p.m. and she listed the department she was visiting as “Judge McCormick.”³

When detectives retrieved the bags of cocaine from the *Chambers* case, someone had tampered with one of the bags and then had used a piece of tape to reseal the bag. When detectives weighed the bag, it weighed 5.00 grams less than it had weighed when the Commonwealth introduced at the *Chambers* trial. Also, detectives lifted a latent print from the bag that matched to McCloskey’s fingerprint.

¹ Rpp. 40-43. Rp. stands for Reproduced Record. Rpp. are citations referring to multiple pages in the Reproduced Record. The Reproduced Record is attached to this pleading.

² Rpp. 2-8.

³ Rpp. 2-8.

On November 3, 2006, when detectives confronted McCloskey with the sign-in sheet, tampered bag, the missing 5.00 grams of cocaine, and the latent fingerprint, she confessed to taking the 5.00 grams of cocaine with the intent to sell it because she needed money to get her through some “financial difficulties[.]”⁴

On November 14, 2006, - a month before meeting Mr. Kennedy – authorities arrested McCloskey. She posted bail that day and was released.

On December 19, 2009, the Monday after she met Mr. Kennedy – in case CP-65-CR-0005029-2006, the Commonwealth filed an *Information* charging McCloskey with a felony: PWIMSD – cocaine.⁵ The Commonwealth also filed an *Information*, in case CP-65-0005030-2006, charging her with multiple misdemeanors: (1) theft by unlawful taking, (2) tampering with evidence, (3) tampering with public record, and (4) intentional possession of controlled substance.⁶

On November 28, 2006, McCloskey pled guilty to the felony PWIMSD count in case 5029-2010 and received three years of probation.⁷ She also pled guilty to theft by unlawful taking and tampering with evidence counts in case 5030-2010 and received a consecutive year of probation.⁸ As part of both sentences, McCloskey had to submit to drug and alcohol treatment.

⁴ Rpp. 2-8.

⁵ Rpp. 11-21.

⁶ Rpp. 22-27.

⁷ Rpp. 9-10, 11-21.

⁸ Rpp. 9-10, 22-27.

On April 25, 2009, McCloskey – or someone claiming to be her – came across a story about her crimes and sentence on the Blogonaut website. The blog discussed her crimes and criticized her lenient sentence and the fact the Commonwealth had dismissed two counts in case 5030-2010. For instance, in the “COMMENTS” section of the website, someone wrote the following comment on March 19, 2009:

It seems as though this was all planned in advance and the punishment was not severe enough. Would the punishment have been the same for a non court employee which would have taken evidence from a court proceedings???

An additional comment would like to be posted for the free walker but this is not the appropriate place.⁹

When McCloskey – or someone claiming to be McCloskey – saw this comment, this person wrote:

I am the person who committed this crime. I had a serious problem at the time. I was afraid to go to anyone for help because of the nature of my job and the potential embarrassment to my family. Unfortunately, I made a big mistake, and it affected everyone in worse ways than I could ever imagine. Was the sentence fair? I think so. I did not sell the drugs. Also, I had to drop out of nursing school. I can never get a good job because of the felony on my record that they insisted I plead to. I would have been better off in the long run going to jail for 2 years. The felony follows me everywhere. It always will. I have lost friends and family members no longer speak to me. My life was ruined by my foolishness. I advise anyone who has a drug problem to get help before they hurt those they love and put them in the public eye.¹⁰

⁹ Rpp. 40-43.

¹⁰ Rpp. 40-43.

On December 30, 2009, Westmoreland County authorities filed a motion moving to revoke McCloskey's probation due to a probation violation. On April 19, 2010, Judge Rita Hathaway revoked McCloskey's probation and resented her to three additional years of probation, with one year of electronic home monitoring, and random drug testing.¹¹

On March 8, 2011, Westmoreland County authorities filed another revocation motion. On March 29, 2011, Judge Hathaway issued a bench warrant for McCloskey's arrest after she had failed to appear at a March 28, 2011 probation revocation hearing. By this point, though, McCloskey had fled to El Paso, Texas. The bench warrant identified McCloskey's El Paso address as 6869 Enid Court, Apt. #65, El Paso, Texas 79912.

On August 8, 2011, El Paso authorities arrested McCloskey for theft of property not greater than \$500. On July 26, 2013, McCloskey pled guilty to the theft charge and was sentenced to seven days in the El Paso Detention Center.¹²

On November 18, 2013, once McCloskey was extradited back to Westmoreland County, Judge Hathaway revoked her probation and sentenced her to one to two years in the Westmoreland County Jail ("WCJ"). Upon completion of her incarceration, McCloskey had to serve four years of probation. Judge Hathaway also ordered another

¹¹ Rpp. 11-21.

¹² Rpp. 28-29.

drug and alcohol evaluation and mental health evaluation.¹³ While incarcerated at the WCJ, McCloskey sought outpatient drug treatment from Catholic Charities.¹⁴

On December 27, 2014, McCloskey stole more than \$200 from a Westmoreland County Walmart. On October 20, 2015, McCloskey pled guilty to the theft charge in case MJ-10301-NT-0000015-2015.¹⁵

On August 31, 2016, Westmoreland County authorities arrested McCloskey again and charged her with theft by unlawful taking, receiving stolen property, and disorderly conduct. Authorities alleged McCloskey had stolen \$590.45 from the victim and listed the offense date as March 1, 2016. On February 22, 2017, the Commonwealth filed an *Information*, in case number CP-65-CR-0000309-2017, charging her with the above offenses. On June 23, 2017, Judge Meagan Bilik-DeFazio issued a bench warrant for McCloskey's arrest because she failed to show at a required hearing on this date. On September 19, 2017, McCloskey pleaded guilty to disorderly conduct and was ordered to pay a \$300 fine.¹⁶

B. The alleged sexual assault that resulted in Robert Kennedy's conviction and incarceration

At 4:00 p.m. on December 16, 2006, after McCloskey went to Mercy Hospital, Allegheny County Bureau of Police ("ACBP") detectives interviewed McCloskey at

¹³ Rpp. 11-21.

¹⁴ Rpp. 11-21.

¹⁵ Rpp. 31-34.

¹⁶ Rpp. 37-39.

Mercy Hospital.¹⁷ According to McCloskey, she met Mr. Kennedy on Match.com three weeks before their date the previous night – December 15, 2006. McCloskey said she had met Mr. Kennedy at Todd's by the Bridge Tavern ("Todd's") in Versailles at 10:00 p.m.

Once at Todd's, McCloskey said they "stood at the end of the bar" and "devoured one alcoholic drink a piece." McCloskey had a gin and tonic, while Mr. Kennedy had a mixed drink. She said they each had another drink before they went back to the dance floor and danced. While they danced, McCloskey said Mr. Kennedy left once to "get another mixed drink." She said she went to the bathroom while dancing and that when she returned from the bathroom Mr. Kennedy had bought her "a fruity shot." After drinking the shot, McCloskey said she "felt very tired" and that Mr. Kennedy "told her she was starting to stumble." McCloskey told detectives she believed the shot contained "something more than the alcohol."

McCloskey said when she told Mr. Kennedy she was tired he told her she could stay at his house "if she could not make it home." He "told her that it would be safe, and she could sleep on the couch." McCloskey agreed to stay at his house. They left Todd's at 1:00 a.m. (on December 16th) and went to a nearby Denny's with Mr. Kennedy. McCloskey said she had two gin and tonics and one shot at Todd's. She said Mr. Kennedy drove them to Denny's in his vehicle.

¹⁷ Rpp. 44-45.

McCloskey had no recollection of driving to Denny's, entering Denny's, or ordering food at Denny's, but she recalled what she had eaten at Denny's. McCloskey also recalled leaving Denny's, Mr. Kenney driving her back to her car near Todd's, entering her car and following Mr. Kennedy back to his house, and parking her car near his house.

McCloskey told detectives "she did not want to stay" at Mr. Kennedy's "the whole night but wanted to take a short nap and get herself together, and then make the trip back to her home." Once inside Mr. Kennedy's, Mr. Kennedy "gave her a pillow and blanket." She took the pillow and blanket and "laid down on" his living room couch. Once on the couch, the next thing she remembered was waking up in pain, with Mr. Kennedy hunched over her having sexual intercourse with her. McCloskey said she was nude from the waist down. She yelled at Mr. Kennedy, asked him what he was doing, and told him he was hurting her. When she yelled at him, she said Mr. Kennedy "grabbed her arms and forced them up over her head[.]" She said she "started to fight, and got him off of her by pushing with her legs."

Once she got him off, she said she "got up and ran to the bathroom," closed the door, and urinated. After wiping, though, she noticed her vagina was bleeding. She flushed the wipe and washed her face. When she exited the bathroom fifteen minutes later, she said Mr. Kennedy was "passed out naked from the waist down." McCloskey said she got dressed, gathered her belongings, and left his residence at 4:20 a.m.

McCloskey did not call the police to report the alleged rape. Instead, she said she called her friends John and Tracy Sieghman and told them “she was raped.” She said she arrived home at 6:20 a.m. Once home, she did not call the police. Instead, she said she “passed out” because she was “very tired.” She said she woke up at noon when Doug Markos of the Greensburg Police Department had called her and told her “she needed to go to the hospital and get a forensic examination.” McCloskey said she arrived at Mercy Hospital at 1:30 p.m. on December 16, 2006.

The doctor who conducted the forensic examination noted that McCloskey had a “minor” abrasion on her neck.¹⁸ The forensic examination did not note any “blunt force” injuries to McCloskey’s neck or arms. Tests on McCloskey’s blood identified a trace amount of Benadryl (diphenhydramine) in her blood. McCloskey believed Mr. Kennedy had spiked one of her drinks with Benadryl at Todd’s and this was why she felt unwell, but not drunk, at Todd’s.

C. Mr. Kennedy’s statement to detectives

Detectives interviewed Mr. Kennedy on December 17, 2006.¹⁹ He gave a verbal and a written statement. Mr. Kennedy said he had met McCloskey at Todd’s at 9:45 p.m. on December 15, 2006. Upon meeting her, she “exited her car with open arms” and hugged him. Once inside Todd’s, Mr. Kennedy said he had three doubles and two

¹⁸ Rpp. 46-47.

¹⁹ Rpp. 48-49.

shots, while McCloskey had five mixed drinks. They also shared a pitcher of shots, which amounted to five shots apiece.

Mr. Kennedy said they then danced for an hour, during which McCloskey repeatedly told him “he was a cute guy.” McCloskey had also told him she “was a light weight,” that “she was feeling buzzed,” and that “she was not sure” she could make it home. After dancing, Mr. Kennedy asked McCloskey if she wanted to go to Denny’s. McCloskey said yes. Mr. Kennedy said McCloskey did not want to leave her car at Todd’s, so she followed him to his residence, parked her car, and then got into his car to drive to Denny’s.

After Denny’s they went to his house – where they arrived at 2:30 a.m. (on December 17th). As they drove to his house from Denny’s, McCloskey told him she was unsure if she could drive home and that she needed to be home in the morning because her landlord was doing electrical work in her residence.

Once they arrived at his house, Mr. Kennedy said they sat on the couch for a while before he got McCloskey a glass of water. After drinking the water, McCloskey laid “her head on his shoulder” and started kissing his neck. This resulted in a long make-out session. After the make-out session, McCloskey went to the bathroom to remove her make-up. Once she exited the bathroom, Mr. Kennedy saw she had removed her belt. She sat on the couch next to him, started kissing him, removed his belt, and began touching his groin area. At this point, she moved to the floor and asked him to join her. He joined her on the floor where the two had consensual vaginal sex.

He said McCloskey “grabbed his penis and forced it into her vagina.” He said “they changed body positions sharing time on top of each other.” He said they both performed oral sex on one another.

Mr. Kennedy said they had sex for an hour, at which point McCloskey told him “she was not sure how much longer she could continue to have sex.” He asked her “several times” if she wanted him to ejaculate inside of her. She “told him to ejaculate inside of her” – so he did. After ejaculating, McCloskey got dressed, while he went to sleep. When he woke up, McCloskey was gone. She had left his kitchen and porch light on and his backdoor unlocked. He assumed everything “went well” with the date because they had good “consensual sex.” Mr. Kennedy said he sent McCloskey a couple text messages on December 16th asking if she still wanted to meet for dinner that night (December 16th). When McCloskey never replied, he texted this message, “Why haven’t I heard from you? You can at least tell me and be honest.” Detectives saw this message on McCloskey’s and Mr. Kennedy’s phone. After giving a verbal statement, Mr. Kennedy handwrote a statement.

D. Trial

1. McCloskey’s direct-examination testimony

McCloskey met Mr. Kennedy in December 2006 on Match.com. They emailed for two weeks before calling one another. Mr. Kennedy asked her out to drinks, and

she agreed to meet him at Todd's in (Friday) December 15, 2006. McCloskey lived in Greensburg.²⁰

When she met Mr. Kennedy on December 15, 2006, McCloskey immediately decided she was not attracted to him because he did not look like his Match.com photograph. Despite being unattracted to him, she stuck it out because she drove all the way to McKeesport to meet him. They went inside Todd's, went to the end of the bar, and ordered drinks. She had a gin and tonic and a shot of liquor before they went to the back room and danced for an hour. After dancing, Mr. Kennedy purchased another (third) drink for her.²¹

After drinking her third drink, McCloskey said she did not feel "right." She described it as feeling "tired" and "out of it," but not drunk. Despite feeling unwell, she did not think anything was wrong with her and she was able to continue conversing with Mr. Kennedy at the bar. Although she claimed not to be drunk, McCloskey testified that Mr. Kennedy had told her she was acting drunk and that she was staggering.²²

Shortly after Mr. Kennedy told her this, they left the bar. As they were leaving, Mr. Kennedy told her she should not drive home, but instead should go to Denny's with him and get something to eat. McCloskey agreed, left her car at Todd's, and Mr.

²⁰ NT, Trial, 5/20/2008, pp. 15-18.

²¹ NT, Trial, 5/20/2008, pp. 21-25.

²² NT, Trial, 5/20/2008, pp. 24-26.

Kennedy drove them to Denny's. At this point, McCloskey claimed sporadic memory losses. For instance, she recalled leaving her car at Todd's, but she had no recollection of driving to or arriving at Denny's. She remembered, however, looking at the menus, ordering food, paying, and leaving.²³

When they left Denny's, Mr. Kennedy suggested she go to his house, rest for a bit, and when she felt better she could drive home. McCloskey agreed because she did not think she was capable of driving. McCloskey, though, said Mr. Kennedy drove her back to Todd's where she got into her car and followed Mr. Kennedy to his house.²⁴

McCloskey recalled walking into Mr. Kennedy's house without any assistance but could not recall if she followed Mr. Kennedy into the house. Once inside, she recalled walking into the kitchen and talking with Mr. Kennedy but claimed she could not remember where in his house they had talked. McCloskey said Mr. Kennedy told her she could rest on the living room couch if she was tired. Mr. Kennedy, she said, retrieved a blanket and pillow for her. She recalled sitting on the couch, but then said she could not recall anything after sitting on the couch.²⁵

After sitting on the couch, McCloskey said the next thing she recalled was waking up on the living room floor and realizing Mr. Kennedy was having vaginal sex with her. She was on her back and Mr. Kennedy was on top of her. She said she was fully clothed

²³ NT, Trial, 5/20/2008, pp. 26-27.

²⁴ NT, Trial, 5/20/2008, pp. 27-28.

²⁵ NT, Trial, 5/20/2008, pp. 29-30.

when she sat on the couch, but when she woke up her pants and underwear were off, and her bra and shirt were pulled up.²⁶

McCloskey recalled asking Mr. Kennedy what he was doing and told him he was hurting her. She said Mr. Kennedy ignored her and “just kept going.” McCloskey recalled asking him to get off her. Mr. Kennedy, she said, ignored her again, but this time he grabbed her wrists, held them over her head, and continued vaginally penetrating her with his penis. When the prosecutor leadingly asked whether she struggled with or tried to fight off Mr. Kennedy, McCloskey changed her testimony and said she fought with Mr. Kennedy as he grabbed her wrists and moved them above her head.²⁷

McCloskey initially said she “pushed” Mr. Kennedy to get him off. Later, though, she said she “kicked” him and that her “kick” is what got Mr. Kennedy to stop. Once she kicked him off, McCloskey ran into straight to bathroom. McCloskey, though, never explained how she knew where the bathroom was in Mr. McCloskey’s residence.²⁸ She said she cried in the bathroom but could not recall if she locked the bathroom door. When she wiped her face, she claimed her face was bleeding, but she could not identify what part of her face was bleeding or what caused the bleeding. She

²⁶ NT, Trial, 5/20/2008, pp. 29-30.

²⁷ NT, Trial, 5/20/2008, p. 30.

²⁸ NT, Trial, 5/20/2008, p. 31.

also said she felt vaginal pain and a burning sensation when she urinated, but she never mentioned vaginal bleeding, which is something she had mentioned in her statement.²⁹

McCloskey said she remained in the bathroom for 15 to 20 minutes. When she exited, she walked into the living room, saw Mr. Kennedy laying on the floor with his eyes closed, got dressed, grabbed her purse, and left his residence. She got into her car and drove away, but she said she got lost in Mr. Kennedy's neighborhood.³⁰

McCloskey said she drove for thirty minutes before she called her friends John and Tracy Seighman. She could not recall when she called the Seighmans, but believed it was around 3:00 a.m. She then said she texted John and that John had called her back. She said she was crying and confused when she told John she had been raped and needed help to get home because she was lost. She said it took her a few hours to ultimately get home, even with John's help. She said she drove to her house, instead of a hospital or police department to report the alleged sexual assault. She initially said she did not speak with anyone else, but then said may have talked with Tracey after she spoke with John.³¹

McCloskey said she arrived home at 6 a.m. When she got home, she laid down on her bed and cried briefly before falling asleep. When she woke up later that morning, she said the first person who called her was Lt. Doug Marcos of the Greensburg Police

²⁹ NT, Trial, 5/20/2008, p. 31.

³⁰ NT, Trial, 5/20/2008, pp. 36-37.

³¹ NT, Trial, 5/20/2008, pp. 38-39.

Department. Marcos, she said, called her because John Seighman had called him and told him what had happened. Marcos told her he would be right over so he could take her to the hospital. Although Marcos said he was on his way to her house to take her to the hospital, McCloskey said she got a ride to the hospital from her aunt because she did not want to drive to the hospital herself. McCloskey and her aunt arrived at Jeanette Mercy Hospital at 1:00 p.m.³²

McCloskey said she did not give Mr. Kennedy permission to remove her clothes, touch her, or vaginally penetrate her with his penis.³³

2. McCloskey's cross-examination testimony

McCloskey said she had divorced her husband shortly before the alleged sexual assault. In a Match.com email McCloskey sent to Mr. Kennedy before their date, she openly talked about having sex with another Match.com user. McCloskey agreed with trial counsel that she was “very open” to talking about sex with people. McCloskey also agreed with trial counsel that she obviously decided – at some point that night – that it was okay and safe to go to Mr. Kennedy's house.³⁴

McCloskey reiterated that when they arrived at Mr. Kennedy's house, Mr. Kennedy showed her to the living room couch, at which point she laid down on the couch. On direct-examination, McCloskey said Mr. Kennedy got her a pillow and

³² NT, Trial, 5/20/2008, pp. 39-41.

³³ NT, Trial, 5/20/2008, pp. 46-47.

³⁴ NT, Trial, 5/20/2008, pp. 51-52.

blanket. On cross-examination, though, when the trial counsel questioned McCloskey about her preliminary hearing testimony, McCloskey claimed the preliminary hearing transcript had to be incorrect. For instance, according to the preliminary hearing transcript, McCloskey testified that after sitting on the couch, she was the one who retrieved the blanket and pillow.³⁵ On direct-examination, however, she said Mr. Kennedy got the blanket and pillow for her. McCloskey told trial counsel she had noticed the “typo” in the preliminary hearing transcripts before she testified because she had reviewed her preliminary hearing testimony with the prosecutor.³⁶

On direct-examination, McCloskey said she clearly recalled not kissing Mr. Kennedy on his couch that night. At the preliminary hearing, though, McCloskey said she could not recall if she kissed Mr. Kennedy on the couch that night and specifically testified, “I’m sure anything is possible, but I don’t remember it.”³⁷ McCloskey said she doubted kissing Mr. Kennedy because she was not attracted to him. When trial counsel asked why she went home with him if she was unattracted to him, she said, “I went home with him because I couldn’t drive.”³⁸

³⁵ NT, Trial, 5/20/2008, p. 53.

³⁶ NT, Trial, 5/20/2008, p. 53.

³⁷ NT, Trial, 5/20/2008, pp. 60-61.

³⁸ NT, Trial, 5/20/2008, p. 61.

McCloskey, though, said she was not drunk because she only had three drinks (“I wasn’t drunk.”), but later during cross-examination she said, “I thought I was a little unsteady. I knew I didn’t feel well.”³⁹ She then said she did not consume an alcoholic beverage after 10:30 p.m. that night (December 15, 2006).⁴⁰

Trial counsel challenged her time line. McCloskey testified she had her last drink at 10:30 p.m., that they left the bar at 1:00 a.m., and went to Denny’s and ate. Although she could not recall how long they were at Denny’s, she recalled ordering and paying. After eating at Denny’s, Mr. Kennedy drove her back to her car, which was still parked near Todd’s, and she got into her car and followed Mr. Kennedy to his house. She then followed Mr. Kennedy into his house, had a conversation with him before he showed her to his living room couch where she cannot recall if she made out with him before she allegedly passed out. After passing out for an undetermined amount of time, she woke up to find Mr. Kennedy having nonconsensual vaginal sex with her. When she kicked or pushed him off her, she ran into his bathroom where she stayed for 15 to 20 minutes. When she left the bathroom, she got dressed, left his residence, got into her car, and began her two-hour trek home. She said she left Mr. Kennedy’s residence at 3:00 a.m.⁴¹

³⁹ NT, Trial, 5/20/2008, pp. 54-55, 77.

⁴⁰ NT, Trial, 5/20/2008, pp. 73-74.

⁴¹ NT, Trial, 5/20/2008, pp. 73-74.

In other words, between 1:00 a.m. and 3:00 a.m. – or in 120 minutes – McCloskey claimed she did the following: (1) left Todd's, (2) walked to Mr. Kennedy's car to drive to Denny's, (3) drove to Denny's with Mr. Kennedy, (4) walked from Mr. Kennedy's car into Denny's, (5) got seated at Denny's, (6) ordered food at Denny's, (7) waited for the food to be brought to their booth at Denny's, (8) ate her Denny's food, (9) paid the check, (10) walked out of Denny's to Mr. Kennedy's car, (11) drove back to her car parked near Todd's, (12) exited Mr. Kennedy's car and got into her car, (13) drove to Mr. Kennedy's residence, (14) had trouble parallel parking her car in front of Mr. Kennedy's residence, (15) exited her car and walked into Mr. Kennedy's residence, (16) had a conversation with Mr. Kennedy once inside his residence, (17) sat on his couch and laid down, (18) waited for Mr. Kennedy to bring her a pillow and blanket, (19) may have made out with Mr. Kennedy on the couch, (20) passed out for an undetermined period of time, (21) woke up with Mr. Kennedy having nonconsensual vaginal sex with her and kicked or pushed him off her, (22) got up and went into his bathroom for 15 to 20 minutes, and (23) got dressed and left his residence.

Trial counsel continued challenging McCloskey's memory. When trial counsel re-read her preliminary hearing testimony where she said it was possible she had kissed and made out with Mr. Kennedy, this Q/A occurred:

A. I don't remember that part of the night.

Q. You said it was possible?

A. I can't answer what I don't remember.

Q. You could have also had sex with him?

A. I can't answer that. I don't believe so.

Q. You don't believe you did, but you could have been?

A. I don't know how to answer your question.

Q. I know that.⁴²

Trial counsel also challenged her testimony where she claimed she only regained consciousness or woke up while Mr. Kennedy was having sex with her. For instance, McCloskey said the vaginal intercourse was not the sensation that woke her up, it was the "pain" that woke her up. If the "pain" of vaginal sex woke her, trial counsel asked how it was possible she did not wake up when Mr. Kennedy allegedly battered, bruised, and choked her – or at least that is the narrative created by the photographs McCloskey took of her alleged injuries the days following the alleged sexual assault:

A. It is actually pain that woke me up.

Q. But he is having sex with you?

A. Yes.

Q. But what about all the bruises and marks on your body that you say – I assume you are saying [those] occurred during this incident. I mean, this is a bruise on your neck. There's a bruise behind your ear. Here's another bruise on your neck. Here's a bruise on your chest. None of that woke you up?

⁴² NT, Trial, 5/20/2008, p. 63.

A. Apparently not.⁴³

Trial counsel also challenged her claim that she feared Mr. Kennedy and wanted to “get away” from him when she allegedly woke up and he was having non-consensual vaginal sex with her.

Q. And did you pick up your cell phone [when you went to the bathroom]?

A. No. I wanted to get away.

Q. Did you call the police?

A. No.

Q. Did you call the police after you put your pants on?

A. No.

Q. Did you call the police after you got in your car?

A. No.

Q. Did you call the police on your way home?

A. No.

Q. Did you call the police any time that night?

A. No.

....

Q. Excuse me. You never called anyone like the police that night, did you?

A. No.

⁴³ NT, Trial, 5/20/2008, p. 67.

Q. You could have, would you agree?

A. Sure.

....

A. I think I was just in shock.

Q. You were in shock?

A. I think so.

Q. Let me ask you this: When was it that you went into shock?

A. I don't know.

Q. Was it right as soon as you got up and saw him on top of you or did that occur sometime later?

A. I don't know, sir.

Q. When did you stop remembering what was happening? Was that early in the evening; what that later in the evening?

A. I didn't know until the event was over what I remembered and what I didn't.

A. Yes.⁴⁴

McCloskey initially testified she asked the prosecutor for copies of her preliminary hearing testimony and the statement she had given to the police on December 16, 2006:

Q. Did you read the police report today?

A. Yes.

⁴⁴ NT, Trial, 05/20/2008, pp. 68-70.

Q. Why, to refresh your memory?

A. I don't know.

Q. Why did you read them?

A. I wanted to see it.

Q. Excuse me?

A. I wanted to see it.

....

Q. This morning, okay. What did you read? Did you read all the reports?

A. My preliminary [hearing] transcripts and the police report, except for Robert's part.⁴⁵

McCloskey said she “needed to read” the police report and preliminary hearing transcripts because she “was curious as to what [they] said.” When trial counsel asked why she would be “curious” as to what she told the detectives on December 16, 2006, all McCloskey could say was, “Because I never saw the police report.”⁴⁶ When trial counsel asked why she was “curious” about her preliminary hearing testimony, McCloskey said, “[The district attorney] asked me to look it over.”⁴⁷

⁴⁵ NT, Trial, 5/20/2008, pp. 53-54.

⁴⁶ NT, Trial, 5/20/2008, p. 54.

⁴⁷ NT, Trial, 5/20/2008, pp. 54-55.

When trial counsel asked McCloskey how far she drove from Todd's to Mr. Kennedy's house, she said only two blocks, but when trial counsel confronted her with her prior testimony, where she said eight blocks, McCloskey said eight blocks. When trial counsel asked why she initially said two blocks, she said because the police report said two blocks:

Q. You drove your vehicle after taking alcohol, did you not?

A. Two blocks, yes.

Q. Two blocks. I thought you said it was eight blocks?

A. I thought it was. That what he told me, it was eight blocks.

Q. How far did you think – or did you find out that it was two blocks?

A. Yes.

Q. So you remember how far it was? You remember now how far it was to his house?

A. I thought it was eight blocks.

Q. Why did you say two blocks?

A. Because the report said two blocks.

Q. Oh, so now you are delivering us the information you read in the report and not what you remember, is that right?

A. No. I told you that I remembered him telling me it was eight blocks, but I found out it was only two.

Q. After you read the report?

A. Correct.⁴⁸

McCloskey had no idea how diphenhydramine got into her system. She also denied taking any illegal drugs during or around the time of the incident, but she admitted she was on probation for a “cocaine possession” conviction (CP-65-CR-0005029-2006).⁴⁹ McCloskey, however, never mentioned her unlawful taking and tampering with evidence convictions in case CP-65-CR-0005030-2006. Neither, though, did trial counsel or the prosecutor.

3. John Seighman’s trial testimony

John never gave a formal statement to the police. At trial, he said he knew McCloskey through his wife, Tracy, because Tracy and McCloskey were friends before he Tracy. On December 16, 2006, John was at home when McCloskey called his cell phone in the middle of the night. McCloskey, he said, was “very excited,” “flustered,” crying “uncontrollably,” and “totally confused.” John spent the first few minutes of the call trying to calm her down. John said McCloskey eventually “uttered the words she thinks she was raped.” He had no idea how long his phone call with McCloskey lasted. He said Tracy never spoke with McCloskey during the call. After the call, John called Lt. Marcos, who was friends with him and Tracy. He told Marcos that McCloskey had told him “she thought she was possibly raped[.]”⁵⁰

⁴⁸ NT, Trial, 5/20/2008, pp. 59-60.

⁴⁹ NT, Trial, 5/20/2008, p. 55.

⁵⁰ NT, Trial, 5/21/2008, pp. 106-111.

On cross-examination, John said he was unsure what time McCloskey had called him and whether it had occurred before or after 4:00 a.m. He also testified McCloskey had told him “she thinks she was raped[.]”⁵¹ He also said he had specifically asked McCloskey if she wanted him to call Lt. Marcos. McCloskey said no and said she only “wanted to talk to” him (John). As John put it, “She was more concerned about getting home than anything.”⁵²

On re-direct, for the first time, John said he now recalled McCloskey telling him “very clearly” that she was, in fact, “sexually assaulted.”⁵³

4. Tracy Seighman’s trial testimony

Tracy said McCloskey texted her at 10:00 p.m. on December 15, 2006 to let her know she was alright. Tracy replied and asked if she (McCloskey) wanted her (Tracy) to text back later to check up on her, but McCloskey texted, “no.” When Tracy woke up at 5:30 a.m. on December 16, 2006, John told her about the phone call he had had with McCloskey. Tracy said she called McCloskey at 6:30 a.m., but McCloskey did not answer, so she left a message and told McCloskey to meet her at the ER at the hospital, which is where Tracy worked as an ultrasound tech. When Tracy arrived at the hospital that morning, she told the ER staff to call her when her friend arrived. Tracy said she told the secretary and ER staff that her friend had been raped. At 1:30 p.m., Tracy

⁵¹ NT, Trial, 5/21/2008, p. 117.

⁵² NT, Trial, 5/21/2008, p. 120.

⁵³ NT, Trial, 5/21/2008, p. 121.

received a call from the hospital staff saying McCloskey had just arrived. Tracy went to McCloskey's room and said McCloskey looked "extremely shaken and upset." She said McCloskey had marks on her arms and legs, but not her neck.⁵⁴

5. The Commonwealth's expert testimony

McCloskey's tox screen presented with Vicodin and diphenhydramine. There was less than 50 ng/mL of diphenhydramine identified in McCloskey's system. This was within therapeutic levels (25-112 ng/mL).⁵⁵

Dr. Maher Alhashimi, the doctor who had examined McCloskey on December 16, 2006, testified and McCloskey never told him she was drugged or believed that she may have been drugged by the alleged assailant.⁵⁶

6. McCloskey's alleged injuries and the photographs of them

On December 16, 2006, nurses at the hospital took eight photographs of McCloskey: (1) three photographs of the abrasion on the back of McCloskey's neck;⁵⁷ (2) two photographs of the right front side of McCloskey's neck that shows no bruising;⁵⁸ (3) two photographs of McCloskey's right inner forearm that shows a faint mark on her forearm;⁵⁹ and (4) one photograph of the back of her right calf.⁶⁰ Although

⁵⁴ NT, Trial, 5/21/2008, pp. 123-126.

⁵⁵ NT, Trial, 8/25/2008, pp. 25-28.

⁵⁶ NT, Trial, 8/25/2008, pp. 44, 50-51.

⁵⁷ Rpp.

⁵⁸ Rpp. _____

⁵⁹ Rpp. _____

⁶⁰ Rpp. _____. There is some discrepancy as to who took these photographs. The prosecutor said detectives took these photographs. NT, Trial, 5/20/2008, p. 32. Dr. Alhashimi, though, said nurses took the photographs. NT, Trial, 8/25/2008, p. 45.

nurses had thoroughly photographed her alleged injuries, McCloskey felt the need to photograph her neck, forearm, and calf on December 17th and December 18th at home. She gave the photographs to the prosecutor who gave them to the defense.⁶¹

At trial, the Commonwealth entered the photographs taken by the nurses (C-2) and those taken by McCloskey on December 17th (C-3) and December 18th (C-4) into the record.⁶² McCloskey claimed Mr. Kennedy inflicted the marks and bruising captured in the December 17th and 18th photographs.⁶³

Dr. Alhashimi said he saw a neck “abrasion” and a “slight” abrasion on the back of McCloskey’s neck. Dr. Alhashimi said: “She had some abrasion on the neck and slight abrasion on the back of the neck.”⁶⁴ Dr. Alhashimi then said: “She does have some abrasion on the back of the neck or I would say a minor bruise, an abrasion on the arm, upper arm, [but] no bruise. Slight bruise on the forearm.”⁶⁵ Dr. Alhashimi did not see bruising or finger impressions on the front or sides of McCloskey’s neck.⁶⁶

During his closing argument, the prosecutor repeatedly referred to the bruises captured in McCloskey’s photographs. For instance, the prosecutor argued:

⁶¹ Rpp. _____

⁶² NT, Trial, 5/20/2008, pp. 32, 33, 34, 35.

⁶³ NT, Trial, 5/20/2008, pp. 86-87.

⁶⁴ NT, Trial, 8/25/2008, pp. 44-45.

⁶⁵ NT, Trial, 8/25/2008, p. 45.

⁶⁶ NT, Trial, 8/25/2008, pp. 49-50.

What does he say. Well, she fell on the floor. I've got to explain the bruising. I'm not saying that the bruising is coming from him undressing her. It is just from him moving her and grabbing her and drugging her.

He had no explanation for any of the bruises on her body. He says, this was just consensual sex. It wasn't rough, but listen to his statement to the police. She fell on the floor. That might explain away something. 67

The prosecutor also argued:

What kind of story does it tell the Court? What does he tell the Court? It tells the Court his statement to the police at the time was him acknowledging that he had some explaining to do. It wasn't just we had sex, and to this day, he can't explain away those bruises, Your Honor.

She is covered in them. There are three sets of photos that have been introduced. Those photos speak volumes as to what that man did. That's not consensual sex. 68

At the end of his closing, the prosecutor argued:

We have physical evidence, physical findings, not only of the bruising but the vaginal trauma, Your Honor. 69

⁶⁷ NT, Trial, 8/27/2008, p. 81.

⁶⁸ NT, Trial, 8/27/2008, p. 82.

⁶⁹ NT, Trial, 8/27/2008, p. 84.

7. Defense's Case

a. Todd's bartenders and Dr. Winick

Lauren Conrad, a Todd's bartender, testified she saw McCloskey drinking gin and tonics. She did not recall seeing Mr. Kennedy alone at the bar with McCloskey's drinks. She said they both came to the bar when Mr. Kennedy ordered drinks for them.⁷⁰ Perry Gricar, another Todd's bartender, said Mr. Kennedy and McCloskey spent most of the night in the back "dirty dancing" with one another. He said McCloskey followed Mr. Kennedy to the bar most of the night and that he never saw Mr. Kennedy at the bar by himself with McCloskey's drinks. He said Mr. Kennedy and McCloskey were holding hands when they left the bar and said they looked like they were "having a good time."⁷¹

Dr. Charles Winek testified that the diphenhydramine identified in McCloskey's body was at a therapeutic level.⁷²

b. Robert Kennedy's testimony

Mr. Kennedy said he arrived at Todd's around 9:00 p.m. He had a rum and coke and waited for McCloskey. He met McCloskey outside Todd's. She had parked in front of a yellow curb, so he showed her where she could re-park her car. McCloskey parked further down the street. After re-parking her car, McCloskey greeted him with a hug.

⁷⁰ NT, Trial, 8/27/2008, pp. 22-25.

⁷¹ NT, Trial, 8/27/2008, pp. 31-35.

⁷² NT, Trial, 8/27/2008, p. 6.

They then went into Todd's and stood by the bar for a while where he ordered two drinks: a rum and coke for himself and a gin and tonic for McCloskey. They drank their drinks and talked with Conrad and Gricar for a bit before they went to the back and danced.⁷³

They danced for a while until McCloskey went to the bathroom. When she returned, they went to the bar and purchased another round of drinks: a rum and coke for him and a gin and tonic for McCloskey. He also had ordered Jagerbombs (Jager plus Red Bull) for them. After finishing their drinks and Jagerbombs, they returned to the dance floor where they danced until 1:00 a.m. (on December 17th).⁷⁴ Mr. Kennedy denied putting anything in McCloskey's drinks.⁷⁵

Mr. Kennedy said they decided to go to Denny's. McCloskey did not want to leave her car parked at Todd's, so she followed him back to his residence in her car and parked her car near his residence. He then drove them to Denny's in his car. After Denny's, he drove them back to his residence. During the drive, McCloskey told him she did not think she could drive home due to how much alcohol she had consumed at Todd's. Mr. Kennedy told her she could sleep on his couch. He said McCloskey accepted his offer and that they arrived at his house (from Denny's) at 3:30 a.m.⁷⁶

⁷³ NT, Trial, 8/27/2008, pp. 39-43.

⁷⁴ NT, Trial, 8/27/2008, pp. 43-44.

⁷⁵ NT, Trial, 8/27/2008, pp. 47-48.

⁷⁶ NT, Trial, 8/27/2008, pp. 44-47.

Once inside his house, Mr. Kennedy said he had consensual sex – vaginal and oral – with McCloskey on the living room floor. He said they had sex for one hour. McCloskey told him she was getting “dry” and told him he “needed to” ejaculate. He asked if she wanted him to ejaculate inside her and she said yes – so he did. After he ejaculated, McCloskey went to the bathroom and got dressed. Mr. Kennedy fell asleep while McCloskey was still there. When he woke up, though, she was gone.⁷⁷ Later that day (December 16th), Mr. Kennedy texted McCloskey a few times, but McCloskey never replied.⁷⁸

E. Post-sentencing hearing and direct appeal

The Court granted Mr. Kennedy a post-sentencing hearing to develop his trial counsel ineffectiveness claims. The hearing occurred on April 30, 2009. At the hearing, the Court said this about McCloskey: “[T]here were problems with her testimony.”⁷⁹ However, when Mr. Kennedy’s new attorney, Scott Coffey, said the case turned on McCloskey’s credibility because there were “no other witnesses as to what happened that night,” the Court interrupted Mr. Coffey and said: “You keep ignoring the fact that the physical evidence with respect to the injuries are not witnesses. That is a witness. [The prosecutor] hit the nail on the head when he said her body was a witness.”⁸⁰

⁷⁷ NT, Trial, 8/27/2008, pp. 48-53.

⁷⁸ NT, Trial, 8/27/2008, pp. 53-55.

⁷⁹ NT, Post-sentencing Hrg., 4/30/2009, p. 82.

⁸⁰ NT, Post-sentencing Hrg., 4/30/2009, p. 79.

On direct appeal, Mr. Kennedy raised several ineffectiveness claims, including one claiming trial counsel failed to introduce McCloskey's *crimen falsi* convictions of theft and tampering with evidence from Westmoreland County. In Mr. Kennedy's pleadings, Mr. Coffey alleged the case "turned wholly on" McCloskey's credibility. In its 1925(a) opinion, the Court, again, disagreed and said it had based its verdict, in part, on "the physical evidence and third-party witness testimony[.]"⁸¹ The Court added:

Physical evidence included photographs and medical reports detailing the bruising and vaginal trauma of the victim, and third-party witness testimony included statements by friends and attendants of the victim evidencing her mental and emotional trauma.⁸²

NEWLY-DISCOVERED FACTS

1. Greg McCloskey's statement

On November 7, 2018, undersigned counsel interviewed McCloskey's ex-husband, Greg McCloskey ("Greg"). Greg currently works for Westmoreland County as the Director of Public Works and Weights & Measures. Greg's contact information is 724-830-3955 (office), 724-830-3969 (fax), gmcclusk@co.westmoreland.pa.us.

Greg and McCloskey married in July 1995. They divorced in 2006.

Based on his marriage to McCloskey, Gregg is cognizant of McCloskey's reputation for dishonesty, particularly at the time when she made her allegations against Mr. Kennedy in December 2006.

⁸¹ Rpp. 50-60.

⁸² Rp. 53.

Embezzlement: In terms of specific instances of dishonesty and criminality, Greg discussed how McCloskey had worked for Kelly Simon Productions (“KSP”) in the late 1990s and at the turn of the millennium. Greg explained how Tracy had embezzled over \$56,000 from KSP and how he – himself – had to use his own 401k money to pay back the \$56,000 to KSP. Specifically, he discussed how KSP representatives had reached out to him in 2000 or 2001 explaining McCloskey’s embezzlement and asking if he could repay the \$56,000; if he could not, KSP would report McCloskey’s embezzlement to the authorities and asked that they criminally prosecute McCloskey. When Greg confronted McCloskey about the embezzlement, she repeatedly admitted she had, in fact, embezzled close to \$60,000 from KSP.

Credit card fraud: Greg also mentioned how McCloskey had opened credit card accounts in other people’s names, namely Janice Roskey’s name and Viola Harvan’s name. Janice Roskey is McCloskey’s aunt, while Viola Harvan is McCloskey’s material grandmother. Greg learned of the fraud when Janice contacted in the early 2000s and told him about the fraudulent accounts. Greg said McCloskey had racked up \$5,000 on the credit card in Viola’s name and \$8,000 on the credit card in Janice’s name. When Greg confronted McCloskey about the credit card fraud, she repeatedly admitted she had, in fact, fraudulently obtained credit cards in Janice’s and Viola’s name. Greg said he had to take another \$13,000 out of his 401k to payoff the \$13,000 McCloskey had fraudulently charged to the two credit cards. Greg also said he spoke to Janice and

Viola and that both had told him they never gave McCloskey permission to open credit card accounts in their names.

Stolen evidence case: Greg said he was also familiar with the stolen evidence case from Westmoreland County, where McCloskey had stolen cocaine from the Westmoreland County Courthouse.

Greg said no one from Mr. Kennedy's defense team contacted him regarding McCloskey. If they had, however, Greg said he would *not* have spoken to Mr. Kennedy's defense team because he feared McCloskey would try to ruin him professionally and financially. Greg told undersigned counsel, "You have no idea what this woman is capable of. Had I helped Mr. Kennedy's defense team and testified against her, God knows what she would've done to me and my family at the time."

Greg said he was "extremely hesitant" to speak with undersigned counsel on November 7, 2018 because he still "feared" what McCloskey might do to him and his family if she learned he was meeting with Mr. Kennedy's counsel. Greg also said Mr. Kennedy's family members had contacted him over the last five years and that he had told them he did not feel comfortable speaking with them because he feared what McCloskey might do to him and his family if she learned he had assisted Mr. Kennedy's defense team.

Although Greg is still weary of McCloskey, once undersigned counsel explained McCloskey's allegations against Mr. Kennedy, particularly the timing of her allegations, Greg became convinced McCloskey had falsely accused Mr. Kennedy of sexual assault

for the sole purpose of garnering sympathy before her sentencing hearing regarding the cocaine possession/theft case from Westmoreland County. Because he believes McCloskey put an innocent person in prison, Greg said he is willing to testify about McCloskey's dishonesty and criminality at a PCRA hearing despite his continuing concerns regarding her vindictiveness.

B. Kelly Simon's statement

On April 8, 2019, undersigned counsel interviewed Kelly Simon. Kelly owns and runs Kelly Simon Event Management (or Kelly Simon Productions, as Greg referred to it). Counsel will continue using KSP to refer to Kelly's company for clarity and consistency. KSP is located at 645 East Pittsburgh Street, Ste. 357, Greensburg, Pennsylvania 15601. Kelly can be reached at 724-337-7979 (office) or 724-219-3570 (fax).

Kelly confirmed everything Greg had mentioned about McCloskey embezzling nearly \$60,000 from KSP back in the late 1990s and at the turn of the millennium. Kelly went into detail explaining how McCloskey perpetrated the embezzlement, saying McCloskey clearly knew what she was doing, and she knew how to hoodwink people at KSP to hide the stolen funds. Kelly said, "If McCloskey was able to hoodwink everyone at KSP for so long about the embezzled money, I can only imagine what McCloskey did to Mr. Kennedy's judge."

Kelly said she would testify at a PCRA hearing and explain to the Court the depths McCloskey went to try and hide the fact she was embezzling tens of thousands of dollars from KSP.

PCRA REQUIREMENTS

Under the PCRA statute, Mr. Kennedy must prove and/or show the following:

First, Mr. Kennedy must show he has been convicted of a crime under the laws of this Commonwealth and is serving a criminal sentence. 42 Pa. C.S. § 9543(a)(1). Mr. Kennedy stands convicted of numerous criminal offenses and is currently incarcerated at SCI-Greene.

Second, Mr. Kennedy must present a cognizable claim under 42 Pa. C.S. § 9543(a)(2). Mr. Kennedy alleges state and federal claims that undermine the truth-determining process. 42 Pa. C.S. §§ 9543(a)(2)(ii)&(iii).

Third, Mr. Kennedy must show his claims are not previously litigated or waived. 42 Pa. C.S. §9543(a)(3). Mr. Kennedy's claims have not been previously litigated or waived because they are based on newly-discovered facts that could not have been developed any sooner than November 7, 2018.

Fourth, Mr. Kennedy must have filed his PCRA petition within 1-year of when his conviction became final. 42 Pa. C.S. § 9545(b)(1). Section 9545(b)(1), though, has three timeliness exceptions for petitions filed after the 1-year limitations period, the second of which is “the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.” 42 Pa.

C.S. § 9545(b)(1)(ii). This exception is referred to the newly-discovered facts exception. *Commonwealth v. Burton*, 158 A.3d 618, 627 (Pa. 2017).

The newly-discovered facts exception, as set forth in § 9545(b)(1)(ii), is distinct from the after-discovered evidence basis for relief delineated in 42 Pa. C.S. § 9543(a)(2). To qualify for an exception to the PCRA’s time limitations under § 9545(b)(1)(ii), “a petitioner need only establish that the facts upon which the claim is based were unknown to him and could not have been ascertained by the exercise of due diligence.” *Commonwealth v. Burton*, 158 A.3d at 629.

Mr. Kennedy satisfies these requirements.

First, the new facts provided by Greg and Kelly were unknown to Mr. Kennedy until November 7, 2018.

Second, the new facts could not have been discovered even with the exercise of due diligence. As mentioned, Greg specifically said he would not have cooperated with Mr. Kennedy’s defense team before or after trial because of his substantial concerns regarding McCloskey’s vindictiveness. Thus, even if trial, appellate, and initial-review PCRA counsel had contacted Greg, he would not have spoken to them, meaning none of them would have learned about McCloskey’s embezzlement, credit card fraud, and pathological tendency to lie, cheat, and con people. Likewise, when Mr. Kennedy’s family contacted Greg in 2016, he refused to speak with them because he feared McCloskey would ruin him financially if she learned he had talked to Mr. Kennedy’s defense team.

Moreover, without Greg’s KSP embezzlement statements, no prior counsel would have known to interview Kelly Simon to verify the embezzlement. Put differently, without Greg’s statement, no prior counsel would have been expected to interview Kelly Simon before November 7, 2018 – the date on which Greg finally discussed Kelly’s KSP embezzlement, credit card fraud, and vindictiveness.

Under 42 Pa. C.S. § 9545(b)(2), “Any petition invoking an exception provided in paragraph (1) shall be filed within one year of the date the claim could have been presented.” Thus, by filing his petition today, Mr. Kennedy’s petition is timely.

STATE AND FEDERAL CLAIMS

I. The new facts provided by Greg McCloskey and Kelly Simon would likely compel a different verdict. U.S. Const. admts. 5, 6, 8, 14; Pa. Const. art. I, §§ 8, 9.

A. Introduction

Neither Mr. Kennedy nor McCloskey dispute the fact they had vaginal intercourse in the privacy of Mr. Kennedy’s residence during the early morning hours of December 16, 2006. Thus, the vaginal intercourse occurred and only Mr. Kennedy and McCloskey witnessed the vaginal intercourse. The fundamental question, though, is whether the vaginal intercourse was consensual or non-consensual. Mr. Kennedy said it was consensual. McCloskey said it was non-consensual and constituted rape. This case, therefore, is a classic “she said, he said” case.

Thus, the crux of the Commonwealth's case hinged on McCloskey's credibility. More importantly, because both parties agreed vaginal intercourse had, in fact, occurred, there was no other way for Mr. Kennedy to raise reasonable doubt other than to introduce evidence challenging/discrediting McCloskey's credibility. In other words, this is not a rape case where Mr. Kennedy can obtain post-conviction DNA testing to raise reasonable doubt or prove his innocence because he, in fact, had vaginal intercourse with McCloskey. Thus, DNA testing would merely confirm what we already know. Likewise, because Mr. Kennedy and McCloskey had vaginal intercourse in the privacy of Mr. Kennedy's home, Mr. Kennedy could not present eyewitness testimony to corroborate his claim that the vaginal intercourse was consensual. Lastly, because Mr. Kennedy's home was not equipped with security cameras aimed inside his home, Mr. Kennedy could not present video footage of his encounter with McCloskey to corroborate his claim the vaginal intercourse was, in fact, consensual.

In the end, the only thing Mr. Kennedy could do at trial to prove his innocence and to raise reasonable doubt, was to present as much impeachment evidence as possible to persuade the fact-finder that McCloskey had the means, motive, and opportunity to fabricate a sexual assault. The same holds true now – during Mr. Kennedy's PCRA proceedings. All he can do is attack McCloskey's credibility. Thus, this is the rare case where the only way an inmate can obtain PCRA relief is to present substantial impeachment evidence that so damages the accuser's credibility it would likely compel a different verdict if is presented to a new fact-finder or jury.

Mr. Kennedy drives this point home because if the new facts merely impeach a witness's credibility, PCRA relief is generally unwarranted. Specifically, to obtain PCRA relief based on newly-discovered facts, the petitioner must typically prove the new facts: (1) could not have been obtained before trial through reasonable diligence; (2) are not cumulative of other evidence presented at trial; (3) *are not being used solely to impeach the credibility of a witness or witnesses*; and (4) would likely compel a different verdict. *Commonwealth v. D'Amato*, 856 A.2d 806, 823 (Pa. 2004).

While impeachment evidence will *generally* be insufficient to compel a different verdict, whether impeachment evidence can, in fact, compel a different verdict depends on the facts presented. Put differently, "A bald statement that evidence that only impeaches would never justify a new trial defies common sense and justice." *Commonwealth v. Choice*, 830 A.2d 1005, 1009 (Pa. Super. 2005) (Klein, J., dissenting). As Judge Klein emphasized in his dissent in *Choice*, "[I]f the goal is to find justice, there well may be circumstances where after-discovered evidence that goes only to attack credibility may justify a new trial." *Id.* at 1012. This is one of those circumstances.

This case turns on prongs 3 and 4. Here, as mentioned, the only thing Mr. Kennedy could do at trial was to impeach McCloskey's credibility. Consequently, this case must represent an exception to the general rule regarding new facts that solely impeach a witness.

B. The new facts would likely compel a different verdict

- 1. When coupled with the facts presented at trial, the new facts not only undermine McCloskey's credibility, they prove she had the means, motive, and opportunity to fabricate her sexual assault allegation**

Greg McCloskey's and Kelly Simon's statements regarding McCloskey's dishonesty criminal acts and her ability to hoodwink people close to her would have destroyed McCloskey's credibility and made it clear to the fact-finder McCloskey had a knack for pulling the wool over people's eyes. Had Greg and Kelly testified at trial, the fact-finder would have learned how McCloskey embezzled close to \$60,000 from a former employer and racked up \$13,000 of fraudulent credit card charges by falsely using her aunt's and grandmother's names on the credit cards.

Thus, before making her false accusations against Mr. Kennedy and before trial, McCloskey had (1) embezzled nearly \$60,000 from KSP, (2) fraudulently opened two credit cards in her aunt's and grandmother's names and racked up \$13,000 in fraudulent credit card charges, and (3) broke into Judge McCormick's chambers, stole 5.00 grams cocaine from another criminal case, and sold it for a profit. Likewise, McCloskey was awaiting sentencing for her Westmoreland County PWISDM-cocaine, theft, and tamping with evidence convictions when she made her false accusations against Mr. Kennedy.

Collectively, then, McCloskey had the means, motive, and opportunity to fabricate her sexual assault allegations against Mr. Kennedy.

Means: She had the means because she had a pathological tendency to steal from and lie to those who most trusted her: (1) her husband, (2) her immediate family, and (3) her long-term employers. Here, had the fact-finder known about the depths of McCloskey's dishonesty and criminality, the fact-finder would have likely concluded that McCloskey befriended Mr. Kennedy – like she had befriended her ex-husband, her immediate family, Kelly Simon, and Judge McCormick – for the sole purpose of using him in her diabolical, premeditated plan to flip the script regarding the high felony drug charges she was facing.

Motive: The motive is clear. McCloskey needed to flip the script after being arrested and charged with PWISDM-cocaine, theft, and tampering with evidence in Westmoreland County on November 14, 2006 in connection with the stolen cocaine evidence from Judge McCormick's chambers. Exactly one month later, though, McCloskey was no longer the criminal defendant who had hoodwinked Judge McCormick and his staff. No, she was a rape victim survivor.

In other words, what better way to transform yourself from a criminal defendant in a high felony drug case to a sympathetic victim than to falsely claim someone had raped you? Likewise, what are the odds of someone being hit with significant felony drug charges and raped in less than one month? It is remarkable when you think about it. In short, the motive could not be clearer and based on the new facts and trial facts

a reasonable fact-finder would likely conclude that McCloskey had a legitimate motive to fabricate her rape allegations against Mr. Kennedy.

Opportunity: McCloskey, obviously, also had the opportunity because she, in fact, had vaginal intercourse with Mr. Kennedy. Based on the new facts and trial facts, a reasonable fact-finder would likely conclude that once they had vaginal intercourse, McCloskey set her diabolical plan into action by (1) claiming the vaginal intercourse was non-consensual and (2) fabricating the wounds on her neck and forearm.

In short, Greg's and Kelly's testimony would have eviscerated the following: (1) McCloskey's overall credibility; (2) the credibility of her claim the vaginal sex she had with Mr. Kennedy was non-consensual; and (3) her claim the wounds on her neck and arms were inflicted by Mr. Kennedy.

2. The new facts impact the credibility of McCloskey's claim that the marks and bruises on her neck, which are captured in the photographs she took on December 17th and 18th, were inflicted by Mr. Kennedy during the early morning hours of December 16th

Based on Greg's and Kelly's statements, at a new trial, Mr. Kennedy could persuasively argue McCloskey fabricated the marks on her neck captured in the December 17th and 18th photographs. The December 16th photographs, which nurses took at the hospital, capture a very, very faint mark on the right side of McCloskey's neck. These photographs were taken nearly twelve hours after alleged assault. The December 17th and 18th neck photographs, which McCloskey took at home, are night-and-day different than the December 16th neck photographs that captured a barely

perceptible mark on the right of her neck – and you do not need an expert to note the stark differences. These photographs speak for themselves. The December 16th photograph shows nothing, whereas the 17th and 18th photographs show several markings. Based on the new facts, Mr. Kennedy can now persuasively argue that McCloskey self-inflicted the markings captured in the 17th and 18th photographs.



**Detectives photographs from
12/16**



**Accuser's photograph from
12/17**



**Accuser's photograph from
12/18**



**Accuser's photograph from
12/18**

More importantly, the marks and alleged bruising on McCloskey's neck make no sense when considered in conjunction with McCloskey's testimony. McCloskey's narrative is straightforward: she laid down on Mr. Kennedy's couch and either passed out or fell asleep; when she woke up, Mr. Kennedy was having vaginal sex with her on the floor next to the couch. The inference from the alleged neck bruises is that Mr. Kennedy choked her with his bare hands at some point during the incident. The marks on her neck are not ligature marks, so they must have been created by Mr. Kennedy's bare hands or his forearm which he placed against her neck. Either way, the marks on her neck suggest Mr. Kennedy tried to block McCloskey's breathing at some point during the incident – and did so when she was unconscious.

Here is the problem, though: If McCloskey was passed out, as she claimed, why would Mr. Kennedy choke her or try to block her breathing? Rapists generally choke their victims to gain control and to force their submission. Some rapists choke their victims to watch them suffer. You have neither situation here. If McCloskey was passed out, Mr. Kennedy did not need to gain control over the situation, he could simply do as he pleased with McCloskey's body. Also, if McCloskey was passed out, and did not feel Mr. Kennedy choking her, which is what she said at trial, Mr. Kennedy would have received no sexual or mental gratification watching McCloskey suffer or choke.

Furthermore, if Mr. Kennedy choked her and cut off her airways, McCloskey, presumably, would have woke up because she could not breath or had difficulty

breathing. According to McCloskey, the vaginal sex woke her up, but Mr. Kennedy grabbing her neck hard enough to leave behind the marks captured in her December 17th and 18th photographs did not.

In the end, when Greg's and Kelly's statements are combined with the record evidence, a reasonable fact-finder would likely conclude the marks and bruises captured in McCloskey's December 17th and 18th photographs were not inflicted by Mr. Kennedy during their sexual encounter, but by McCloskey after the incident for the sole purpose of manufacturing evidence to make her false rape accusation appear credible and believable.

Yes, the Court placed much weight on the alleged bruises captured in these photographs. This, however, does not bar relief. Trial counsel never argued that McCloskey had fabricated the marks on her neck and arm because trial counsel did not know the depths of McCloskey's criminality, nor did he know how far she would go to con those closest to her. Greg's and Kelly's statements, though, paint a clear picture of what McCloskey would do to get what she wanted. Thus, their statements cast a whole new light on the marks and bruises captured in McCloskey's December 17th and 18th photographs.

Moreover, like trial counsel, the Court also had an incomplete picture of McCloskey at trial. Greg's and Kelly's statements, though, create a complete picture of her and her credibility or lack thereof. Their statements destroy her credibility and the December 17th and 18th photographs are intimately connected to her credibility.

McCloskey claimed the marks in the photographs came from Mr. Kennedy, but based on her history of lying and conning people, why should the fact-finder believe her, especially when Mr. Kennedy had no reason to choke her in the first place? Again, it comes back to “he said, she said,” meaning the marks and bruises captured in the December 17th and 18th photographs can have no more credibility than the person who took the photographs. Furthermore, undersigned counsel has litigated countless sexual assault cases over the last fifteen years, and this is the *first case* where the alleged victim felt the need to photograph her injuries two and three days after the alleged assault.

Simply put, based on Greg’s and Kelly’s statements, there is now more than enough evidence where the fact-finder would likely conclude that Mr. Kennedy did not inflict the marks captured in the December 17th and 18th photographs, but that McCloskey inflicted them after the fact to make her false rape accusation appear more credible and believable.

3. Greg McCloskey’s and Kelly Simon’s statements would be admissible at a retrial

Greg’s and Kelly’s testimony regarding McCloskey’s reputation for dishonesty and the specific instances of her dishonesty is admissible under Pa.R.Evid. 405(a) and Rule 405(b)(2). Rule 405(a) reads: “When evidence of a person’s character or character trait is admissible, it may be proved by testimony about the person’s reputation.” Rule 405(b)(2) says a defendant in “a criminal case” may use “specific instances of conduct”

to prove “a character trait of an alleged victim” when the character trait is “admissible under” Pa.R.Evid. 404(a)(2)(B). Under Rule 404(a)(2)(B), “subject to limitations imposed by statute, a defendant may offer evidence of an alleged victim’s pertinent trait[.]”

The crux of the Commonwealth’s case was McCloskey’s honesty and credibility. Thus, the only way Mr. Kennedy could have raised reasonable doubt at trial was to introduce evidence showing that McCloskey had a reputation for being dishonest and introducing evidence regarding specific instances of her dishonesty. Consequently, a “pertinent trait” at trial was whether McCloskey was honest or dishonest, meaning Greg’s and Kelly’s testimony is admissible under Rules 404(a)(2)(B), 405(a), and 405(b)(2).

Mr. Kennedy, therefore, is entitled to a new trial based on the newly-discovered facts.

RIGHT TO AN EVIDENTIARY HEARING

Mr. Kennedy is entitled to summary relief where there are not disputes to material facts. Pa.R.Crim.P. 907(2). However, the PCRA court “shall order a hearing” when the PCRA petition “raises material issues of fact.” Pa.R.Crim.P. 908(A)(2); *accord Commonwealth v. Williams*, 732 A.2d 1167, 1189-1190 (Pa. 1999). A hearing cannot be denied unless the Court is “certain” Mr. Kennedy’s petition lacks “total” merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983); *accord Commonwealth v. Rhodes*, 416 A.2d 1031, 1035-1036 (Pa. Super. 1979). Even in “borderline cases

Petitioners are to be given every conceivable legitimate benefit in the disposition of their claims for an evidentiary hearing.” *Commonwealth v. Pulling*, 470 A.2d 170, 173 (Pa. Super. 1983). Thus, an “evidentiary hearing should... be conducted where the record does not clearly refute the claim of an accused that his plea was unlawfully induced.” *Id.* (citing numerous guilty plea cases). Mr. Kennedy is entitled to a hearing because the newly-discovered facts raise material issues of fact regarding McCloskey’s credibility and the photographs she took on December 17th and 18th.

RIGHT TO AMEND

Mr. Kennedy reserves the right to amend or supplement his petition if: (1) he develops new facts relevant to his claims; or (2) his amended petition is defective. Pa.R.Crim.P. 905(A) (“Amendment shall be freely allowed to achieve substantial justice”); Pa.R.Crim.P. 905(B) (when a petition is “defective,” the PCRA court “shall order amendment of petition”).

CONCLUSION

WHEREFORE, Mr. Kennedy respectfully requests the following relief:

1. An evidentiary hearing where Greg McCloskey and Kelly Simon can testify.
2. A new trial.

43 Any other relief the Court deems necessary to protect and vindicate Mr. Kennedy's right to fundamentally fair post-conviction proceedings.

Respectfully submitted this the **14th day of May, 2019.**

/s/Craig M. Cooley

Craig M. Cooley

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CERTIFICATE OF SERVICE

On May ____, 2019, counsel mailed (via USPS) a copy of Mr. Kennedy's petition to the Allegheny County District Attorney's Office.

**ALLEGHENY COUNTY COMMON PLEAS COURT
CRIMINAL DIVISON**

COMMONWEALTH OF PENNSYLVANIA)	
Plaintiff-Respondent,)	
v.)	CP-02-CR-0003178-2007
)	
ROBERT KENNEDY)	
Defendant-Petitioner.)	

Pa.R.Crim.P. 902(A)(15) Certifications

1. If the Court grants an evidentiary hearing, Mr. Kennedy will present Greg McCloskey. Mr. Kennedy expects Greg McCloskey to testify to the following:

- a. His marriage to Theresa McCloskey;
- b. How he had to use \$60,000 from his 401K plan to repay KSP the money McCloskey had embezzled;
- c. How McCloskey had opened fraudulent credit card accounts in Janice Roskey's and Viola Harvan's names and racked up \$13,000 in fraudulent charges for both cards and how he had to repay this money using another \$13,000 from his 401K plan.

2. If the Court grants an evidentiary hearing, Mr. Kennedy will present Kelly Simon. Mr. Kennedy expects Kelly Simon to testify to the following:

- a. How Theresa McCloskey worked for KSP;
- b. How McCloskey embezzled more than \$60,000 from KSP

Respectfully submitted this the 15th day of May, 2019.

/s/Craig M. Cooley
COOLEY LAW OFFICE