PENNSYLVANIA SUPERIOR COURT
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA **Appellee-Respondent,**	)	**1490 WDA 2019**
v.	)	**CP-02-CR-0003178-2007**
ROBERT KENNEDY **Appellant-Petitioner.**	)	

Petitioner-Appellant's Opening Brief

Appeal from the September 11, 2019 Order Dismissing Robert Kennedy's PCRA Petition Entered by the Honorable John A. Zottola of the Allegheny County Common Pleas Court, Criminal Division, CP-02-CR-0003178-2007

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STATEMENT OF JURISDICTION

Jurisdiction for this appeal is provided for at 42 Pa. C.S. § 742, relating to this Court's exclusive appellate jurisdiction from a Common Pleas Court's final order.

ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the September 11, 2019 Order dismissing Robert Kennedy's PCRA petition entered by the Honorable John A. Zottola of the Allegheny County Common Pleas Court, Criminal Division, CP-02-CR-0003178-2007.[1]

On September 30, 2019, Mr. Kennedy appealed.[2]

On November 1, 2019, Mr. Kennedy filed his *Concise Statement of Errors on Appeal*.[3]

On December 3, 2019, Judge Zottola entered his opinion.[4]

CLAIMS PRESENTED

Claim #1: Mr. Kennedy's PCRA petition is timely.

Claim #2: Mr. Kennedy's newly-discovered fact claim is meritorious.

Claim #3: The PCRA court erred by not granting a PCRA hearing.

SCOPE AND STANDARD OF REVIEW

In reviewing the grant or denial of PCRA relief, the Court examines whether the PCRA court's findings and conclusions are supported by the record and free of legal error. *Commonwealth v. Mitchell*, 141 A.3d 1277, 1283-1284 (Pa. 2016). The PCRA court's factual findings are entitled to deference if supported by the record, but its legal conclusions are reviewed *de novo*. *Commonwealth v. Hawkins*, 894 A.2d 716, 722 (Pa. 2006).

[1] Rp. 84. Rp = Reproduced Record page number(s).
[2] Rpp. 85-86.
[3] Rpp. 87-88.
[4] As required by the appellate rules, the PCRA court's opinion is attached as an appendix to this brief

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 encounter he had with Tracy Lynn McCloskey during the early morning hours of December 16, 2006. McCloskey claimed it was rape, while Mr. Kennedy said it was consensual.

Mr. Kennedy pled 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)).

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 penalties 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 this Court affirmed on June 15, 2010. Mr. Kennedy didn't 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 didn't 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.

On May 17, 2019, Mr. Kennedy filed his instant after-discovered fact PCRA petition.[5]

On September 11, 2019, Judge Zottola dismissed the PCRA petition.[6]

STATEMENT OF FACTS

A. Tracy 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 before this date are relevant to the issues before the Court, namely Tracy 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'd worked for Judge McCormick since 2004. As part of her duties, 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.[7] On that day, Judge McCormick had presided over a jury trial in *Commonwealth v. Robert E. Chambers*, 2698-2005. It was a drug trial which began and ended that day. During the *Chambers* trial, the prosecutor introduce "bags of powered and crack cocaine." After the *Chambers* trial ended, it was McCloskey's

[5] Rpp. 89-143.
[6] Rp. 84.
[7] Rpp. 40-43.

responsibility "to collect all of the evidence," including the bags of cocaine, and to "lock" the cocaine "in a safe in Judge McCormick's office."[8]

McCloskey didn't 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."[9]

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

On November 3, 2006, when detectives confronted McCloskey with this evidence, she confessed to taking the five grams of cocaine with the intent to sell it because she needed money to get her through some "financial difficulties[.]"[10]

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

On December 19, 2006, the Monday after she'd met Mr. Kennedy, the Westmoreland County District Attorney's Office ("WCDAO") filed an *Information* (CP-65-CR-0005029-2006) charging McCloskey with a felony: PWIMSD – cocaine.[11] The WCDAO also filed an *Information* (CP-65-0005030-2006) charging her with multiple misdemeanors: (1) theft by unlawful taking, (2) tampering with evidence, (3) tampering with public records, and (4) intentional possession of a controlled substance.[12]

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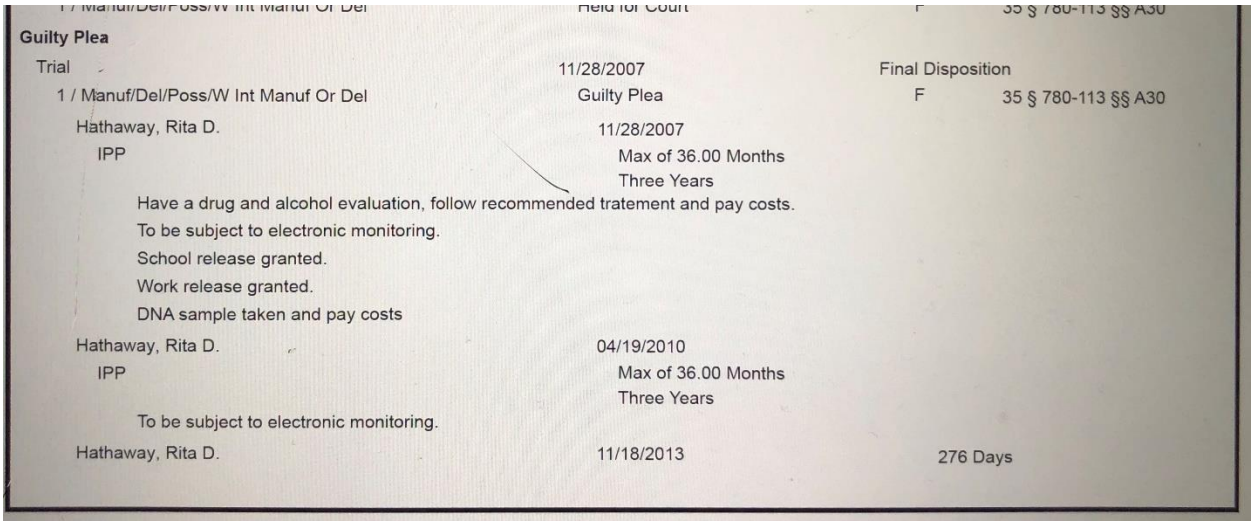
[8] Rpp. 2-8.
[9] Rpp. 2-8.
[10] Rpp. 2-8.
[11] Rpp. 11-21.
[12] Rpp. 22-27.

On November 28, 2007, McCloskey pled guilty to the felony PWIMSD count in case number 5029-2010 and received three years of probation.[13] She also pled guilty to the theft by unlawful taking and tampering with evidence counts in case number 5030-2010 and received a consecutive year of probation.[14] As part of both sentences, McCloskey had to submit to drug and alcohol treatment.



Guilty Plea

Trial	11/28/2007	Final Disposition	
1 / Manuf/Del/Poss/W Int Manuf Or Del	Guilty Plea	F	35 § 780-113 §§ A30
Hathaway, Rita D.	11/28/2007		
IPP	Max of 36.00 Months Three Years		
Have a drug and alcohol evaluation, follow recommended tratement and pay costs. To be subject to electronic monitoring. School release granted. Work release granted. DNA sample taken and pay costs			
Hathaway, Rita D.	04/19/2010		
IPP	Max of 36.00 Months Three Years		
To be subject to electronic monitoring.			
Hathaway, Rita D.	11/18/2013	276 Days	

On April 25, 2009, McCloskey came across a story about her crimes and relaxed sentence on the Blogonaut website. The blog discussed her crimes and criticized her lenient sentence and the fact the WCDAO had dismissed two counts in case number 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.[15]

When McCloskey saw this comment, she 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

[13] Rpp. 9-10, 11-21.
[14] Rpp. 9-10, 22-27.
[15] Rpp. 40-43.

> 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.[16]

On December 30, 2009, Westmoreland County authorities moved to revoke McCloskey's probation. On April 19, 2010, Judge Rita Hathaway revoked McCloskey's probation and resentenced her to three additional years of probation, with one year of electronic home monitoring, and random drug testing.[17]

On March 8, 2011, Westmoreland County authorities filed another revocation petition. On March 29, 2011, Judge Hathaway issued a bench warrant for McCloskey's arrest after she'd 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.[18]

On November 18, 2013, once extradited back to Westmoreland County, Judge Hathaway revoked McCloskey's probation and sentenced her to one to two years in the Westmoreland County Jail ("WCJ") and four years of probation. Judge Hathaway also ordered another drug and alcohol

[16] Rpp. 40-43.
[17] Rpp. 11-21.
[18] Rpp. 28-29.

evaluation and mental health evaluation.[19] While incarcerated, McCloskey sought outpatient drug treatment from Catholic Charities.[20]

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 number MJ-10301-NT-0000015-2015.[21]

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 WCDAO filed an *Information* (CP-65-CR-0000309-2017), charging McCloskey 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 pled guilty to disorderly conduct and was ordered to pay a $300 fine.[22]

B. The alleged sexual assault that resulted in Mr. Kennedy's conviction

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 Mercy Hospital.[23] According to McCloskey, she'd met Mr. Kennedy on Match.com three weeks before their date the previous night on December 15, 2006. McCloskey said she'd 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. While they danced,

[19] Rpp. 11-21.
[20] Rpp. 11-21.
[21] Rpp. 31-34.
[22] Rpp. 37-39.
[23] Rpp. 44-45.

McCloskey said Mr. Kennedy left once to "get another mixed drink." She said she went to the bathroom while they danced and when she returned Mr. Kennedy had a fruit shot waiting for her. 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."[24]

McCloskey claimed when she told Mr. Kennedy she was tired, he told her she could stay at his house if she couldn't make it home. He "told her… 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. 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.[25]

McCloskey claimed she had no recollection of driving to Denny's, entering Denny's, or ordering food at Denny's, but she recalled what she'd eaten at Denny's. McCloskey claimed she recalled leaving Denny's, she recalled Mr. Kenney driving her back to her car near Todd's, she recalled entering her car and following Mr. Kennedy back to his house, and she recalled parking her car near his house.[26]

McCloskey claimed she didn't want to stay at Mr. Kennedy's the entire night. She claimed she only wanted to take a short nap so she could "get herself together" and drive home. Once inside Mr. Kennedy's residence, he gave her a pillow and blanket, which she took and "laid down on" his living room couch. Once on the couch, McCloskey claimed she blacked out and claimed when she regained consciousness she was in pain, with Mr. Kennedy hunched over her having vaginal sex with her. McCloskey claimed she was nude from the waist down. She claimed she yelled at Mr. Kennedy, asked him what he was doing, and told him he was hurting her. At this point, she claimed Mr. Kennedy

[24] Rpp. 44-45.
[25] Rpp. 44-45.
[26] Rpp. 44-45.

"grabbed her arms and forced them up over her head[.]" She claimed she began "fighting" him. As they fought, she claimed she pushed him away with her legs.[27]

Once she got him off, she claimed she "ran to the bathroom," closed the door, and urinated. After wiping, however, she claimed her vagina was bleeding. She claimed she remained in the bathroom for fifteen minutes. When she exited, she claimed Mr. Kennedy was "passed out naked from the waist down." McCloskey claimed she got dressed, gathered her belongings, and left at 4:20 a.m.

McCloskey didn't call the police to report the alleged rape. Instead, she called her friends John and Tracy Sieghman and told them she'd been raped. She claimed she arrived home at 6:20 a.m. Once home, she didn't call the police. Instead, she claimed she "passed out" because she was "very tired." She claimed she woke up at noon when Doug Markos of the Greensburg Police Department called and told her "she needed to go to the hospital and get a forensic examination." McCloskey arrived at Mercy Hospital at 1:30 p.m. that day (December 16th).

The doctor who examined McCloskey noted a "minor" abrasion on her neck.[28] The examination didn't note any "blunt force" injuries to her 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.[29] He gave a verbal and a written statement. Mr. Kennedy said he'd met McCloskey at Todd's at 9:45 p.m. on December 15, 2006. Upon meeting her, she hugged him. Once inside Todd's, Mr. Kennedy said he had three doubles and

[27] Rpp. 44-45.
[28] Rpp. 46-47.
[29] Rpp. 48-49.

two 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 also told him she "was a light weight," that she felt "buzzed," and that she was unsure if she'd make it home. After dancing, he asked McCloskey if she wanted to go to Denny's. McCloskey said yes. He said McCloskey didn't 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 16th). 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 back at his house, he 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 began 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. When she returned, he realized she'd 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 unsure how much longer she could have sex. He asked her "several times" if she wanted him to ejaculate inside of her. She told him she did. After ejaculating, McCloskey got dressed, while he fell asleep. When he woke up, McCloskey was gone. He assumed everything "went well" with the date because

they had good "consensual sex." 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 these messages on McCloskey's and Mr. Kennedy's phones.

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 for drinks, and she agreed to meet him at Todd's on (Friday) December 15, 2006. McCloskey lived in Greensburg.[30]

When she met Mr. Kennedy on December 15th, McCloskey claimed she quickly realized she wasn't attracted to him because he didn't look like his Match.com profile picture. Despite being unattracted to him, she claimed 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.[31]

After drinking her third drink, McCloskey claimed she did not feel "right." She described it as feeling "tired" and "out of it," but not drunk. Despite feeling unwell, she didn't 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 said Mr. Kennedy had told her she was acting drunk and that she was staggering.[32]

[30] NT, Trial, 5/20/2008, pp. 15-18.
[31] NT, Trial, 5/20/2008, pp. 21-25.
[32] NT, Trial, 5/20/2008, pp. 24-26.

Shortly after Mr. Kennedy told her this, they left Todd's. As they were leaving, Mr. Kennedy told her she shouldn't drive home, but instead they should go to Denny's and get something to eat. McCloskey agreed, left her car at Todd's, and Mr. 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.[33]

When they left Denny's, Mr. Kennedy suggested they go to his house, where she could rest for a bit, and when she felt better, she could drive home. McCloskey agreed because she didn't think she was capable of driving. McCloskey, though, said Mr. Kenney drove her back to Todd's where she got into her car and followed him to his house.[34]

McCloskey recalled walking into Mr. Kennedy's house without any assistance but couldn't recall if she followed him into the house. Once inside, she recalled walking into the kitchen and talking with him but claimed she couldn't remember where in his house they'd talked. McCloskey said Mr. Kennedy told her she could rest on the living room couch if she was tired. Mr. Kennedy retrieved a blanket and pillow for her. She recalled sitting on the couch, but then claimed she couldn't recall anything after sitting on the couch.[35]

McCloskey claimed 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 he was on top of her. She claimed she was fully clothed 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.[36]

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[33] NT, Trial, 5/20/2008, pp. 26-27.
[34] NT, Trial, 5/20/2008, pp. 27-28.
[35] NT, Trial, 5/20/2008, pp. 29-30.
[36] NT, Trial, 5/20/2008, pp. 29-30.

McCloskey claimed she asked Mr. Kennedy what he was doing and told him he was hurting her. She claimed Mr. Kennedy ignored her and "just kept going." She claimed she asked him to get off her. Mr. Kennedy, she claimed, ignored her again, but this time he grabbed her wrists, held them over her head, and continued to vaginally penetrate her with his penis. When the prosecutor leadingly asked whether she struggled or fought with him, McCloskey changed her testimony and claimed she fought with him as he grabbed her wrists and moved them above her head.[37]

McCloskey initially claimed she "pushed" him off. Later, though, she claimed she "kicked" him off. Once off her, McCloskey claimed she ran into the bathroom. McCloskey, though, couldn't explain how she knew where the bathroom was due to the fact she'd never been inside his residence.[38] She claimed she cried in the bathroom but couldn't recall if she locked the bathroom door. When she wiped her face, she claimed she was bleeding, but she couldn't identify what part of her face was bleeding or what caused the bleeding. She also claimed she felt vaginal pain and a burning sensation when she urinated, but she never mentioned vaginal bleeding, which is something she'd mentioned to detectives.[39]

McCloskey claimed she remained in the bathroom for fifteen to twenty minutes. When she exited, she claimed she walked into the living room, saw Mr. Kennedy laying on the floor with his eyes closed, got dressed, grabbed her purse, and left. She got into her car and drove away, but claim said she got lost in Mr. Kennedy's neighborhood.[40]

McCloskey claimed she drove for thirty minutes before she called her friends John and Tracy Seighman. She couldn't recall when she called the Seighmans, but believed it was around 3:00 a.m. She then claimed she texted John and that John called her back. She claimed she was crying and

[37] NT, Trial, 5/20/2008, p. 30.
[38] NT, Trial, 5/20/2008, p. 31.
[39] NT, Trial, 5/20/2008, p. 31.
[40] NT, Trial, 5/20/2008, pp. 36-37.

confused when she told John she'd been raped and needed help to get home because she was lost. She claimed it took her a few hours to ultimately get home, even with John's help. She drove home, instead of driving to a local hospital or police department to report the alleged rape. She initially said she didn't speak with anyone else, but then claimed she may've talked with Tracey after she spoke with John.[41]

McCloskey claimed she arrived home at 6 a.m. Once home, she claimed she laid down on her bed and cried briefly before falling asleep. When she woke up later that morning, she claimed the first person who called her was Lt. Doug Marcos of the Greensburg Police Department. Marcos, she claimed, called her because John Seighman had called him and told him what happened. Marcos told her he'd 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 didn't want him to drive her, she got a ride to the hospital from her aunt. McCloskey and her aunt arrived at Jeanette Mercy Hospital at 1:00 p.m.[42]

McCloskey claimed she didn't give Mr. Kennedy permission to remove her clothes, touch her, or vaginally penetrate her with his penis.[43]

2. McCloskey's cross-examination testimony

McCloskey said she'd divorced her husband shortly before the alleged rape. 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 that she'd obviously decided – at some point that night – it was okay and safe to go to Mr. Kennedy's house.[44]

[41] NT, Trial, 5/20/2008, pp. 38-39.
[42] NT, Trial, 5/20/2008, pp. 39-41.
[43] NT, Trial, 5/20/2008, pp. 46-47.
[44] NT, Trial, 5/20/2008, pp. 51-52.

McCloskey reiterated that when they arrived at his house, he showed her to the living room couch, at which point she laid down on the couch. On direct-examination, McCloskey claimed Mr. Kennedy got her a pillow and 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.[45] On direct-examination, however, she claimed Mr. Kennedy got the blanket and pillow for her. McCloskey told trial counsel she'd noticed the "typo" in the preliminary hearing transcripts before she testified because she'd reviewed her preliminary hearing testimony with the prosecutor.[46]

On direct-examination, McCloskey claimed she clearly recalled not kissing Mr. Kennedy on his couch that night. At the preliminary hearing, though, McCloskey claimed she couldn't recall if she kissed Mr. Kennedy on the couch and specifically testified, "I'm sure anything is possible, but I don't remember it."[47] McCloskey claimed she doubted kissing Mr. Kennedy because she wasn't 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."[48]

McCloskey, though, claimed she wasn't drunk because she only had three drinks ("I wasn't drunk."), but later during cross-examination she claimed, "I thought I was a little unsteady. I knew I didn't feel well."[49] She then claimed she didn't consume an alcoholic beverage after 10:30 p.m. that night (December 15, 2006).[50]

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[45] NT, Trial, 5/20/2008, p. 53.
[46] NT, Trial, 5/20/2008, p. 53.
[47] NT, Trial, 5/20/2008, pp. 60-61.
[48] NT, Trial, 5/20/2008, p. 61.
[49] NT, Trial, 5/20/2008, pp. 54-55, 77.
[50] NT, Trial, 5/20/2008, pp. 73-74.

Trial counsel also 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. Although she couldn't 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 him home. She then followed him into his house, had a conversation with him before he showed her to his living room couch where she couldn't recall if she'd made out with him before she supposedly 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, she ran into his bathroom where she stayed for fifteen to twenty minutes. When she left the bathroom, she got dressed, left his residence, got into her car, and began her two-hour trek home. She claimed she left at 3:00 a.m.[51]

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 him, (4) walked from his car into Denny's, (5) got seated at Denny's, (6) ordered food at Denny's, (7) waited for the food 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've 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, (22) got up and went into his bathroom for 15 to 20 minutes, and (23) got dressed and left.

[51] NT, Trial, 5/20/2008, pp. 73-74.

Trial counsel continued challenging McCloskey's memory. When trial counsel re-read her preliminary hearing testimony, where she claimed she may've 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.[52]

Trial counsel also challenged her "regained consciousness" testimony. For instance, McCloskey claimed the vaginal intercourse wasn't 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 didn't wake up when Mr. Kennedy allegedly battered, bruised, and choked her – or at least that's the narrative created by the photographs McCloskey took of her alleged injuries the days following the alleged rape:

> 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

[52] NT, Trial, 5/20/2008, p. 63.

a bruise on your chest. None of that woke you up?

A. Apparently not.[53]

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.

[53] 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.[54]

McCloskey initially claimed she'd asked the prosecutor for copies of her preliminary hearing testimony and December 16, 2006 statement:

Q. Did you read the police report today?

A. Yes.

Q. Why, to refresh your memory?

A. I don't know.

Q. Why did you read them?

[54] NT, Trial, 05/20/2008, pp. 68-70.

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.[55]

McCloskey claimed she "needed to read" her statement and preliminary hearing transcripts because she "was curious as to what [they] said." When trial counsel asked why she'd 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."[56] When trial counsel asked why she was "curious" about her preliminary hearing testimony, McCloskey said, "[The prosecutor] asked me to look it over."[57]

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 immediately said eight blocks. When trial counsel asked why she initially said two blocks, she claimed 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?

[55] NT, Trial, 5/20/2008, pp. 53-54.
[56] NT, Trial, 5/20/2008, p. 54.
[57] NT, Trial, 5/20/2008, pp. 54-55.

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.[58]

McCloskey had no idea how the 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 in case number CP-65-CR-0005029-2006.[59] McCloskey, however, never mentioned her unlawful taking and tampering with evidence convictions in case number CP-65-CR-0005030-2006.

3. John Seighman's trial testimony

John never gave a formal statement. At trial, he said he knew McCloskey through his wife, Tracy, because Tracy and McCloskey were friends before he married Tracy. On December 16, 2006, John was 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." He spent the first

[58] NT, Trial, 5/20/2008, pp. 59-60.
[59] NT, Trial, 5/20/2008, p. 55.

few minutes trying to calm her down. He said McCloskey eventually "uttered the words she thinks she was raped." He didn't know how long their call 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[.]"[60]

On cross-examination, John was unsure what time McCloskey had called him and whether it occurred before or after 4:00 a.m. He also said McCloskey had told him "she thinks she was raped[.]"[61] He also said he'd 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."[62]

On re-direct, for the first time, John now recalled McCloskey telling him "very clearly" that she was, in fact, "sexually assaulted."[63]

4. Tracy Seighman's trial testimony

Tracy said McCloskey texted her at 10:00 p.m. on December 15th 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 16th, John told her about McCloskey's phone. Tracy said she called McCloskey at 6:30 a.m., but McCloskey didn't answer, so she left a message, telling McCloskey to meet her at the ER, 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 told the secretary and ER staff her friend had been raped. At 1:30 p.m., Tracy received a call from the hospital staff saying McCloskey had just arrived. Tracy went to

[60] NT, Trial, 5/21/2008, pp. 106-111.
[61] NT, Trial, 5/21/2008, p. 117.
[62] NT, Trial, 5/21/2008, p. 120.
[63] NT, Trial, 5/21/2008, p. 121.

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.[64]

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).[65] Dr. Maher Alhashimi, the doctor who examined McCloskey on December 16th, testified she never mentioned being drugged or believing she may've been drugged.[66]

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

On December 16th, nurses took eight photographs of McCloskey: (1) three of the abrasion on the back of her neck; (2) two of the right front side of her neck that shows no bruising; (3) two of her right inner forearm that shows a very faint mark; and (4) one of the back of her right calf.[67]

Although nurses thoroughly photographed her, McCloskey felt the need to photograph her neck, forearm, and calf on December 17th and December 18th at home. She disclosed the photographs to the prosecutor who gave them to the defense.[68]

At trial, the prosecutor entered the photographs taken by the nurses (C-2) as well as those McCloskey took on December 17th (C-3) and December 18th (C-4) into the record.[69] McCloskey claimed Mr. Kennedy inflicted the marks and bruised captured in the December 17th and 18th photographs, but not captured the December 16th photographs.[70]

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[64] NT, Trial, 5/21/2008, pp. 123-126.
[65] NT, Trial, 8/25/2008, pp. 25-28.
[66] NT, Trial, 8/25/2008, pp. 44, 50-51.
[67] Rpp. 63-71. There's some discrepancy as to who took these photographs. The prosecutor claimed detectives took them. NT, Trial, 5/20/2008, p. 32. Dr. Alhashimi, how, said nurses took them. NT, Trial, 8/25/2008, p. 45.
[68] Rpp. 72-83.
[69] NT, Trial, 5/20/2008, pp. 32, 33, 34, 35.
[70] NT, Trial, 5/20/2008, pp. 86-87.

Dr. Alhashimi said he saw a neck "abrasion" and a "slight" abrasion on the back of McCloskey's neck.[71] 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."[72] Dr. Alhashimi didn't see bruising or finger impressions on the front or sides of McCloskey's neck.[73]

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

> 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.[74]

The prosecutor also argued:

[71] NT, Trial, 8/25/2008, pp. 44-45.
[72] NT, Trial, 8/25/2008, p. 45.
[73] NT, Trial, 8/25/2008, pp. 49-50.
[74] NT, Trial, 8/27/2008, p. 81.

> 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. [75]

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. [76]

7. Defense's Case

a. Todd's bartenders and Dr. Winick

Lauren Conrad, a Todd's bartender, said she saw McCloskey drinking gin and tonics. She didn't 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.[77] 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."[78]

[75] NT, Trial, 8/27/2008, p. 82.
[76] NT, Trial, 8/27/2008, p. 84.
[77] NT, Trial, 8/27/2008, pp. 22-25.
[78] NT, Trial, 8/27/2008, pp. 31-35.

Dr. Charles Winek sadid the diphenhydramine identified in McCloskey's body was at a therapeutic level.[79]

b. Robert Kennedy's testimony

Mr. Kennedy said he arrived at Todd's at 9:00 p.m. He had a rum and coke and waited for McCloskey. He met McCloskey outside Todd's. She'd parked in front of a yellow curb, so he showed her where she could re-park her car. she parked further down the street. After re-parking her car, she greeted him with a hug. 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 her. They drank their drinks and talked with Conrad and Gricar for a bit before they went to the back and danced.[80]

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 ordered Jagerbombs (Jager plus Red Bull) for them. After finishing their drinks and Jagerbombs, they returned to the dance floor and danced until 1:00 a.m. (on December 16th).[81] Mr. Kennedy denied putting anything in McCloskey's drinks.[82]

Mr. Kennedy said they decided to go to Denny's. McCloskey didn't want to leave her car parked at Todd's, so she followed him back to his house in her car and parked her car near his house. He then drove them to Denny's in his car. After Denny's, he drove them back to his huose. During the drive, McCloskey said she didn't think she could drive home due to how much she'd drank at Todd's. Mr. Kennedy told her she could sleep on his couch. He said McCloskey accepted his offer and they arrived at his house at 3:30 a.m.[83]

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[79] NT, Trial, 8/27/2008, p. 6.
[80] NT, Trial, 8/27/2008, pp. 39-43.
[81] NT, Trial, 8/27/2008, pp. 43-44.
[82] NT, Trial, 8/27/2008, pp. 47-48.
[83] NT, Trial, 8/27/2008, pp. 44-47.

Once inside his house, he said they had consensual vaginal and oral sex on the living room floor for an hour. McCloskey told him she was getting "dry" and 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.[84] Later that day (December 16th), he texted her a few times, but she never replied.[85]

E. The trial court's verdict

The trial court, sitting as fact-finder and judge, found Mr. Kennedy guilty of (1) rape of an unconscious victim, (2) rape – forcible compulsion, (3) sexual assault, (4) indecent assault of an unconscious person, and (5) indecent assault – without consent.

F. Post-sentencing hearing and direct appeal

The trial court granted Mr. Kennedy a post-sentencing hearing on April 30, 2009 to develop his trial counsel ineffectiveness claims. At the hearing, the trial court said this about McCloskey: "[T]here were problems with her testimony."[86] 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 trial court interrupted Scott 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."[87]

On direct appeal, Mr. Kennedy raised several ineffectiveness claims, including one arguing trial counsel failed to introduce McCloskey's *crimen falsi* convictions of theft and tampering with evidence from Westmoreland County. In Mr. Kennedy's pleadings, Scott Coffey alleged the case

[84] NT, Trial, 8/27/2008, pp. 48-53.
[85] NT, Trial, 8/27/2008, pp. 53-55.
[86] NT, Post-sentencing Hrg., 4/30/2009, p. 82.
[87] NT, Post-sentencing Hrg., 4/30/2009, p. 79.

"turned wholly on" McCloskey's credibility. In its 1925(a) opinion, the trial court, again, disagreed and said it had based its verdict, in part, on "the physical evidence and third-party witness testimony[.]"[88] The trial 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.[89]

NEWLY-DISCOVERED FACTS

A. Greg McCloskey's statement

On November 7, 2018, 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), and gmcclosk@co.westmoreland.pa.us.

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

At the time of their marriage, Greg was employed as a manager at West Penn Power in Westmoreland County.

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

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 funds to pay back the $56,000 to KSP. Specifically, he discussed how KSP representatives had contacted him in 2000 or 2001 explaining McCloskey's embezzlement and asking if he could repay the $56,000; if not, KSP would report McCloskey's embezzlement to

[88] Rpp. 50-60.
[89] Rp. 53.

authorities, and ask that she be criminally prosecuted. When Greg confronted McCloskey about the embezzlement, she repeatedly admitted she had, in fact, embezzled close to $60,000 from KSP.

Once Greg agreed to reimburse KSP, Kelly Simon and KSP's attorney had Greg and Theresa sign a confidentiality agreement to ensure neither discussed the embezzlement publicly. Kelly Simon feared KSP may be hurt financially if people learned she'd mismanaged her business in a way where an employee was capable of embezzling $60,000 before anyone noticed the missing funds. Due to the confidentiality agreement, Greg told no one about McCloskey's embezzlement outside his immediate family, and he said McCloskey didn't publicize it for another reason: doing so would destroy future employment opportunities.

Credit card fraud: Greg also mentioned how McCloskey opened credit card accounts in her family members' names, namely Janice Roskey's name and Viola Harvan's name. Janice Roskey is Theresa McCloskey's aunt, while Viola Harvan is her maternal grandmother. Greg learned of the fraud when Janice contacted him in the early 2000s and told him about the fraudulent accounts and charges. Greg said McCloskey charged $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, she repeatedly admitted she'd, 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 account to pay off the fraudulent credit cards charges. Greg also said he spoke to Janice and Viola and both 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 in 2007. If they had, however, Greg repeatedly said he *wouldn't have cooperated* with his defense team because he feared McCloskey would try to ruin him professionally and financially. Greg told 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."

In fact, Greg 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 someone from Mr. Kennedy's defense team. Greg also said Mr. Kennedy's family members had contacted him over the last five years and that he'd told them he didn't feel comfortable speaking with them because he still feared McCloskey.

Although still weary of McCloskey, once counsel explained McCloskey's allegations against Mr. Kennedy, particularly the timing of her allegations, Greg became convinced McCloskey had falsely accused Mr. Kennedy of rape for the purpose of garnering sympathy regarding her November 2006 Westmoreland County criminal charges. Because Greg believes McCloskey put an innocent person in prison, and the KSP confidentiality agreement presumably no longer enforceable, he hesitantly agreed to testify at a PCRA hearing to discuss McCloskey's specific acts of dishonesty, deception, and betrayal.

B. Kelly Simon's statement

On April 8, 2019, 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 mentioned about McCloskey embezzling nearly $60,000 from KSP in the late 1990s. Kelly said McCloskey worked part-time and performed administrative and book-keeping tasks for KSP. 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 also confirmed the confidentiality agreement and the fact she and KSP told few people about the embezzlement. As Kelly put it, "It's not good for business if the community thinks you're lackadaisical in the oversight of your own company. I learned a lot from the McCloskey situation that made KSP better, but I definitely didn't tell people about the embezzlement."

Kelly agreed to testify at a PCRA hearing to discuss specific instances of how McCloskey lied to her and her KSP staff, and how McCloskey perpetrated the embezzlement for so long.

PCRA COURT OPINION

The PCRA court assumed Mr. Kennedy's PCRA petition was timely.[90]

In terms of the merits of Mr. Kennedy's newly-discovered fact claim, the PCRA court correctly identified the elements of said claim:

> To obtain relief based on after-discovered evidence, appellant must demonstrate that the evidence: (1) could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of a witness; and (4) would likely result in a different verdict if a new trial were granted.[91]

[90] Appx., p. 5
[91] Appx., p. 5 (quoting *Commonwealth v. Pagan*, 950 A.2d 270, 292 (Pa. 2008)).

A. Prong one: The "facts" aren't obtainable before trial via due diligence

The PCRA court said Mr. Kennedy "fail[ed] to meet" the "first element," *i.e.*, the alleged new facts couldn't have been obtained before trial via due diligence. The PCRA court said Mr. Kennedy based his PCRA petition on three "sources" of "new" fact: (1) Gregory McCloskey's statement, (2) Kelly Simon's statement, and (3) Theresa McCloskey's 2006 Westmoreland County criminal convictions.[92] The PCRA court got the first two right, but not the third. Mr. Kennedy mentioned McCloskey's 2006 convictions in his PCRA petition, but only to give context to and emphasize McCloskey's proclivity to hoodwink people.

1. The favorable facts in Greg McCloskey's statement

The PCRA court said Greg McCloskey's comments that he wouldn't have cooperated with or testified on Mr. Kennedy's behalf at trial were "irrelevant" under the first prong.[93] In other words, despite Greg McCloskey's clear and repeated comments about not cooperating before or during trial, the PCRA court said Mr. Kennedy can't satisfy the first prong's "unobtainable" requirement because trial counsel never "even *attempted* to contact Greg McCloskey."[94] The PCRA court said Greg McCloskey was an "obvious" and "available source of information in 2007 that was ignored."[95]

2. The favorable facts in Kelly Simon's statement

Regarding the favorable facts in Kelly Simon's April 2019 statement, the PCRA court said these facts could've been "uncovered" before trial "through reasonable diligence" because it's "not unreasonable to investigate a key witness's employment history."[96] The PCRA court said "[j]ust

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[92] Appx., p. 5.
[93] Appx., pp. 6-7.
[94] Appx., p. 6 (emphasis in original).
[95] Appx., p. 6.
[96] Appx., p. 7.

because" Mr. Kennedy wasn't "told directly" about Kelly Simon's "testimony" doesn't mean "it was unobtainable in 2007."[97]

B. Prong three: Solely used to impeach

The PCRA court said the favorable facts in Greg McCloskey's and Kelly Simon's statements didn't warrant relief because they're "*purely* impeachment testimony[.]"[98] The PCRA court said, the favorable facts in Greg McCloskey's and Kelly Simon's statements have "no bearing on the crimes which [Mr. Kennedy] committed against [Theresa McCloskey]" because they don't "alter the facts of the case."[99]

C. PCRA hearing request

The PCRA court denied Mr. Kennedy's PCRA hearing request because it was a "fishing expedition" and the facts presented in his PCRA petition couldn't "possibly warrant a new trial[.]"[100]

[97] Appx., p. 7.
[98] Appx., p. 7 (emphasis in original).
[99] Appx., p. 8.
[100] Appx., p. 8.

ARGUMENTS

Claim #1
Mr. Kennedy's PCRA petition is timely

A. Introduction

Mr. Kennedy didn't file his current 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, 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 is referred to as the newly-discovered fact exception, *Commonwealth v. Burton*, 158 A.3d 618, 627 (Pa. 2017), and it's distinct from the *substantive* newly-discovered fact basis for relief under 42 Pa. C.S. § 9543(a)(2)(vi). To trigger this *procedural* timeliness exception, "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.

When a PCRA petition is untimely, the PCRA court lacks jurisdiction to adjudicate it. *Commonwealth v. Albretch*, 994 A.2d 1091, 1095 (Pa. 2010). Here, the PCRA court *assumed* the timeliness of Mr. Kennedy's PCRA petition. Counsel has never had a PCRA court *assume* the timeliness of a client's PCRA petition. Because the case law clearly establishes timeliness as a jurisdictional requirement, *Commonwealth v. Chester*, 895 A.2d 520, 522 (Pa. 2006), counsel is certain a PCRA court can't assume a petition's timeliness. Thus, to protect Mr. Kennedy's PCRA rights, counsel addresses the timeliness issue and explains why Mr. Kennedy's petition is timely.[101]

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[101] Counsel preserved the timeliness argument in Mr. Kennedy's *Concise Statement of Errors on Appeal*:

> Claim #3: The Court dismissed Mr. Kennedy's PCRA petition because it was "patently frivolous and without support on the record[.]" This language is vague and broad, meaning it could be based on any number of findings, including an untimeliness finding. If the Court's "patently frivolous and without support on the record" finding encompasses an untimeliness finding, the Court's untimeliness finding is wrong as a matter of law.

Rp. 88.

The PCRA court substantively concluded Mr. Kennedy's newly-discovered fact claim under § 9543(a)(2)(vi) was meritless because the facts comprising this claim were "obtainable" before trial. If the PCRA court's substantive finding is correct, Mr. Kennedy's PCRA petition must be untimely because the PCRA court's "obtainable" finding under § 9543(a)(2)(vi) is effectively the same as finding the facts were "ascertainable" under § 9545(b)(1)(ii)'s timeliness exception.

The PCRA court's "obtainable" finding isn't supported by the record and is legally incorrect.

B. The PCRA court's "obtainable" finding is arbitrary, not supported by the record, and legally incorrect

The facts comprising Mr. Kennedy's newly-discovered fact claim weren't "ascertainable" or "obtainable" before trial, even with the exercise of due diligence.

1. The favorable facts in Greg McCloskey's statement

During his November 7, 2018 statement, Greg McCloskey repeatedly and categorically told counsel he wouldn't have cooperated with or testified on Mr. Kennedy's behalf at trial. His reasons? Theresa McCloskey's vindictiveness, her ability to stealthily harm others financially and even criminally, as evidenced by Mr. Kennedy's fabricated rape allegation, and her instability which was driven by her drug and alcohol use. Greg McCloskey even feared Theresa would manufacture a domestic violence or physical abuse criminal allegation against him and have him thrown in jail. Theresa was simply too unpredictable, vindictive, and narcissistic to run the risk of speaking with Mr. Kennedy's defense team, let alone testify on his behalf at his 2007 trial. Greg McCloskey also mentioned the confidentiality agreement regarding the KSP embezzlement.

Consequently, had trial counsel attempted to interview Greg McCloskey in 2007, he categorically wouldn't have talked with or assisted him. Greg McCloskey also said he'd refused to speak with Mr. Kennedy's family members since Mr. Kennedy's conviction because he still legitimately

feared reprisal from Theresa should she learn he assisted – or was assisting – Mr. Kennedy's defense team.

Thus, based on Greg McCloskey's comments, he would've made himself "unascertainable" or "unobtainable" to Mr. Kennedy's defense team before trial. This is critical because, if Greg McCloskey would've made himself "unavailable," trial counsel would've had a legitimate, strategic reason not to call him as a defense witness: No competent defense attorney will put a witness on the stand if said witness refused to speak with them before trial and trial counsel has no idea what said witness will say if put on the stand. The PCRA cases, particularly those addressing trial counsel's alleged ineffectiveness for failing to call a witness at trial, supports this position.

a. The PCRA court's findings/conclusions regarding the favorable facts in Greg McCloskey's statement

The PCRA court claimed the favorable facts in Greg McCloskey's statement were "obtainable prior to the conclusion of trial[.]"[102] Why? Because Mr. Kennedy knew – based on his Match.com emails with Theresa – she "was going through a divorce[.]" These emails, the PCRA court said, made Greg McCloskey "an obvious" and "available source of information in 2007[.]"[103] The PCRA court also said Mr. Kennedy's defense team never "*attempted* to contact Greg McCloskey," and therefore "ignored" this information.[104]

While the PCRA court's finding that Greg McCloskey was "an obvious… source of information" is presumably reasonable, its finding that he was an "*available* source of information" isn't. Greg McCloskey repeatedly told undersigned counsel he wouldn't have cooperated with or testified on Mr. Kennedy's behalf.

[102] Appx., p. 5.
[103] Appx., p. 6.
[104] Appx., p. 6.

The PCRA court's final finding creates a draconian and unconstitutional situation. According to the PCRA court, "Because [Greg] McCloskey was never approached by [trial counsel], it is *irrelevant* that he claims that he would not have testified in 2007."[105] The PCRA court's *irrelevancy* finding is wrong as a matter of law, not supported by the record, and violates Mr. Kennedy's due process rights.

b. The hypothetical: What if Mr. Kennedy raised a trial counsel ineffectiveness claim based Greg McCloskey's statement, alleging trial counsel was ineffective for failing to interview and present Greg McCloskey at trial?

The PCRA court said trial counsel should've – at the very least - attempted to interview Greg McCloskey in 2007. Thus, the PCRA court held trial counsel was *ineffective* for not attempting to interview Greg McCloskey in 2007. Okay – well, let's play out what would've happened had Mr. Kennedy raised an IAC claim in his current PCRA petition, alleging trial counsel was ineffective for failing to interview and present Greg McCloskey at trial, keeping in mind Greg McCloskey's statement includes repeated comments clearly indicating he wouldn't have cooperated with or testified on Mr. Kennedy's behalf at trial.

Had Mr. Kennedy raised this IAC claim, the PCRA court would've adjudicated it using the failure to call/present a witness case law. To prevail on an IAC claim for failing to call a witness, Mr. Kennedy must show:

> (1) that the witness existed; (2) that the witness *was available*; (3) that counsel was informed of the existence of the witness or should have known of the witness's existence; (4) *that the witness was prepared to cooperate and would have testified on appellant's behalf*; and (5) that the absence of the testimony prejudiced appellant.

Commonwealth v. Brown, 767 A.2d 576, 581-582 (Pa. Super. 2001) (emphasis added).

[105] Appx., pp. 6-7.

Commonwealth v. Franklin, 580 A.2d 25 (Pa. Super. 1990) is instructive. In *Franklin*, the defendant was convicted of murdering Joseph Hillis and attempting to murder John Pickens. During his PCRA proceedings, the defendant alleged trial counsel was ineffective for not interviewing and presenting John Pickens as a defense witness because Pickens would've testified the defendant didn't do the shooting. *Id.* at 29. After a PCRA hearing, the PCRA court rejected the defendant's IAC claim, in part, because Pinkens "was not prepared to cooperate with the defense, and… he was unwilling to testify on [the defendant's] behalf [at trial]." *Id.* This Court affirmed, in part, finding Pickens "was unwilling to cooperate with the defense, and… he did not wish to testify for [the defendant]." *Id.* at 30.[106]

Based on *Franklin* and Greg McCloskey's repeated comments that he wouldn't have cooperated with or testified on Mr. Kennedy's behalf, the PCRA court would've quickly *rejected* this IAC claim because the second and fourth prongs can't be satisfied.

In terms of the second prong, Greg McCloskey was *available* to the extent trial counsel *could've approached him* before trial, if this is, in fact, what the phrase *"was available"* means under this case law. Simply approaching Greg McCloskey, however, doesn't mean he would've spoken with or even answered trial counsel's questions, and based on his repeated comments – he wouldn't have talked with trial counsel. Thus, while Greg McCloskey may've been *available to approach*, he wasn't *available to disclose*, and it's the disclosure of the favorable facts that's most critical to this type of IAC claim. Had Greg McCloskey refused to disclose the favorable facts in 2007, trial counsel can't be ineffective for not presenting him at trial. Consequently, because Greg McCloskey's comments makes clear he *wasn't available to disclose* what he knew about Theresa, Mr. Kennedy can't satisfy the second prong.

[106] *See also Commonwealth v. Pena*, 2015 Pa. Super. Unpub. LEXIS 365 *14 (March 4, 2015) (petitioner's ineffectiveness claim for failing to present a trial witness was rejected, in part, because the witness – Ortiz – "was clearly not prepared to cooperate with appellant.").

The fourth prong is also straightforward to adjudicate, as Greg McCloskey clearly and repeatedly said he wouldn't have cooperated with or testified on Mr. Kennedy's behalf in 2007.[107]

In short, part of Greg McCloskey's statement prevents Mr. Kennedy from weaponizing the favorable facts in his statement under this type of IAC claim because Greg McCloskey clearly and repeatedly said he wouldn't have cooperated with or testified on Mr. Kennedy's behalf before trial. Thus, under *Franklin* and like cases, trial counsel can't be ineffective for not interviewing or presenting Greg McCloskey.

Cases like *Franklin* are significant and relevant here for at least two reasons:

First, these cases mean if a witness was – or would've been – uncooperative with trial counsel and unwilling to testify on the defendant's behalf, trial counsel can't be ineffective for not calling this witness because the witness effectively made himself "unavailable" – or better yet, the witness made the favorable facts he knew "unascertainable" – to trial counsel. This leads to the second significant point.

Second, if trial counsel can't be ineffective because the witness made himself "unavailable" and his favorable facts "unascertainable," logic, common sense, and justice mandate that this *Franklin*-type finding *must* apply with equal force to § 9545(b)(1)(ii)'s "unascertainable" (timeliness) requirement and § 9543(a)(2)(vi)'s "unobtainable" (substantive) requirement. In other words, this Court can't possibly say in one breath that specific facts were "unavailable"/"unascertainable" to trial counsel when adjudicating a *Franklin*-type IAC claim, yet in the next breath say the very same facts were

[107] It's for these reasons, undersigned counsel didn't raise an IAC claim alleging trial counsel was ineffective for not interviewing and presenting Greg McCloskey at trial. Here, once counsel interviewed Greg McCloskey, and he repeatedly spoke about why he feared Theresa and why he wouldn't have assisted Mr. Kennedy's defense team *under any circumstances*, counsel quickly knew – because of cases like *Franklin* – he couldn't use the favorable facts in his statement to argue that trial counsel was ineffective for not interviewing or presenting him at Mr. Kennedy's trial.

"available"/"ascertainable" to trial counsel when adjudicating a § 9543(a)(2)(vi) newly-discovered fact claim. This would epitomize arbitrary decision-making.

Consequently, contrary to the PCRA court's holding, Greg McCloskey's "claims that he would not have testified in 2007" are absolutely relevant – procedurally and substantively. If the *Franklin* line of cases hold that the favorable facts in Greg McCloskey's statement were *unavailable* to trial counsel in 2007, based on Greg McCloskey's repeated comments he wouldn't have cooperated with or testified on Mr. Kennedy's behalf, then the favorable facts can't possibly be *available* under a § 9545(b)(1)(ii) timeliness assessment or a § 9543(a)(2)(vi) substantive assessment. If so, this, again, would epitomize arbitrary decision-making and violate Mr. Kennedy's PCRA due process rights.

In terms of due process, if Mr. Kennedy can't rely on this *Franklin*-type finding of "unavailable"/"unascertainable" to satisfy § 9545(b)(1)(ii)'s "unascertainable" (timeliness) requirement or the "unobtainable" (substantive) requirement in a § 9543(a)(2)(vi) newly-discovered fact claim, Mr. Kennedy can't vindicate his PCRA rights, *i.e.*, obtaining post-conviction *review of*, and possibly *relief from*, a set of facts that warrant – at the very least – *review* under the PCRA, namely § 9543(a)(2)(vi).[108] A similar hypothetical – involving defendant, John Smith, and eyewitness, Mike Jones – drives home the constitutional crisis created by the PCRA court's reasoning (or lack thereof).

Mike Jones, the eyewitness, is known and obvious because his name is listed multiple times in police reports and the defendant, John Smith's, custodial statement. Suppose Mike Jones is reluctant – for safety reasons – to cooperate or testify on John Smith's behalf at trial, and he uses this reluctance to remain off-the-grid before, during, and after John Smith's trial. Suppose more, however, that John

[108] The PCRA, importantly, affords petitioners a limited substantive liberty interest in receiving post-conviction *review of*, and possibly *relief from*, newly-discovered facts. 42 Pa. C.S. § 9593(a)(2)(vi); *District Attorney's Office v. Osborne*, 557 U.S. 52, 68 (2009) ("Osborne does… have a liberty interest in demonstrating his innocence with new evidence under state law."). PCRA petitioners, consequently, must be able to adequately vindicate the substantive rights afforded to them under the PCRA. *Id.* at 69 (a petitioner's due process rights are violated if the State's post-conviction relief "*procedures*… are fundamentally inadequate to vindicate the substantive rights provided" in the State's post-conviction relief statute).

Smith's trial counsel never searched for or attempted to interview Mike Jones before trial. Years later, though, shortly before John Smith files his first PCRA petition, Mike Jones contacts John Smith's post-conviction attorney and gives him the following statement:

> There's no way on God's green Earth I would've assisted John Smith's trial attorney before trial or testified on John Smith's behalf at trial because, had I done so at the time, my life would've been in grave danger. However, I'm older now, more mature, I've moved out of the neighborhood, I'm no longer scared, and I'm ready to tell the world what I know. I know for a fact John Smith isn't the gunman because I saw the gunman and it wasn't John Smith. Yes, John Smith was at the party where the shooting happened, but John Smith wasn't the gunman.

Based on Mike Jones's statement, John Smith can't use its favorable facts to argue trial counsel was ineffective for not presenting Mike Jones at his trial. Why? Because Mike Jones wouldn't have cooperated with or testified on John Smith's behalf at trial. *See Commonwealth v. Franklin*, 580 A.2d at 29-30. Consequently, the only possible way John Smith can obtain review of, and relief from, the favorable facts in Mike Jones's statement, is to rely on the *Franklin* finding of "unavailable"/"unascertainable" and argue: because the favorable facts in Mike Jones's statement are "unavailable"/"unascertainable" under *Franklin*, these favorable facts must also be "unobtainable" under § 9543(a)(2)(vi), meaning the *Franklin* finding satisfies the first prong of my newly-discovered fact claim under § 9543(a)(2)(vi).

Based on the PCRA court's reasoning here, however, John Smith would never be able to obtain *relief* from the favorable facts in Mike Jones's statement for one simple reason: trial counsel *never attempted to interview Mike Jones before trial*, which, according to the PCRA court, makes Mike Jones's "claims that he would not have testified" at John Smith's trial "irrelevant." In other words, John Smith can't obtain relief under an IAC claim because of *Franklin*, yet because trial counsel didn't attempt to interview Mike Jones before trial, he also can't obtain relief under § 9543(a)(2)(vi). Put differently, trial counsel *can't be held* ineffective in one instance preventing relief under a *Franklin* IAC

claim, yet trial counsel *can be held* ineffective in the second instance to prevent relief under a § 9543(a)(2)(vi) newly-discovered fact claim. The absurdity of this outcome speaks for itself and violates John Smith's PCRA due process rights. *District Attorney's Office v. Osborne*, 557 U.S. at 68-69.

This, unfortunately, is exactly what happened here. Mr. Kennedy's trial counsel *can't be held* ineffective under a *Franklin* IAC claim based on Greg McCloskey's clear and repeated statements he wouldn't have cooperated, yet trial counsel's *failure to attempt to interview* Greg McCloskey is the *key fact* that not only destroys Mr. Kennedy's § 9543(a)(2)(vi) newly-discovered fact claim, it renders his PCRA petition untimely under § 9545(b)(1)(ii).[109] The inconsistency – or better yet, arbitrariness – of the PCRA court's ruling is factually and legally wrong and violates Mr. Kennedy's due process rights. Simply put, Greg McCloskey's repeated comments that he wouldn't have cooperated with or testified on Mr. Kennedy's behalf at trial are quite relevant to this Court's § 9545(b)(1)(ii) timeliness inquiry, particularly the "unascertainable" requirement.

Also relevant to Court's § 9545(b)(1)(ii) timeliness inquiry, is Mr. Kennedy's post-conviction *diligence* to speak with Greg McCloskey. As Greg McCloskey made clear, he'd repeatedly refused to speak with Mr. Kennedy's family after Mr. Kennedy's conviction because he still legitimately feared reprisal from Theresa. Consequently, it's not like Mr. Kennedy woke up in November 2018 – eleven years after his conviction – and said, "Maybe I should try to speak with Theresa's husband Greg McCloskey." To the contrary, Mr. Kennedy's family has – over the years – reached out to Greg McCloskey to see if he'd be willing to discuss his marriage with Theresa.

This, however, represents the fundamental challenge faced by post-conviction litigants: How often must a petitioner pursue a witness to be diligent, yet at the same time not be viewed as harassing said witness? This Court and the Supreme Court have rarely discussed this dilemma when discussing

[109] Again, the PCRA court assumed the timeliness of Mr. Kennedy's PCRA petition, but its "obtainable" finding under § 9543(a)(2)(vi) effectively makes Mr. Kennedy's PCRA petition untimely.

reasonable diligence under § 9545(b)(1)(ii) and § 9543(a)(2)(vi). Greg McCloskey, thankfully, wasn't offended by Mr. Kennedy's repeated efforts to try to speak with him. Other witnesses, however, have contacted their local District Attorney's Office and complained to the District Attorney that an inmate or his family is harassing them by repeatedly trying to speak with them – even though they've repeatedly told the inmate and/or his family they don't wish to speak with him.[110]

In the end, even if trial counsel attempted to interview Greg McCloskey in 2007, Mr. Kennedy wouldn't have been able to develop/obtain the favorable facts mentioned in his November 2018 statement. Likewise, despite Mr. Kennedy's incarceration and *pro se* status for most of his post-conviction litigation, he and his family diligently tried to speak with Greg McCloskey multiple times. Like Mike Jones, the eyewitness in the John Smith hypothetical, Greg McCloskey eventually believed it was safe for him to speak with Mr. Kennedy's defense team – which he did in November 2018. Based on these circumstances, the favorable facts in Greg McCloskey's interview must be considered timely under § 9545(b)(1)(ii).

2. The favorable facts in Kelly Simon's statement

The PCRA court said the favorable facts in Kelly Simon's statement could've been "uncovered" before trial "through reasonable diligence" because it's "not unreasonable to investigate a key witness's employment history."[111] The PCRA court, again, plays willy-nilly with this Court's and the Supreme Court's ineffectiveness case law to weaponize it against Mr. Kennedy in an arbitrary and unconstitutional way.

[110] In fact, undersigned counsel, himself, has been formally threated by prosecutors for simply trying to contact and interview key witnesses.
[111] Appx., p. 7.

According to the PCRA court, Mr. Kennedy should've raised another trial counsel ineffectiveness claim, but this time based on Kelly Simon's statement. Undersigned counsel, however, specifically refused to raise this IAC claim because, as demonstrated below, the PCRA court would've quickly rejected it.

The PCRA court *assumes* the existence of available witnesses and/or information that could've and would've disclosed not only Theresa's part-time employment at KSP seven years before she accused Mr. Kennedy of rape, but the fact she embezzled $60,000 from KSP. The PCRA court's opinion also *assumes* Theresa's KSP embezzlement was common knowledge in Westmoreland County and to those who knew her and Greg. Both assumptions are wrong.

To begin with, although the PCRA court assumed the existence of such witnesses, it failed to identify a specific person or group of people who would know about Theresa's KSP embezzlement. This leads to the PCRA court's second faulty assumption. When counsel spoke with Greg McCloskey and Kelly Simon, both said very few people knew about Theresa's KSP embezzlement – and for obvious reasons:

First, Kelly Simon didn't want the public to learn about the embezzlement to protect her business. Thus, while she obviously wanted her $60,000 back, she wanted to claw it back privately.[112] This was why she and her attorney first approached Greg McCloskey privately, and why she had Greg and Theresa sign a *confidentiality agreement*. Had she approached law enforcement and pursued criminal charges, Theresa's embezzlement would've been front page news and adversely impacted her business.

Second, according to Greg McCloskey, neither he nor Theresa wanted friends, family, and law enforcement to know about the embezzlement for obvious reasons. Also, the confidentiality agreement prohibited them from disclosing/discussing the embezzlement.

[112] After meeting with undersigned counsel in November 2018, Greg McCloskey searched for the confidentiality agreement but couldn't locate the copy he'd received when the agreement was finalized.

In terms of Theresa, knowledge of her criminal conduct would've impacted her future employment prospects. For instance, there's no way Theresa would've landed her minutes clerk position had Judge Richard E. McCormick, the Westmoreland County Common Pleas Court, and others in the community known about her KSP embezzlement.[113] Thus, the fact she landed the minutes clerk position strongly suggests very few people knew about her KSP employment and her embezzlement – including Judge McCormick.

In terms of Greg, he was a manager at West Penn Power when the embezzlement occurred. He feared if West Penn Power learned of Theresa's embezzlement it could impact his job or he could even lose his job.

Lastly, if law enforcement got involved, it would've made news in Westmoreland County, adversely impacting Theresa, Greg, and KSP for the reasons mentioned above.

Consequently, in 2007, seven years after the embezzlement, few people knew about Theresa's KSP employment and her embezzlement. Which, again, isn't shocking because most people don't want others to know about their dirty laundry, and the confidentiality agreement prevented Greg and Theresa from mentioning the embezzlement.

Thus, the question – again – is who, outside of Greg McCloskey and Theresa McCloskey,[114] could trial counsel have interviewed to connect Theresa McCloskey to Kelly Simon and KSP?

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[113] That Theresa landed the minutes clerk position makes clear she didn't disclose her KSP employment to Judge McCormick or the Westmoreland County Common Pleas Court because a minutes clerk position would've – not doubt – required a criminal background and employment history review. In fact, Greg McCloskey told undersigned counsel his (Greg's) mother knew Judge McCormick and she put in a good word for Theresa to Judge McCormick, but neither she (his mother) nor Theresa disclosed the embezzlement to Judge McCormick. Counsel finds it extremely hard to believe Judge McCormick would've hired Theresa had he known about her $60,000 KSP embezzlement. Look what happened when Judge McCormick hired her. Had Judge McCormick known about the embezzlement, he wouldn't have hired her because putting someone like her in charge of tracking physical evidence in a criminal trial, *e.g.*, drugs, was a recipe for – and, in fact, turned out to be – a disaster.

[114] It's reasonable for a defense attorney not to approach the accuser in a sexual assault case because the accuser generally won't speak with defense counsel and may in fact make a harassment allegation. Thus, Theresa McCloskey can't be one of the witnesses assumed in the PCRA court's opinion, nor can Theresa's family because interviewing the accuser's family is also fraught with problems.

Judge McCormick? The folks at the Westmoreland County Common Pleas Court? No – because Judge McCormick and these folks didn't know about her embezzlement.

Theresa's friends? What – trial counsel was supposed to check MySpace.com and Facebook in 2007 to see if (1) Theresa had a profile on these social media platforms, and if so, (2) whether her profile was open to the public and listed her "friends" (assuming she had any)?[115]

In short, while trial counsel had a duty to investigate, *Strickland* is only concerned with whether trial counsel conducted a *reasonable* investigation. This duty, therefore, "does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

Here, trial counsel obviously investigated because he learned about Theresa's minutes clerk position with Judge McCormick – which led trial counsel to her 2006 Westmoreland County felony drug and theft convictions. Theresa, keep in mind, held the minutes clerk position from 2004 to 2006, meaning trial counsel's employment investigation went back at least three years (2007 to 2004) and it unearthed relevant impeachment evidence. The question becomes, then, after going back three years and developing such impeachment evidence, did *Strickland* require trial counsel to continue his employment investigation? If so, this leads us back to the first question: Who – outside of Greg McCloskey and Theresa McCloskey – would trial counsel have interviewed to connect Theresa to KSP and the embezzlement, especially when very few people knew about the embezzlement?

[115] In early 2007 Facebook wasn't the social media giant it is today. Indeed, undersigned counsel didn't create a Facebook page until late 2008 and counsel fancies himself as social media savvy. Also, based on counsel's own experience, attempting to interview friends of sexual assault accusers is terribly non-productive for obvious reasons.

The PCRA court disparaged trial counsel for not linking Theresa to KSP and identifying her embezzlement. However, simply claiming a fact is "obtainable" – as if trial counsel could've simply picked up the phone and called someone to learn this fact – misses the point entirely under *Strickland*. Based on what trial counsel knew and what he'd developed from Theresa's time as a minutes clerk for Judge McCormick, the only reasonable person trial counsel could've attempted to interview to learn more about Theresa – and to make the connection to KSP – was her ex-husband: Greg McCloskey.[116]

So, yes, trial counsel should've attempted to interview Greg McCloskey, but we've already gone done this rabbit hole. *Supra*, pp. 39-45. That Greg McCloskey repeatedly said he wouldn't have cooperated with or testified on Mr. Kennedy's behalf destroys any IAC claim alleging trial counsel was ineffective for failing to interview and present Greg McCloskey at trial. As a result, Mr. Kennedy is left with the § 9543(a)(2)(vi) newly-discovered fact claim raised in his PCRA petition.

In the end, the PCRA court's finding regarding Kelly Simon's statement isn't supported by the record, but is based on the unsupported premise trial counsel was ineffective for not figuring out – *without any assistance from Greg McCloskey* – that Theresa worked part-time for a company seven years before she accused Mr. Kennedy of rape. The italicized part represents the kicker: without speaking with Greg McCloskey, trial counsel was expected to uncover Theresa's part-time KSP employment.

[116] Again, trial counsel couldn't simply pick up the phone and call Kelly Simon because he didn't know Theresa had worked part-time for KSP, and he didn't know this because Theresa, Greg, Kelly Simon, and KSP all agreed not to talk about Theresa's KSP employment and embezzlement by signing the confidentiality agreement.

C. Conclusion

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. The facts comprising Mr. Kennedy's § 9543(a)(2)(vi) newly-discovered fact claim satisfy the "unascertainable" and "due diligence" requirements.

In terms of Greg McCloskey, he made clear he wouldn't have cooperated with or testified on Mr. Kennedy's behalf at trial. This made him "unavailable" and the favorable facts he knew "unascertainable" under *Franklin*. Logic, justice, and due process require that Mr. Kennedy be permitted to rely on this "unavailable"/"unascertainable" finding to satisfy § 9545(b)(1)(ii)'s "unascertainable" (timeliness) requirement. Also, Greg McCloskey's statement satisfies the "due diligence" requirement because he acknowledged he'd repeatedly refused to speak with Mr. Kennedy's family since Mr. Kennedy's conviction.

Greg McCloskey's statement is also critical because he represented the only potential witness trial counsel should've interviewed who likely knew Theresa's long-term employment history. Greg and Theresa were married for ten years, so it'd be reasonable to assume he knew her long-term employment history. Thus, Greg McCloskey bridged the gap between KSP and Theresa, meaning trial counsel needed to speak with Greg McCloskey to connect Theresa with Kelly Simon and KSP.

Based on the confidentiality agreement, moreover, few people knew about the embezzlement – Greg McCloskey and Kelly Simon being two of them. And this is a critical fact when considering the PCRA court's unsupported and unrealistic assumption that trial counsel could've easily learned about Theresa's part-time KSP employment had trial counsel simply "investigated" her "employment history." Counsel wishes defense investigations were as easy as the PCRA court makes them out to be. Defense investigations aren't this easy, particularly when there's a confidentiality agreement preventing a key witness or witnesses from disclosing plainly exculpatory/impeachment evidence.

Simply put, then, Greg McCloskey was the lone portal by which trial counsel could've reasonably learned about Theresa's employment with KSP – which would've ultimately led him to Kelly Simon.

The facts in Mr. Kennedy's PCRA petition couldn't have been developed until Greg McCloskey finally agreed to meet with Mr. Kennedy's defense team in November 2018. And Mr. Kennedy diligently – and respectfully – pursued Greg McCloskey's assistance for several years before he agreed to meet with undersigned counsel in November 2018. Mr. Kennedy's PCRA petition, therefore, is timely.

Claim #2
Mr. Kennedy's newly-discovered fact claim is meritorious

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. The fundamental issue, though, is whether the sex was consensual. Mr. Kennedy said it was. McCloskey claimed it wasn't. This case, therefore, is a classic "she said, he said."

Thus, the Commonwealth's case hinged *solely* on Theresa McCloskey's credibility. More importantly, because both parties agreed vaginal intercourse had occurred, there was no other way for Mr. Kennedy to raise reasonable doubt other than to introduce evidence discrediting McCloskey's credibility. Consequently, this isn't a rape case where Mr. Kennedy can use DNA testing to prove his innocence because he, in fact, had sex with McCloskey. DNA testing, therefore, would merely confirm what we already know. Furthermore, because Mr. Kennedy and McCloskey had sex in the privacy of Mr. Kennedy's home, he couldn't present eyewitness testimony to corroborate his claim the sex was consensual. Lastly, because Mr. Kennedy's home was not equipped with security cameras aimed inside his home, he couldn't present video footage to show the sex was consensual.

In the end, the only thing Mr. Kennedy could do to raise reasonable doubt, was to present as much impeachment evidence as possible to persuade the fact-finder Theresa McCloskey had the personality and motive to fabricate her rape allegation against him. 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 new impeachment evidence that so damages the accuser's credibility that – if this new impeachment evidence were presented at retrial – it would likely produce a different result.

Mr. Kennedy drives home this point due to the PCRA court's opinion. To obtain PCRA relief based on newly-discovered facts under § 9543(a)(2)(vi), the petitioner must typically prove the new facts: (1) couldn't have been obtained before trial through reasonable diligence; (2) aren't cumulative of other evidence presented at trial; (3) *aren't 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) (emphasis added).

The PCRA court said the favorable facts in Greg McCloskey's and Kelly Simon's statements didn't warrant PCRA relief because they're "*purely* impeachment testimony[.]"[117] The PCRA court said the facts regarding McCloskey's embezzlement represent "classic… impeachment evidence."[118] Furthermore, the PCRA court effectively held that Mr. Kennedy's conviction is based on something other than McCloskey's credibility when it said the impeaching facts in Greg McCloskey's and Kelly Simon's statements have "no bearing on the crimes which [Mr. Kennedy] committed against [Theresa McCloskey]" because they don't "alter the facts of the case."[119] Based on the PCRA court's direct appeal opinion, it's referring to the alleged bruising/marks seen in the photographs McCloskey took at her house on December 17th and 18th.[120] The PCRA court is wrong. This case represents the rare case where substantial new impeachment evidence would likely compel a different result.

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 *Choice* dissent, "[I]f the goal is to find justice, there well

[117] Appx., p. 7 (emphasis in original).
[118] Appx., p. 7.
[119] Appx., p. 8.
[120] Rpp. 52-53.

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 represents 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 impeaching facts presented at trial, the substantial new impeaching facts not only undermine McCloskey's credibility, they prove she had the personality and motive to fabricate her rape allegation against Mr. Kennedy

Had Greg McCloskey and Kelly Simon testified at trial, the fact-finder would've learned how Theresa McCloskey embezzled $60,000 from KSP and racked up $13,000 of fraudulent credit card charges by falsely opening credit cards under her aunt's and grandmother's names. More importantly, Kelly Simon would've explained the lengths Theresa McCloskey went to hide the embezzling and to hoodwink her and the other KSP employees. Greg McCloskey's and Kelly Simon's testimony regarding Theresa McCloskey's ability to so easily and repeatedly lie, steal, and to fabricate more lies to cover her old lies would've destroyed her credibility, and made clear to the fact-finder that she had an insatiable and sociopathic knack for fabricating narratives to advance and protect her own interests – even if that meant destroying the lives and/or businesses of those closest to her (KSP) or those she hardly knew (Mr. Kennedy).

Thus, before making her false accusations against Mr. Kennedy, McCloskey had (1) embezzled $60,000 from KSP, (2) fraudulently charged $13,000 on two credit cards made out in her aunt's and grandmother's names, and (3) broken into Judge McCormick's chambers to steal cocaine. Lastly, and perhaps most importantly, McCloskey's rape allegation came exactly a month after Westmoreland County authorities had arrested and charged her regarding the stolen drugs from Judge McCormick's chambers.

Collectively, then, McCloskey had the means, motive, and opportunity to fabricate her rape allegation against Mr. Kennedy.

Means: She had the means because she had a sociopathic worldview that made her prolificate at stealing, lying, and deceiving those who most trusted her: (1) her husband, (2) her immediate family, (3) her employers, and (4) a Match.com date who dirty danced with her most of the night at Todd's. Here, had the fact-finder known about the depth and breadth of McCloskey's dishonesty and deception, the fact-finder would've likely concluded she *lured* Mr. Kennedy to Todd's that night (December 15th) for the sole purpose of using him as a pawn in her diabolical, premeditated plan to flip the script regarding the significant felony drug charges she was facing in Westmoreland County.

Motive: The motive can't be any clearer. Theresa McCloskey needed to flip the script after being arrested and charged in Westmoreland on November 14, 2006 in connection with the stolen cocaine evidence from Judge McCormick's chambers. Exactly one month later, however, McCloskey was no longer the criminal defendant who'd hoodwinked Judge McCormick and his staff. No, now she was a rape victim survivor.

In other words, what better way to transform yourself from a criminal defendant, who'd brazenly stolen five grams of cocaine from a judge's chambers, to a sympathetic and allegedly wounded crime victim, than to falsely claim someone raped you? Likewise, what are the odds of someone being charged with significant felony drug charges *and* raped in less than one month? It's remarkable when you think about it. Sure – people occasionally experience a streak of bad luck, but this may take the cake. To be charged with a drug felony on November 14, 2006 and to be raped a month later on December 16, 2006 is astonishing. It's astonishing not only in terms of bad luck, but in how quickly the criminal justice system changed its view of Theresa McCloskey. One minute she's a criminal defendant facing significant felony drug charges and a lengthy prison sentence; the next minute, however, she's a crime victim who needs the criminal justice system's support and empathy.

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

In short, Greg McCloskey's and Kelly Simon's testimony would've eviscerated whatever credibility Theresa McCloskey had left after trial counsel cross-examined her.[121] At trial, the following facts had already significantly undercut her credibility, which the trial court acknowledged during Mr. Kennedy's post-sentencing motion hearing when it said: "[T]here were problems with [Theresa McCloskey's] testimony."[122]

First, McCloskey's time frame of events don't add up. *Supra*, pp. 18-19 (outlining everything that allegedly happened between 1:00 a.m. and 3:00 a.m. on December 16, 2006).

Second, McCloskey's claim Mr. Kennedy choked or strangled her – while she was passed out/unconscious. If McCloskey was blacked out/unconscious, why would Mr. Kennedy need or want to choke or strangle her?

Third, based on the alleged bruising captured in the photographs McCloskey took at home on December 17th and 18th, McCloskey said Mr. Kennedy must've choked her with great force while she was unconscious. McCloskey, though, claimed this excessive choking didn't wake her up. She woke up, she claimed, when Mr. Kennedy began having vaginal sex with her. Thus, the vaginal sex woke her up, but Mr. Kennedy trying to stop her breathing – by choking her – didn't wake her.

Fourth, the inconsistencies between McCloskey's statement and trial testimony.

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[121] Again, Mr. Kennedy's newly-discovered fact claim doesn't include McCloskey's 2006 Westmoreland County drug conviction – as trial counsel confronted her with this conviction

[122] NT, Post-Sentencing Hrg., 4/30/2009, p. 82.

Fifth, McCloskey's selective memory, and how her memory, conveniently and supposedly, blacked out at the most critical moment of her narrative, *i.e.*, immediately before the intercourse occurred. McCloskey recalled everything inside Mr. Kennedy's house, except, of course, how she ended up on his living floor having vaginal sex with him.

Sixth, the two bartenders at Todd's refuted McCloskey's claim she wasn't attracted to Mr. Kennedy. Both testified McCloskey appeared attracted to Mr. Kennedy because the two "dirty danced" most of the night and they left Todd's holding hands.

Seventh, McCloskey's decision to call John Seighman's after leaving Mr. Kennedy's residence, but not to immediately drive to a hospital or police station to report the alleged rape she supposedly reported to Seighman.

Eighth, McCloskey had an over-the-counter cold medicine (Benadryl) in her system – and not one of the three primary date-rape drugs rapists use to render their dates unconscious: Rohypnol® (flunitrazepam), GHB (gamma hydroxybutryic acid), and ketamine.

Ninth, the Todd's bartenders saw Mr. Kennedy purchase all the drinks for McCloskey and never saw him pour a liquid or anything into her drinks.

Tenth, the doctor who'd examined McCloskey on December 16th, Dr. Alhashimi, said she never mentioned being drugged or having suspicions of being drugged.[123]

Eleventh, that McCloskey felt the need to photograph her alleged bruises on December 17th and 18th – one and two days after her December 16th hospital visit – even though nurses had photographed her alleged bruises on December 16th.[124]

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[123] NT, Trial, 8/25/2008, pp. 44, 50-51.

[124] This fact more than any other is the one that convinced undersigned counsel Theresa McCloskey fabricated the rape allegation. Counsel has litigated nearly a hundred rape cases since 2004, and he's never had an accuser do what Theresa McCloskey did here. No accuser had ever photographed her alleged bruises one and two days after a SANE nurse had examined and photographed her at either a hospital or sexual assault clinic. Moreover, by the time McCloskey was examined and photographed at 4:00 p.m. on December 16th, it had been over

And as argued below, contrary to the PCRA court, the Commonwealth's case hinged *solely* on Theresa McCloskey's credibility because the fact-finder had to make credibility determinations before it found the photographs McCloskey took on December 17th and 18th incriminating.

2. The new facts impact the credibility of Theresa 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

The PCRA court served as the trial court and thus the fact-finder. In its direct appeal opinion, the trial court claimed Mr. Kennedy's conviction wasn't premised solely on Theresa McCloskey's credibility. It was also based on the "physical evidence" and "third-party witness testimony." The trial court identified the "physical evidence" as the "photographs and medical reports detailing the bruising and vaginal trauma." It identified the "third-party witness testimony" as that of John Seighman's and Tracey Seighman's testimony – Theresa McCloskey's best friends. It also mentioned the nurse, Carol Aigner's, and Dr. Alhashimi's testimony.[125] These witnesses, the trial court said, showed that McCloskey "envinc[ed]… mental and emotional trauma" during her December 16th hospital visit.[126]

The trial court (now the PCRA court) stuck to this notion in its PCRA opinion when it said the favorable facts contained in Greg McCloskey's and Kelly Simon's statements have "no bearing on the crimes which [Mr. Kennedy] committed against [Theresa McCloskey]" because they don't "alter the facts of the case."[127]

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twelve hours since the alleged assault. Rp. 46 (listing the examination time as 4:00 p.m.). Furthermore, as discussed below, the coloring of the alleged bruising doesn't correspond to the timing of the alleged assault.

[125] Aigner and Dr. Alhashimi, notably, both worked with Tracey Sieghman at the hospital, and Tracey was with McCloskey on December 16th during her hospital visit.

[126] Appx., p. 3.

[127] Appx., p. 8.

The PCRA court's finding is wrong and not supported by the record. The record plainly proves the Commonwealth's case against Mr. Kennedy rested *solely* on Theresa McCloskey's credibility. To find Mr. Kennedy's guilt beyond a reasonable doubt, the fact-finder had to address and answer the following issues. Each issue, however, required the fact-finder to gauge Theresa McCloskey's credibility: (1) whether McCloskey's non-consensual sex narrative was true; (2) whether the marks and/or bruises seen in the December 17th and 18th photographs are the by-product of Mr. Kennedy's assault or manufactured by McCloskey to advance a false rape narrative; and (3) whether McCloskey's conduct and emotions at the hospital were caused by Mr. Kennedy's assault or manufactured to advance a false rape narrative.

The photographs of the alleged bruising on McCloskey's neck raised a significant red flag, requiring the fact-finder to gauge whether she had the temperament, personality, or pathology to purposely inflict marks on her neck for the sole purpose of selling a false rape narrative. The photographs taken at the hospital on December 16th by the nurses showed, at most, a small abrasion on the back of McCloskey's neck.[128] These photographs also appear to show faint marks on McCloskey's leg and right calf.[129] The alleged incriminating value of the hospital photographs, however, came from none other than Theresa McCloskey herself, who claimed the abrasion and marks captured in the photographs came from Mr. Kennedy's assault – not from her trying to manufacture fake bruises or wounds to bolster her rape allegation. And this is critical because McCloskey testified she went directly home after the alleged assault, instead of to a hospital or police station, and that she stayed home for at least seven hours (6:00 a.m. and 1:00 p.m.), arriving at the hospital at 1:30 p.m. on December 16th.

[128] NT, Trial, 8/25/2008, p. 44.
[129] Rpp. 61-72.

Consequently, because there's a seven-hour gap between McCloskey allegedly fleeing Mr. Kennedy's residence in despair after the alleged assault, and her going to the hospital, to view the hospital photographs as incriminating the fact-finder first had to find McCloskey's testimony regarding the context of the photographs *credible*: "I don't believe Theresa McCloskey would've manufactured the marks captured in these photographs, thus I believe these marks are what Theresa claim they are – marks inflicted by Mr. Kennedy during the assault."

The photographs taken by Theresa at her house on December 17th and 18th,[130] require the same *credibility* finding, but these photographs required a post-exam *credibility* determination. Like the hospital photographs, the incriminating value of the at home photographs came from McCloskey, where she claimed the alleged bruising captured in these photographs originated from Mr. Kennedy's assault, not from her self-inflicting them for the purpose of selling a false rape narrative. Consequently, before drawing an incriminatory inference from the at home photographs, the fact-finder had to find McCloskey's testimony regarding the nature of these photographs *credible*: "The bruising looks worse in these photographs, but I find Theresa's testimony about the origins of this bruising credible, meaning I find credible her testimony that the bruising came from Mr. Kennedy's assault, not from her self-inflicting them sometime after her December 16th rape exam."

a. The lack of bruising in the December 16th photograph raises grave concerns and credibility issues regarding Theresa McCloskey's rape narrative

Based on Greg McCloskey's and Kelly Simon's statements, Mr. Kennedy could've persuasively argued Theresa McCloskey had the temperament, personality, and pathology to self-inflict the marks on her neck captured in the December 17th and 18th photographs. The December 16th photographs, as mentioned, capture only a very, very faint mark on the right side of McCloskey's neck. The December 17th and 18th neck photographs, however, are night-and-day different than the December

[130] Rpp. 73-83.

16th photographs. Based on the new facts, Mr. Kennedy can 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

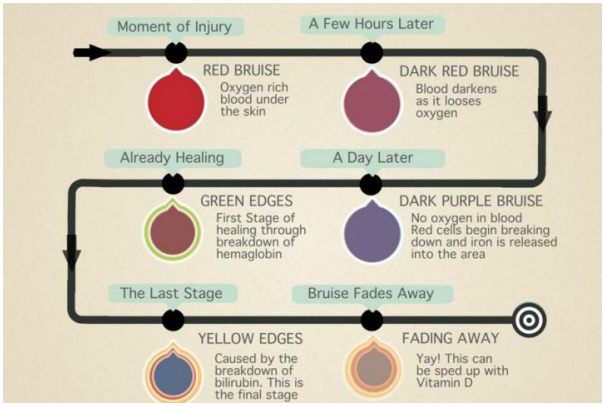
Accuser's photograph from 12/18

Furthermore, based on the coloring (or totally lack of) of these alleged bruises, something is seriously amiss regarding the December 16th photographs. For instance, the December 16th photograph shows, literally, no markings on the right side of McCloskey's neck. However, had Mr. Kennedy violently choked her with his bare hands, as McCloskey's testimony and December 17th and

18th photographs suggest, there would've been an immediately bruise/wound to the neck that would look like the reddish wound above the phrase "IMMEDIATELY AFTER" in the below photograph:

[131]

The BRUISE SPECTRUM below reinforces this point, making clear that by the time McCloskey arrived at the hospital on December 16th, had Mr. Kennedy choked her with great force as she suggested, there would've dark red bruising to the right neck area.



[132]

[131] https://www.medicalnewstoday.com/articles/322742 (last visited April 16, 2020).
[132] http://sciencefocus.ust.hk/bruises (last visited April 16, 2020).

b. Theresa McCloskey's blackout claim and alleged bruising don't make any sense

More importantly, the marks and alleged bruising on McCloskey's neck make no sense when considered in conjunction with McCloskey's narrative. 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. At no point after regaining consciousness, however, did Mr. Kennedy choke or attempt to choke her. Thus, the choking had to occur during this alleged blackout period.

However, the inference from the alleged neck bruises – only seen in the December 17th and 18th photographs – is that Mr. Kennedy choked her with his bare hands at some point during the incident. The marks in the December 17th and 18th photographs aren't ligature marks, so they must've 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 her breathing during the incident – and *did so when she was unconscious*.

Here's the problem, though: If McCloskey 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 didn't need to gain control over the situation, he could simply do as he pleased with her. Also, if McCloskey was passed out, and didn't feel Mr. Kennedy choking her, which is what she claimed at trial, Mr. Kennedy would've 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've woke up because *she couldn't breathe* or *had difficulty breathing*. According to McCloskey, however, the vaginal sex woke her up, but Mr. Kennedy grabbing or pushing on her neck hard enough to leave alleged bruises on her neck – which are only captured in December 17th and 18th photographs – didn't.

In the end, when Greg McCloskey's and Kelly Simon'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 weren't inflicted by Mr. Kennedy during their *consensual* sexual encounter, but by McCloskey after the *consensual* encounter for the sole purpose of manufacturing evidence to make her false rape accusation appear credible and believable. And the false rape narrative's purpose was to "flip the script" regarding her pending Westmoreland County felony drug charges

Moreover, the fact-finder had an incomplete picture of Theresa McCloskey. Greg McCloskey's and Kelly Simon's statements, however, create a complete picture of her sociopathic, narcissistic, and deceptive tendencies. Their statements, moreover, destroy Theresa McCloskey's credibility, obliterating her narrative regarding what the December 17th and 18th photographs captured, and wrecking the Commonwealth's case against Mr. Kennedy which was based *solely* on the fact-finder finding Theresa McCloskey's various narratives credible.

3. Greg McCloskey's and Kelly Simon's statements would be admissible

Greg McCloskey's and Kelly Simon's statements regarding Theresa McCloskey's reputation for dishonesty and the specific instances of her dishonesty would be admissible under Pa.R.Evid. 405(a) and Rule 405(b)(2) at a trial. 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 Commonwealth's case hinged on Theresa McCloskey's credibility. Thus, the only way Mr. Kennedy could've raised reasonable doubt at trial was to introduce evidence showing 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 McCloskey's and Kelly Simon's testimony is admissible under Rules 404(a)(2)(B), 405(a), and 405(b)(2) at trial.

Claim #3
The PCRA court erred by not granting a PCRA hearing

The PCRA court erred by not granting a PCRA hearing.

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 can't be denied unless the PCRA court is "certain" Mr. Kennedy's petition lacked "total" merit. *Commonwealth v. Bennett*, 462 A.2d 772, 773 (Pa. Super. 1983). 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 was entitled to a hearing because Greg McCloskey's and Kelly Simon's statements "raise[] material issues of fact." Pa.R.Crim.P. 908(A)(2).

First, a PCRA hearing would've resolved the PCRA court's allegations regarding Greg McCloskey's refusal to testified at trial. A PCRA hearing would've shown – or will develop facts showing – that the favorable facts in Greg McCloskey's statement weren't "ascertainable" or "obtainable" when Mr. Kennedy went to trial. Greg McCloskey could've testified and told the PCRA court what he told counsel in November 2018 regarding his grave concerns about assisting Mr. Kennedy's defense team before trial.

Second, a PCRA hearing would've developed facts regarding the small number of people who knew about Theresa McCloskey's KSP embezzlement due to the confidentiality agreement Greg McCloskey, Theresa McCloskey, and KSP signed once Greg McCloskey agreed to reimburse the $60,000 using his own 401K monies.

Third, based on Greg McCloskey's and Kelly Simon's testimony, a PCRA hearing would've developed substantial new facts regarding Theresa McCloskey's sociopathic, narcissistic, and deceptive tendencies. These facts and tendencies, destroy Theresa McCloskey's credibility – or whatever credibility she had left after trial based on the trial court's own observation that her trial testimony was "problematic."

Mr. Kennedy, therefore, was entitled to a PCRA hearing.

CONCLUSION

WHEREFORE, based on the foregoing facts, authorities, and arguments, Mr. Kennedy respectfully requests the Court to either grant him a new trial or – at the very least – a PCRA hearing.

Respectfully submitted this the 20th day of April, 2020.

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CERTIFICATE OF SERVICE

On April 20, 2020, counsel e-filed this pleading via PAC-File, meaning the Commonwealth was served electronically.

CERTIFICATE OF COMPLIANCE

Mr. Kennedy's opening brief exceeds 14,000. Thus, Mr. Kennedy filed a motion requesting permission to exceed the word count.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA — CRIMINAL DIVISION

Plaintiff-Respondent, — CP-02-CR-0003178 2007

-vs-

ROBERT KENNEDY

Defendant-Petitioner.

OPINION

On August 27, 2008, following a non-jury trial, the Petitioner, Robert Kennedy, was convicted of Count 1—Rape of an Unconscious Victim (18 Pa. C.S. § 3121(a)(3)), Count 2—Rape—Forcible Compulsion (18 Pa. C.S. § 3121(a)(1)), Count 3—Sexual Assault (Pa. C.S. § 3124.1), Count 4—Indecent Assault of an Unconscious Person (Pa. C.S. § 3126(a)(4), and Count 5—Indecent Assault—without consent (Pa. C.S. § 3126(a)(1)). Defendant was sentenced to 60 to 120 months for Count 1 and 66 to 132 months for Count 2, to run consecutively for an aggregate sentence of 126-252 months in incarceration. No further penalty was issued for the remaining counts: Petitioner filed several different Post-Conviction Relief Act ("PCRA") petitions. The Petitioner filed a new PCRA petition on May 17, 2019 and on September 30, 2019, Petitioner filed an Appeal to the Superior Court following the denial of his latest PCRA petition.

Pursuant to Rule Pa.R.A.P. 1925(b), the Petitioner filed a Concise Statement of Errors Complained of on Appeal on November 1, 2019 from which the following is taken verbatim:

> Claim #1: The PCRA court erred by rejecting Mr. Kennedy's newly discovered fact claim. The new facts from Greg

McCloskey's and Kelly Simmons's statements would likely compel a different outcome at retrial. The Commonwealth's case hinged on the credibility of Theresa McCloskey's sexual assault narrative as well as her claim the markings in the photographs she took of her neck and arms were caused by Mr. Kennedy's sexual assault and not fabricated by her to bolster a false rape claim.

Claim #2: The PCRA court erred by not granting an evidentiary hearing where Greg McCloskey and Kelly Simmons could've testified regarding Theresa McCloskey's reputation for dishonesty as well as specific instances of her dishonesty under Pa.R.Evid. 405(a) and Pa.R.Evid. 405(b)(2).

Claim #3: The Court dismissed Mr. Kennedy's PCRA petition because it was "patently frivolous and without support on the record[.]" This language is vague and broad, meaning it could be based on any number of findings, including an untimeliness finding. If the Court's "patently frivolous and without support on the record" finding encompasses an untimeliness finding, the Court's finding is wrong as a matter of law.[1]

Petitioner and the victim met through Match.com, an internet dating site, and made plans to meet in person. (TT1 16, 51).[2] Although the victim lived in Greensburg, PA, Petitioner pressured the victim to meet at his favorite bar, Todd's by the Bridge Tavern, in McKeesport, Allegheny County on December 15, 2006. (TT1 21, 51). The victim was unfamiliar was the Pittsburgh area, but managed to find Todd's by the Bridge Tavern and met him in its parking lot around 10:00 PM. (TT1 21-2). The victim testified that Petitioner did not resemble his Match.com profile pictures and she did not feel sexually attracted to him. However, she decided to stay at Todd's with the Petitioner because she had traveled over forty minutes for the date. (TT1 23).

At Todd's, the victim consumed three alcoholic drinks, which were given to her by the Petitioner. (TT1 25, TT3 56).[3] Petitioner purchased one of the drinks while the victim was in the

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[1] Robert Kennedy's Concise Statements of Errors on Appeal on pp. 1-2.
[2] Trial Transcript 1 ("TT1") refers to the transcript from May 20-21, 2008.
[3] Trial Transcript 3 ("TT3") refers to the transcript dated August 27, 2008.

restroom, which she consumed once she returned. (TT3 44). The victim testified that she began to feel that "something wasn't right" after she consumed her third and final drink. (TT1 26). The Petitioner suggested that they get something to eat, so he drove the victim to Denny's around 1:30 AM and stayed for approximately 90 minutes. However, the victim testified that she had no memory of what she ate at Denny's. (TT1 26-7). When leaving the diner, Petitioner told the victim that it was safe to sleep at his house if she felt that she could not drive home. The victim testified that she still felt ill and unable to drive all the way home, so she agreed to go to the Petitioner's house around 3:00 AM. (TT1 27-8). Once inside the Petitioner's house, she sat on the couch and lost consciousness. (TT1 29).

The victim regained consciousness due to intense pain in her vagina and saw that the Petitioner was on top of her and penetrating her vagina with his penis. (TT1 30). She asked the Petitioner to stop, but he grabbed her arms and held them above her head. The victim kicked the Petitioner off of her and ran into his bathroom, where she noticed that she was bleeding from her vagina and that she had pain when she urinated. (TT1 30-1). When the victim left the bathroom, the Petitioner was asleep on the floor, so she grabbed her clothes, left the house, and drove away in her car. (TT1 37).

Once on the road, the victim called her friends, the Seighmans, for help. Mr. Seighman testified that the victim was crying and panic-stricken, so he called the police on the victim's behalf. Once the victim found her way home, she fell asleep until she was awakened by a phone call from Lieutenant Doug Marcos of the Greensburg Police. (TT1 40, 117-18). Lt. Marcos asked the victim to come to Jeanette Hospital, where medical professionals conducted a rape test kit. (TT1 40). Dr. Alhashimi, the Emergency Room physician, testified that the victim had vaginal trauma, such as bleeding and mild labial swelling, as well as bruising and several

abrasions on her body. (TT2 48).[4] A blood test revealed that the victim had diphenhydramine in her system, despite never knowingly ingesting the drug during the timeframe in question. (TT3 16). The Commonwealth's expert witness, Jennifer Janssen, a certified toxicologist, testified that even a small amount of diphenhydramine can cause drowsiness and confusion, especially when paired with alcohol. (TT2 30).

A non-jury trial occurred on this matter on May 20-21, 2007 and August 25 and 27, 2007, where the Petitioner was found guilty at the previously mentioned counts and was sentenced on November 24, 2008. The Petitioner filed a post-sentence motion on December 3, 2008, to which the Commonwealth responded on April 15, 2009. On April 17, 2009, the Petitioner filed a Second Amended Post-Sentence Motion. A hearing was held on April 30, 2009, after which the Petitioner's Motion was denied. The Petitioner filed his first Notice of Appeal to the Superior Court on June 3, 2009 and was directed to file a Concise Statement of Matters Complained of on Appeal, pursuant to Pa.R.A.P. 1925(b), which he filed on July 1, 2009. The Superior Court affirmed the judgment on June 15, 2010.

The Petitioner filed a *pro se* PCRA petition on September 27, 2010. Counsel was appointed on October 14, 2010, and appointed counsel filed a "No Merit" Letter and Motion to Withdraw on November 30, 2010. The Motion to Withdraw was granted and the PCRA petition was dismissed on January 5, 2011. On July 9, 2014, the Petitioner filed another PCRA petition, which was dismissed on September 25, 2014.

The PCRA petition at hand was filed on May 17, 2019, to which the Commonwealth responded on June 18, 2019. The petition was dismissed on September 11, 2019, and the Petitioner filed an Appeal to the Superior Court following the denial of his latest PCRA petition

[4] Trial Transcript 2 ("TT2") refers to the transcript dated August 25, 2008.

on September 30, 2019. The Petitioner was ordered to write a Concise Statement of Errors Complained of on Appeal, which was filed on November 1, 2019.

As a threshold matter, the timeliness of the Petitioner's PCRA petition will be addressed first. For a PCRA petition to be timely, it must be filed within one year of the date the judgment of sentence became final. 42 Pa.C.S.A. § 9545(b). However, Petitioner contends that this third PCRA petition falls within the time-bar exception for newly-discovered evidence. 42 Pa. C.S. § 9545(b)(1)(ii). For the purposes of this opinion, this PCRA petition will be viewed as timely so as to address the petition's merits.

The Petitioner next contends that this court erred by rejecting the claim that his newly discovered evidence, namely the impeachment testimony of two witnesses, would have compelled a different outcome at a retrial. In order to be granted a new trial due to the discovery of evidence, the Petitioner must show all four elements by a preponderance of the evidence that:

> (1) the evidence could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence; (2) is not merely corroborative or cumulative; (3) will not be used solely to impeach the credibility of the witness; and (4) would likely result in a different verdict if a new trial were granted.

Commonwealth v. Pagan, 950 A.2d 270, 292 (Pa. 2008)(citing Commonwealth v. Randolph, 873 A.2d 1277, 1283 (Pa. 2005)); Commonwealth v. Rivera, 939 A.2d 355, 359 (Pa. Super. 2007); Pa.R.Crim.P. 720(c).

However, the Petitioner fails to meet even the first element because the "new" evidence was obtainable prior to the conclusion of trial; therefore, a new trial should not be granted.

"A defendant cannot claim he has discovered new evidence simply because he had not been expressly told of that evidence," nor can a defendant who "fails to question or investigate an obvious, available source of information claim evidence from that source is newly discovered

evidence." Commonwealth. v. Padillas, 997 A.2d 356, 364 (Pa. 2010); see also Commonwealth v. Crawford, 427 A.2d 166, 175 (Pa. 1981).

In his PCRA petition, the Petitioner cites to several "new" pieces of evidence, including testimony from Greg McCloskey, the victim's ex-husband, that the victim has a reputation for dishonesty and has committed embezzlement and credit card fraud. The Petitioner also proffers testimony from Kelly Simon, owner of Kelly Simon Event Management, who alleges that the victim embezzled a large amount of money from her company in the late 1990s. Petitioner also references a criminal case against the victim which occurred in Westmoreland County in 2006, shortly before these crimes occurred.

The Petitioner states that he was not aware of these facts until November 7, 2018 and that these facts could not have been discovered because Mr. McCloskey was not contacted by him or his attorney until recently. Mr. McCloskey connected the Petitioner to Kelly Simon, so the Petitioner also alleges that her testimony was not obtainable prior to the conclusion of his trial in 2007. He also claims that even if Mr. McCloskey had been contacted back in 2007, his testimony would still unobtainable because Mr. McCloskey would have refused to testify because he feared retaliation by the victim.

These arguments fail for several reasons. The Petitioner knew that the victim had a previous husband because she told the Petitioner that she was going through a divorce in an email they exchanged on Match.com. (TT1 20-1). Yet, the Petitioner admits that no one from his defense team in 2007 to now even *attempted* to contact Greg McCloskey.[5] Therefore, Mr. McCloskey was an obvious, available source of information in 2007 that was ignored. Padillas, 997 A.2d at 364. See also Commonwealth v. Chambers, 599 A.2d 630, 642 (Pa. 1991). Because

[5] PCRA Petition dated May 17, 2019 on pp. 37.

Mr. McCloskey was never approached by the Petitioner, it is irrelevant that he claims that he would not have testified in 2007. Mr. McCloskey's testimony regarding the criminal charge against the victim in 2006 could easily have been discovered without his testimony because criminal charges are public record. Likewise, Kelly Simon's testimony could have been uncovered through reasonable diligence by Petitioner before the conclusion of trial because it is not unreasonable to investigate a key witness' employment history. Just because the Petitioner was not told directly of Ms. Simon's testimony does not mean that it was unobtainable in 2007. Padillas, 997 A.2d at 364. In sum, the Petitioner fails to prove by a preponderance of the evidence that this evidence could not have been obtained prior to the conclusion of trial despite reasonable diligence because the sources of information were obvious and available.

Even if this evidence was truly unobtainable until after the Petitioner's trial, it is *purely* impeachment testimony and therefore fails the third element. Impeachment evidence goes to the credibility of a witness against the accused. Commonwealth. v. Treiber, 121 A.3d 435, 461 (Pa. 2015). In fact, Petitioner concedes as much in his Concise Statement of Errors Complained of on Appeal, stating that "[t]he Commonwealth's case hinged on the credibility of Theresa McCloskey's sexual assault narrative."[6]

The fact that the victim pleaded guilty to drugs crimes in 2006 and that her ex-husband and former employer allege that she has a reputation for dishonesty are classic examples of impeachment evidence. See, e.g., Commonwealth. v. Griffin, 2016 PA Super 81, 2016 WL 1391668 (Pa. Super. 2016)(holding that federal indictments and civil actions against witnesses concerning an unrelated incident did not warrant a new trial); Commonwealth v. Soto, 983 A.2d 212 (Pa. Super. 2009)(ruling that after-discovered evidence that police chemist had been

[6] Robert Kennedy's Concise Statements of Errors on Appeal on pp. 1.

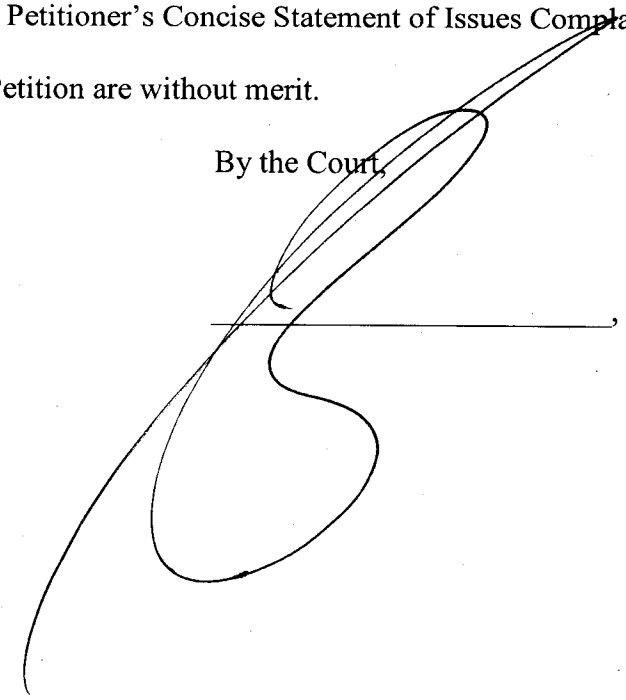
confiscating pain pills for her own use did not entitle defendants to a new trial). This newly proffered evidence has no bearing on the crimes which the Petitioner committed against the victim because it does not alter the facts of the case. As such, the Petitioner failed to meet the third factor because he did not show by a preponderance of the evidence that the "new" evidence is anything but impeachment evidence.

The Petitioner also argues that this court erred by not granting an evidentiary hearing where Mr. McCloskey and Ms. Simons may have testified regarding this matter. However, such a hearing is not warranted because there is no proven evidence that a new trial should be granted. An evidentiary hearing is not "a fishing expedition for any possible evidence that may support some speculative claim." Griffin, 2016 PA Super 81, 2016 WL 1391668 (Pa. 2016). For the reasons previously given, the Petitioner's evidence cannot possibly warrant a new trial; therefore, an evidentiary hearing is not required.

Based on the foregoing, Petitioner's Concise Statement of Issues Complained of on Appeal and the related PCRA Petition are without merit.

By the Court,

Dated: 12-2-19



_____, J.