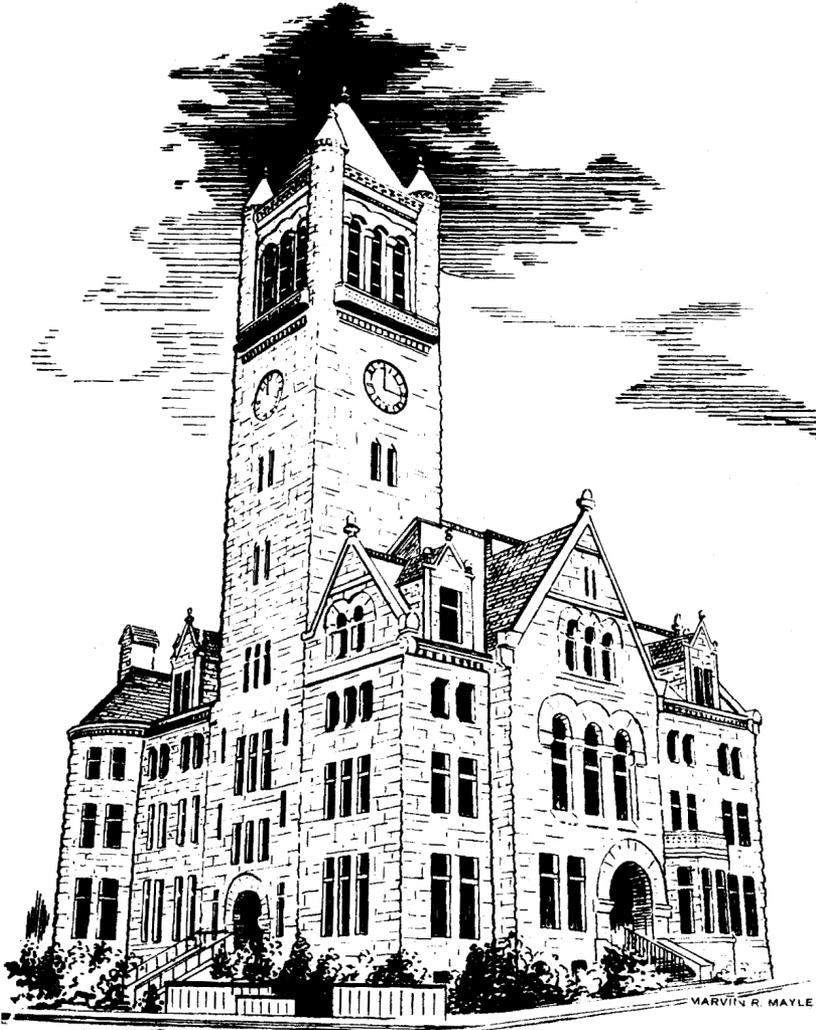


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ESTATE NOTICES

Notice is hereby given that letters testamentary or of administration have been granted to the following estates. All persons indebted to said estates are required to make payment, and those having claims or demands to present the same without delay to the administrators or executors named.

Third Publication

WENDY BLOOM, late of German Township, Fayette County, PA ⁽³⁾

Administrator: David A. Bowser
c/o Adams & Adams
55 East Church Street, Suite 101
Uniontown, PA 15401
Attorney: Jason Adams

IRENE E. MERRILL, late of South Union Township, Fayette County, PA ⁽³⁾

Personal Representative: Lenora Brady
c/o Watson Mundorff & Sepic, LLP
720 Vanderbilt Road
Connellsville, PA 15425
Attorney: Michelle L. Dietz

VIRGINIA RUTH RAVENSCROFT, late of Ohiopyle, Fayette County, PA ⁽³⁾

Executor: Marke Ravencroft
c/o Adams & Adams
55 East Church Street, Suite 101
Uniontown, PA 15401
Attorney: Jason Adams

ELIZABETH M. SALLY, a/k/a BETTY M. SALLY, late of Luzerne Township, Fayette County, PA ⁽²⁾

Personal Representative: Melvin J. Sally, II
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: Jeremy J. Davis

ELMER J. SASKO, a/k/a ELMER JOHN SASKO, late of South Union Township, Fayette County, PA ⁽³⁾

Personal Representative: Douglas S. Sepic
c/o Watson Mundorff & Sepic, LLP
720 Vanderbilt Road
Connellsville, PA 15425
Attorney: Douglas S. Sepic

DANIEL WALTERS, a/k/a DANIEL WAYNE WALTERS, late of Nicholson Township, Fayette County, PA ⁽³⁾

Personal Representative: Sabine Gaskill
181 Bowood Road
Smithfield, PA 15478
c/o P.O. Box 622
Smithfield, PA 15478
Attorney: Charity Grimm Krupa

Second Publication

MARK A. KLINK, a/k/a MARK ALAN KLINK, SR., late of Dunbar Township, Fayette County, PA ⁽²⁾

Administratrix: Tracy L. Klink
c/o 9 Court Street
Uniontown, PA 15401
Attorney: Vincent J. Roskovensky, II

LOUIS E. SAVINI, late of South Union Township, Fayette County, PA ⁽²⁾

Personal Representative: Philip J. Savini, Sr.
c/o Davis & Davis
107 East Main Street
Uniontown, PA 15401
Attorney: James T. Davis

WILLIAM F. SHILLINGS, late of North Union Township, Fayette County, PA ⁽²⁾

Personal Representative:
Herbert G. Mitchell, Jr.
c/o 902 First Street
P.O. Box 310
Hiller, PA 15444
Attorney: Herbert G. Mitchell, Jr.

LOUIS N. USHER, JR., late of Jefferson Township, Fayette County, PA ⁽²⁾
Executor: Victoria Ann Usher
 535 Fayette City
 Perryopolis, PA 15473
 c/o 111 East Main Street
 Uniontown, PA 15401
Attorney: Robert Harper

First Publication

LORRAINE BABICH, late of Uniontown, Fayette County, PA ⁽¹⁾
Executor: Louis R. Geller, Jr.
 232 Welsh Road
 Washington, PA 15301
 c/o Shire Law Firm
 1711 Grand Boulevard
 Park Centre
 Monessen, PA 15062
Attorney: Mark J. Shire

HELEN DOLAN, late of Bullskin Township, Fayette County, PA ⁽¹⁾
Executor: Dolly Baker
 2402 Brownfield Drive
 Greensburg, PA 15601
 c/o Schimizzi Law, LLC
 35 West Pittsburgh Street
 Greensburg, PA 15601
Attorney: Richard Schimizzi

ALICE W. JEFFERYS, late of Uniontown, Fayette County, PA ⁽¹⁾
Executor: Lisa A. Jefferys
 7706 Cypress Walk
 Fort Myers, FL 33966
 c/o 51 East Main Street
 Uniontown, PA 15401
Attorney: Anthony Dedola

PAUL J. MOSCOVITS, late of Luzerne Township, Fayette County, PA ⁽¹⁾
Personal Representative: Joseph Moscovits
 c/o Davis & Davis
 107 East Main Street
 Uniontown, PA 15401
Attorney: Samuel J. Davis

ALEXANDER M. MOUNAYAR, SR., A/K/A ALEXANDER MITRI MOUNAYAR, SR., late of North Union Township, Fayette County, PA ⁽¹⁾
Personal Representative: Karen M. Widmeyer
 c/o George & George, LLP
 92 East Main Street
 Uniontown, PA 15401
Attorney: Joseph M. George

LINDA L. SMITH, late of Belle Vernon, Fayette County, PA ⁽¹⁾
Executor: Vernon Eugene Smith
 35 Locust Avenue
 Charleroi, PA 15022
 c/o Sinko Zimmerman, LLC
 Suite 200 One Adam Place
 310 Seven Fields Blvd.
 Seven Fields, PA 16046
Attorney: Betsy A. Zimmerman

LEGAL NOTICES

NOTICE

NOTICE is hereby given pursuant to the provisions of Act 295 of December 16, 1982, P.L. 1309, that a Certificate was filed in the Office of the Secretary of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on or about August 27, 2019, to conduct a business in Fayette County, Pennsylvania, under the assumed or fictitious name of Redman Farms with the principal place of business at 450 Brownsville Road, Fayette City, PA 15438.

The name or names and addresses of persons owning and interested are: Donald D. Redman.

Gordon Law P.L.L.C.
 Robert Gordon, Esquire
 99 East Main Street
 Uniontown, PA 15401

NOTICE

Notice is hereby given that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, for a professional corporation which was organized under the Business Corporation Law of the Commonwealth of Pennsylvania, approved December 21, 1988. The name of the corporation is: UNIONTOWN MEDICAL ASSOCIATES, INC.

IN THE UNITED STATES BANKRUPTCY
COURT FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

Bankruptcy No. 19-21107 TPA
Chapter 13
Docket No. 62

In re:
Michael J. Pappas
Kara D. Pappas
Debtor (s)

Michael J. Pappas
Kara D. Pappas
Movant(s)
v.

No Respondent)
Respondent(s)

**NOTICE OF HEARING WITH RESPONSE
DEADLINE ON MOTION TO SELL
PROPERTY**

TO THE RESPONDENTS:

You are hereby notified that the above Movant seeks an order affecting your rights or property.

You are further notified to file with the Clerk and serve upon the undersigned attorney for Movant a response to the motion no later than September 14, 2019, i.e., seventeen (17) days after the date of service below, in accordance with the Federal Rules of Bankruptcy Procedure, Local Rules and Procedures of this Court, and the procedures of the Presiding Judge as found on the Judge's web page at www.pawb.uscourts.gov. If you fail to timely respond, the Motion may be granted at the hearing.

You should take this to your lawyer at once.

A hearing will be held on September 25, 2019 at 11:30 AM **before Judge Agresti in Courtroom "C" 54th Floor, US Steel Tower, 600 Grant Street, Pittsburgh, PA 15219**. The court may entertain higher offers at the hearing.

The property to be sold is Commercial Confessed Judgment Note

The debtor has received an initial offer of **\$59,000.00**

Hand money required **\$3,000.00** via certified check or cashier's check at the hearing, and provide evidence of ability to pay the balance of the purchase at closing, in either the form of a letter from a bank indicating that the purchaser has the required funds on hand, a mortgage commitment letter, or similar documentation acceptable to court.

Additional information regarding the terms of the sale and bidding information may be obtained from the undersigned or by accessing the Court's website at <http://www.pawb.uscourts.gov/easi.htm>

Date of service: August 28, 2019

/s/ Scott R. Lowden
Scott R. Lowden, Esq., PA ID 72116
15 W. Beau Street
Washington, PA 15301
(412) 374-7161
lowdenscott@comcast.net

SHERIFF'S SALE

Date of Sale: November 14, 2019

By virtue of the below stated writs out of the Court of Common Pleas of Fayette County, Pennsylvania, the following described properties will be exposed to sale by James Custer, Sheriff of Fayette County, Pennsylvania on Thursday, November 14, 2019, at 2:00 p.m. in Courtroom Number One at the Fayette County Courthouse, Uniontown, Pennsylvania.

The terms of sale are as follows:

Ten percent of the purchase price, or a sufficient amount to pay all costs if the ten percent is not enough for that purpose. Same must be paid to the Sheriff at the time the property is struck off and the balance of the purchase money is due before twelve o'clock noon on the fourth day thereafter. Otherwise, the property may be resold without further notice at the risk and expense of the person to whom it is struck off at this sale who in case of deficiency in the price bid at any resale will be required to make good the same. Should the bidder fail to comply with conditions of sale money deposited by him at the time the property is struck off shall be forfeited and applied to the cost and judgments. All payments must be made in cash or by certified check. The schedule of distribution will be filed the third Tuesday after date of sale. If no petition has been filed to set aside the sale within 10 days, the Sheriff will execute and acknowledge before the Prothonotary a deed to the property sold. (1 of 3)

James Custer
Sheriff Of Fayette County

No. 2067 of 2018 GD
No. 237 of 2019 ED

**Bank of America, N.A.,
Plaintiff,
Vs.**

**Calvin J. Brooks a/k/a Calvin James Brooks
Susan Brooks
The United States of America c/o the U.S.
Attorney for the Western District of
Pennsylvania,
Defendants**

ALL THAT RIGHT, TITLE, INTEREST AND CLAIMS OF CALVIN J. BROOKS A/K/ A CALVIN JAMES BROOKS, SUSAN BROOKS AND THE UNITED STATES OF AMERICA C/O THE U.S. ATTORNEY FOR THE WESTERN DISTRICT OF PENNSYLVANIA OF, IN AND TO THE FOLLOWING DESCRIBED PROPERTY:

ALL THAT CERTAIN LOT OR PARCEL OF LAND SITUATE IN BULLSKIN TOWNSHIP, COUNTY OF FAYETTE AND COMMONWEALTH OF PENNSYLVANIA, BEING MORE FULLY DESCRIBED AT DBV 1197 PAGE 727

BEING KNOWN AS 206 REAR DRY HILL ROAD A/K/A 206 DRY HILL ROAD, CONNELLSVILLE, PA 15425

TAX MAP NO. 04-36-0004

Phelan Hallinan Diamond & Jones, LLP

No. 1136 of 2019 GD
No. 251 of 2019 ED

**U.S. Bank National Association
Plaintiff
v.**

**Todd E. Conaway
Jennifer L. Conaway
Defendant(s)**

By virtue of a Writ of Execution No. 2019-01136, U.S. Bank National Association v. Todd E. Conaway, Jennifer L. Conaway, owner(s) of property situate in the SPRINGFIELD TOWNSHIP, Fayette County, Pennsylvania, being 460 Nilan Hill Road, Point Marion, PA 15474-1388

Parcel No.: 36-07-0199

Improvements thereon: RESIDENTIAL DWELLING

No. 1710 of 2018 GD
No. 250 of 2019 ED

**FIRST NATIONAL BANK OF
PENNSYLVANIA,**

Plaintiff,
vs.

ANNA MARIE COOPER,
Defendant.

ALL THE RIGHT, TITLE, INTEREST
AND CLAIM OF ANNA MARIE COOPER
OF, IN AND TO THE FOLLOWING
DESCRIBED PROPERTY:

ALL THE FOLLOWING DESCRIBED
REAL ESTATE SITUATED IN THE
TOWNSHIP OF NORTH UNION, FAYETTE
COUNTY, PENNSYLVANIA. HAVING
ERECTED THEREON A DWELLING BEING
KNOWN AND NUMBERED AS 270
STARLITE ROAD, LEMONT FURNACE, PA
15456. DEED BOOK VOLUME 3166, PAGE
678, AND PARCEL NUMBER 25-33-0003.

Lauren L. Schuler, Esquire
Hladik, Onorato & Federman, LLP
298 Wissahickon Avenue
North Wales, PA 19454

No. 128 of 2019 GD
No. 246 of 2019 ED

**U.S. Bank National Association, as indenture
trustee, for the CIM Trust 2016-2, Mortgage-
Backed Notes, Series 2016-2**

(Plaintiff)

vs.

**Heather Duttry in her capacity as surviving
heir of Beth Lisa Duttry a/k/a Beth Schaffer,
Deceased, et al.**

(Defendant)

By virtue of Writ of Execution No. 128
of 2019 GD

U.S. Bank National Association, as indenture
trustee, for the CIM Trust 2016-2, Mortgage-
Backed Notes, Series 2016-2 (Plaintiff) vs.
Heather Duttry in her capacity as surviving heir
of Beth Lisa Duttry a/k/a Beth Schaffer,
Deceased, et al.

Property Address 301 Delmont Avenue,

Belle Vernon, PA 15012

Parcel I.D. No. 41-05-0229

Improvements thereon consist of a
residential dwelling.

Judgment Amount: \$88,688.06

McCABE, WEISBERG & CONWAY, LLC
123 South Broad Street , Suite 1400
Philadelphia, PA 19109
(215) 790-1010

No. 1091 of 2019 GD
No. 259 of 2019 ED

American Advisors Group

Plaintiff

v.

**Christopher Fitzgerald, Administrator of the
Estate of Gail M. Fitzgerald**
Defendant

All that certain piece or parcel or Tract of
land situate in Bullskin Township, Fayette
County, Pennsylvania, and being known as 228
Rilla Drive, Connellsville, Pennsylvania 15425.

Being known as: 228 Rilla Drive,
Connellsville, Pennsylvania 15425

Title vesting in Michael J. Fitzgerald and
Gail M. Fitzgerald, husband and wife by deed
from Joseph James Sages and Cecilia A. Sages,
husband and wife, dated June 7, 1974 and
recorded June 7, 1974 in Deed Book 1164, Page
690. The said Michael J. Fitzgerald died on June
10, 2018 thereby vesting title in his surviving
spouse Gail M. Fitzgerald by operation of law.
The said Gail M. Fitzgerald died on September
25, 2018. On November 21, 2018, Letters of
Administration were granted to Christopher
Fitzgerald, nominating and appointing him as
the Administrator of the Estate of Gail M.
Fitzgerald.

Tax Parcel Number: 04 -37-0007

No. 1299 of 2019 GD
No. 249 of 2019 ED

No. 1341 of 2019 GD
No. 269 of 2019 ED

WEI Mortgage LLC
PLAINTIFF
vs.
Robert L. Hixson, Jr.
DEFENDANT

Bridgeway Capital, Inc.
Plaintiff,
vs.
David S. Lynn, Jr. and
Jessica M. Lynn
Defendant(s)

ALL THAT CERTAIN piece or parcel of land situate in Georges Township, Fayette County, Pennsylvania, bounded and described as follows:

COMMONLY KNOWN AS: 105 Dry Knob Road, Smithfield, PA 15478
TAX PARCEL NO. 14-25-0139

ALL THE RIGHT, TITLE, INTEREST AND CLAIM OF DAVID S. LYNN AND JESSICA M. LYNN, OF, IN, AND TO THE FOLLOWING DESCRIBED PROPERTY:

ALL THE FOLLOWING DESCRIBED REAL ESTATE SITUATED IN THE COMMONWEALTH OF PENNSYLVANIA, COUNTY OF FAYETTE AND BOROUGH OF SOUTH CONNELLSVILLE:

HAVING ERECTED THEREON A DWELLING BEING KNOWN AND NUMBERED AS 423 VINE STREET. DEED BOOK 3223, PAGE 2362. TAX PARCEL ID NUMBER: 33-06-0078

BARLEY SNYDER
Shawn M. Long, Esquire
Court I.D. No. 83774
126 E. King Street
Lancaster, PA 17602
717.299.5201

No. 2521 of 2018 GD
No. 268 of 2019 ED

**MID PENN BANK, SUCCESSOR BY
MERGER TO THE SCOTSDALE BANK
& TRUST COMPANY,**
Plaintiff
v.
JON A. LAPE and
SHANEA M. LAPE,
Defendants

PARKER McCAY P.A.
By: Patrick J. Wesner, Esquire
Attorney ID# 203145
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laure l, NJ 08054-1539
(856) 810-5815

No. 31 of 2017 GD
No. 258 of 2019 ED

Property Address: 386 Dawson Scottdale Road, Dawson, Fayette County, Pennsylvania
Parcel ID Number: 18-08-0038
Judgment Amount: \$43,301.66

BEING the same premises which The Estate of Ruth Z. Luxner, by executor, Joseph A. Lape by deed dated August 26, 2011, recorded August 26, 2011 in the Office of the Recorder of Deeds in and for Fayette County, Pennsylvania in Record Book 3163, Page 77, granted and conveyed unto Jon A Lape and Shanea M. Lape.

U.S Bank National Association, as Trustee,
successor in interest to Wachovia Bank, N.A.,
as Trustee for J.P. Morgan Mortgage Trust
2005-A8

Plaintiff,
v.
Mary Louise Mattei
Defendants.

By virtue of a Writ of Execution, No. 2017 -00031, U.S. Bank National Association, et al vs. Mary Louise Mattei, owner of property situate in the TOWNSHIP OF SALTICK, Fayette County, Pennsylvania
118 Third Street, Champion, PA 15622
Parcel No. 31-12-009001
Improvements thereon: SINGLE FAMILY

KML LAW GROUP, P.C.
 Suite 5000
 701 Market Street
 Philadelphia, PA 19 106-1532
 (215) 627-1322
 Attorney for Plaintiff

No. 317 of 2018 GD
 No. 252 of 2019 ED

M&T BANK
1 Fountain Plaza
Buffalo, NY 14203
Plaintiff,
vs.

HAROLD N. PENNINGTON III
JULIE A PENNINGTON A/K/A JULIA A.
PENNINGTON
Mortgagor(s) and Record Owner(s)
132 North 6th Street
Connellsville, PA 15425
Defendant(s)

ALL THAT CERTAIN LOT OF LAND
 SITUATE IN CITY OF CONNELLSVILLE,
 COUNTY OF FAYETTE AND
 COMMONWEALTH OF PENNSYLVANIA.

BEING KNOWN AS: 132 NORTH 6TH
 STREET, CONNELLSVILLE, PA 15425

TAX PARCEL #05-06-0562 & 05-06-0563
 IMPROVEMENTS: A RESIDENTIAL
 DWELLING

SOLD AS THE PROPERTY OF:
 HAROLD N. PENNINGTON III AND JULIE A
 PENNINGTON A/K/A JULIA A.
 PENNINGTON

No. 12 of 2019 GD
 No. 248 of 2019 ED

Wells Fargo Bank, N.A.
Plaintiff,
vs.
Barbara K. Phillabaum
Defendant.

ALL that certain parcel of land lying and
 being situate in the Borough of Brownsville,
 County of Fayette, and Commonwealth of
 Pennsylvania, known as 14 18th Street,
 Brownsville, PA 15417 having erected thereon a

dwelling house.

Being known and designated as Tax ID
 No.: 02020051

BEING the same premises which Anita E.
 Austin, Administratrix of the Estate of Matilda R.
 Davis, deceased, late of Brownsville, Fayette
 County, Pennsylvania, by her attorney-in-fact,
 Sanford S. Finder, Esquire, by Deed dated
 September 26, 1991 and recorded in and for
 Fayette County, Pennsylvania in Deed Book
 884, Page 360, granted and conveyed unto
 Marion E. Phillabaum and Barbara K.
 Phillabaum, his wife.

GEORGE & GEORGE, LLP
 ATTORNEYS AT LAW

No. 1297 of 2019 GD
 No. 271 of 2019 ED

JOHN R. OVER, JR. and MICHELE OVER,
Plaintiffs
vs.
Soom Realty, LLC, A Pennsylvania Limited
Liability,
Defendant

All that certain lot of land Located in the
 City of Uniontown Fayette County,
 Pennsylvania, being identified as Assessment
 Map No. 38-11-0116 known locally as 312
 Morgantown Street, Uniontown PA 15401
 See Record Book 2708, page 305.

Richard M. Squire & Associates, LLC
 One Jenkintown Station, Suite 104
 115 West Avenue
 Jenkintown. PA 19046
 Telephone: 215-886-8790
 Fax: 215-886-8791

No. 336 of 2019 GD
 No. 256 of 2019 ED

Carrington Mortgage Services. LLC
PLAINTIFF
v.
JOHN E. WILLIAMS;
DEFENDANT(S).

TAX PARCEL NO.: 04100018
 PROPERTY ADDRESS: 689 BEAR

ROCKS ROAD, ACME, PA 15610
IMPROVEMENTS: Single Family Dwelling

SEIZED AND TAKEN in execution as the property of JOHN E. WILLIAMS

ALL that certain tract of land situate in Bullskin Township, Fayette County, Pennsylvania, more particularly bounded and described as follows, to wit:

FIRST: BEGINNING at a point in the center of Pennsylvania State Route 1009 common to this land and land now or formerly of James R. Keslar; thence along the center line of said State roadway, South 20 degrees 38 minutes 04 seconds East, 280.65 feet to a point; thence along land now or formerly of Wendell Rupp, North 78 degrees 30 minutes West 322.21 feet to a point; thence along the dividing line between this tract and Parcel Second below, North 8 degrees 44 minutes 25 seconds East 297 feet to a point; thence along land now or formerly of James R. Keslar, South 61 degrees 35 minutes East, 196.30 feet to a point, the place of beginning.

CONTAINING an area of 1.51 acres according to survey or Cross Land Survey Co. dated June 26, 1996 and having thereon erected a two -story frame dwelling and a garage.

SECOND: BEGINNING at a concrete monument common to this tract, Parcel First, described above, and land now or formerly of Wendell Rupp and Ronald O. Morgan; thence along Parcel First, above described, and property now or formerly of James R. Keslar, North 8 degrees 44 minutes 25 seconds East 373.40 feet to a point; thence along land now or formerly of the said James R. Keslar and land now or formerly of Ronald D. Allen, North 60 degrees 51 minutes 25 seconds West, 241.63 feet to a point; thence along land now of fomlerly of Ronald O. Morgan, South 10 degrees 11 minutes 32 seconds West 446.32 feet to a point; thence along the same, South 78 degrees 30 seconds East, 238.05 feet to a point, the place of the beginning.

CONTAINING an area of 2.19 acres according to survey of Cross Land Survey Co. dated June 26, 1996 and having thereon erected three sheds.

BEING known as Tax Map# 04-10-0018

BEING the same premises which Kenneth W. Swink and Cheryl D. Swink, husband and wife, conveyed unto John E. Williams by deed dated July 24, 2015 and recorded with the

Fayette County Recorder on July 31, 2015 in Deed Book 3284, Page 155, Instrument No. 201500008095.

Lauren L. Schuler, Esquire
Hladik, Onorato & Federman, LLP
298 Wissahickon Avenue
North Wales, PA 19454

No. 1551 of 2018 GD
No. 247 of 2019 ED

U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC Trust, Series 2016-CTT (Plaintiff)
vs.
Paul G. Wozniak and Laurie J. Wozniak (Defendants)

By virtue of Writ of Execution No. 1551 of 2018 GD

U.S. Bank National Association, not in its individual capacity but solely as trustee for the RMAC Trust, Series 2016-CTT (Plaintiff) vs. Paul G. Wozniak and Laurie J. Wozniak (Defendants)

Property Address 108 Bailey Avenue, Uniontown, PA 15401

Parcel I.D. No. 38-04-0586

Improvements thereon consist of a residential dwelling.

Judgment Amount: \$86,777.39

END SHERIFF SALES

JUDICIAL OPINION

IN THE COURT OF COMMON PLEAS OF FAYETTE COUNTY, PENNSYLVANIA
 CRIMINAL DIVISION

COMMONWEALTH OF	:	
PENNSYLVANIA,	:	
	:	
vs.	:	
	:	No. 213 of 1997
RONNIE AUSTIN,	:	214 of 1997
Defendant.	:	Honorable Nancy D. Vernon

OPINION AND ORDER

VERNON, J.

August 28, 2019

Before the Court is the seventh Petition for Post-Conviction Relief pursuant to 42 Pa.C.S. § 9541 et seq. filed by Petitioner, Ronnie Austin, alleging that witness Peggy Franks recanted her trial testimony that implicated Petitioner Austin in the homicide for which he stands convicted by the rendering of a statement to a private investigator on April 22, 2017.

TIMELINESS

Procedurally, Petitioner Austin’s case was consolidated with co-defendants Stanley Terry Brown and Edward Layman Monroe. Petitioner Austin’s first jury trial resulted in a mistrial and he was convicted at a second jury trial held in November 1997. Petitioner was sentenced on January 7, 1998, the Superior Court affirmed judgment of sentence on March 23, 1999, and the Supreme Court of Pennsylvania denied his Petition for Allocatur on September 8, 1999.

Any PCRA petition “shall be filed within one year of the date the judgment becomes final[.]” 42 Pa.C.S.A. § 9545(b)(1). A judgment of sentence becomes final “at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” Id. § 9545(b)(3). The PCRA’s timeliness requirements are jurisdictional in nature and a court may not address the merits of the issues raised if the PCRA petition was not timely filed. See *Commonwealth v. Albrecht*, 994 A.2d 1091, 1093 (Pa. 2010).

Here, Austin’s sentence became final on October 7, 1999, thirty days after the Supreme Court of Pennsylvania denied his Petition for Allocatur. Thus, the instant PCRA Petition, filed on June 16, 2017, is facially untimely.

However, Pennsylvania courts may consider an untimely petition if the petitioner

can explicitly plead and prove one of three exceptions set forth under 42 Pa.C.S.A. § 9545(b)(1)(i–iii). Any petition invoking one of these exceptions “shall be filed within 60 days of the date the claim could have been presented.”^{1} 42 Pa.C.S.A. § 9545(b)(2); Albrecht, 994 A.2d at 1094.

Austin invokes the newly-discovered fact exception set forth at 42 Pa.C.S.A. § 9545(b)(1)(ii), and contends that the statement by Peggy Franks on April 22, 2017, constitutes a newly-discovered fact sufficient to prove his Petition was timely filed.

When considering a claim seeking to invoke the newly-discovered fact exception, our Supreme Court requires that a petitioner establish that: “(1) the facts upon which the claim was predicated were unknown and (2) they could not have been ascertained by the exercise of due diligence.” *Commonwealth v. Cox*, 146 A.3d 221, 227 (Pa. 2016). Due diligence demands that the petitioner take reasonable steps to protect his own interests. *Commonwealth v. Carr*, 768 A.2d 1164, 1168 (Pa.Super. 2001). This rule is strictly enforced. *Commonwealth v. Monaco*, 996 A.2d 1076, 1080 (Pa.Super. 2010). Additionally, the focus of this exception “is on the newly discovered facts, not on a newly discovered or newly willing source for previously known facts.” *Commonwealth v. Marshall*, 947 A.2d 714, 720 (Pa. 2008).

Petitioner Austin alleges he could not have obtained the recantation by Peggy Franks earlier than April 22, 2017, even through the exercise of due diligence. Austin recites in his Petition, “It was not until April 22, 2017 that Ms. Franks decided to finally admit that she never saw Mr. Austin at the scene of the crime.” Petitioner Austin cites the 2017 statement as being a recantation of Peggy Franks’ trial testimony by her now stating that Ronnie Austin was never at the scene of the crime, that her son, Aaron Franks, was an alibi witness for Ronnie Austin, and that she had been pressured by the Commonwealth to testify against Ronnie Austin at his trial in 1997.

The Commonwealth responded to the PCRA Petition that Peggy Franks’ 2017 statement is not newly discovered evidence because Petitioner Austin and his codefendants presented evidence of Peggy Franks’ prior recantation at his trial. The Commonwealth admitted into evidence at the PCRA hearing a three-page handwritten statement given by Peggy Franks to defense investigator John Davidson, dated November 4, 1997. See, Commonwealth’s Exhibit 1. The Commonwealth argues that the prior statement given to investigator John Davidson two weeks prior to the November 1997 trial is nearly identical in substance to her April 2017 statement.

To determine whether the April 2017 statement constitutes newly discovered evidence, the Court must consider the evidence that was presented to the jury in the second trial of Petitioner in November 1997.

^{1} Since the filing of Austin’s Petition, 42 Pa.C.S. § 9545(b)(2) has been amended to allow petitioners one year to present claims, in lieu of the previously-allotted sixty days.

1997 JURY TRIAL

At trial, Peggy Franks testified that one “early afternoon” in 1995 at Duke’s bar, Denise Gaines introduced her to “the girl Flossie.” N.T., Vol. 3, 11/13/1997, at 612-613. “Flossie” is the nickname of Patricia Flo Malec, the victim in this matter. Thereafter, Flossie and Peggy Franks went to Denise Gaines’ house where Flossie was given a shirt by Denise Gaines and Flossie changed in the bathroom. Id. at 614-615. While Flossie was in the bathroom, Peggy Franks testified “that’s when Capone came in. [...Capone is] Ronnie Austin.” Id. at 615. Peggy Franks identified the time of day again as “in the afternoon.” Id. at 616. According to Peggy Franks, Petitioner Austin “had a bunch of cocaine rocks in his hand, and he told us that they were for Flossie, to keep her there smoking them, and then they would be back. [Then Ronnie Austin] left.” Id.

Peggy Franks testified to the jury that she gave the cocaine Ronnie Austin provided to her to Flossie who then went into the bathroom with the drugs. Id. at 616-619. “Then that’s when Casper [Stanley Brown] and Capone [Ronnie Austin] came in the house.” Id. at 619. Peggy Franks was in the living room and testified, “They had hoodies on.” Id. Peggy Franks further described, “They had hoodies on, baseball caps on, bandanna wrapped around their heads, that’s it. [...] Then they went into the – through the kitchen into the bathroom.” Under questioning of who went into the bathroom, Peggy Franks testified, “Casper and Capone.” Peggy Franks identified that Flossie was in the bathroom at the time Petitioner Austin also entered the bathroom. Id. at 620. Peggy Franks left the house and went outside to an alley. Id. At the back of the house a blue two-door car was parked with the trunk aimed towards the house. Id. at 621.

Peggy Franks “heard a lot of ruckus and noise in the bathroom” having only stood “about a foot away from the house.” Id. at 620. Peggy Franks continued again saying that she heard, “A lot of ruckus, a lot of moving, banging. [When she entered the house again, she] saw Flo Malec sitting on the couch. She was gagged and tied up.” Id. at 622. Peggy Franks assisted Denise Gaines to “clean up the blood” in the kitchen. Id. at 624. When Peggy Franks returned to the living room, “Casper and Capone had left.” Id. at 625. Peggy did not see where they went, and Flossie was no longer on the couch. Id.

Peggy Franks testified, “Then I told Denise Gaines that we would have to get rid of the purse.” Id. Peggy Franks recalled seeing the blue car outside headed towards Cool-spring Street. Id. at 625-626. Peggy Franks and Denise Gaines “went to a gas station on Connellsville Street” to get fifty cents’ worth of gas in a Maxwell House can. Id. at 627. Peggy Franks testified that she “went down past Garry’s Auto” and she saw “Casper and Capone” “down there by Poke’s Garage in the blue car.” Id. at 627-628. Peggy Franks saw “Casper and Capone, and Capone yelled over and asked us where we was going.” Id. at 632.

Then, Peggy Franks and Denise Gaines “headed up the mountain” in her car and “Casper and Capone was in theirs.” Id. at 628. Peggy Franks confirmed a second time

that “Casper and Capone” were in “the blue car” that was “behind” her car. *Id.* at 629.

While driving on the mountain, Peggy Franks noticed that “Casper and Capone had turned off [...] into like a [...] gravel [...] open space.” *Id.* at 629. Once the blue car stopped, Peggy Franks turned around and came back and passed “them.” *Id.* at 630. Peggy Franks heard a gunshot in the direction of the blue car and testified, “Right after we heard the shot, we seen the boys.” *Id.* at 631. Peggy Franks stated that she “seen the car that Casper and Capone was driving go past.” *Id.* “That night”, Peggy Franks also saw Capone at The Greystone. *Id.* at 635.

Later, around September 1995, Peggy Franks was with Petitioner Austin at Denise Gaines’ house when he stated that “when he did that [...] that his dick got hard.” *Id.* at 635.

Peggy Franks was cross-examined extensively at Petitioner’s trial by Attorney Gettleman, counsel for codefendant Monroe. *Id.* at 647-742. The content of the cross-examination was centered on Peggy Franks’ inconsistent prior statements or previous statements for impeachment purposes.

At the second trial, Peggy Franks was questioned whether her motive for testifying was to keep her son, Aaron Franks, from being implicated in the homicide. The relevant portions are:

Q: Now when you were arrested for these drugs and taken to jail, the police came to talk to you, didn’t they?

A: Yes, sir.

Q: And they told you that if you didn’t cooperate with them, they were going to arrest your son Aaron, didn’t they?

A: No, sir.

Q: They never said that?

A: No, sir.

Q: Well, your son Aaron was there while you were selling the drugs?

A: Yes, sir.

Q: And the police knew that?

A: Yeah. Yes, sir.

Q: Okay. So are you telling me under oath that no police officer at any time ever told you that unless you cooperated, your son Aaron would be implicated in selling drugs?

A: No, sir.

Q: Now, did you ever make a statement on another occasion relative to whether or not your son would be implicated if you – implicated for selling drugs if you didn’t cooperate with the police?

A: No, sir.

Q: You never told anybody that?

A: No, sir.

Q: I beg your pardon?

A: No, sir.

Id. at 654.

Attorney Gettleman then presented Peggy Franks with a three-page handwritten statement dated November 4, 1997, purportedly given by her to a private investigator approximately one or two weeks before the second trial, and inquired of Peggy Franks about the contents. Id. at 655.

Q: Now, you signed this statement and swore to it, right?

A: Yes, sir.

Q: And that was on November 4th of 1997, just last week?

A: Yes, sir.

Q: And prior to signing it, you read it?

A: No, sir.

Q: You never read it?

A: No, sir.

Q: So you just signed your name?

A: Yes, sir.

Q: So you have no knowledge of anything that's in the statement?

A: No, sir.

Q: So when you said that you swore to it and attested to it, that was a lie?

A: No, sir.

[...]

Q: So in order to swear to something, you would have to know what you were swearing to, right?

A: Yes, sir.

[...]

Q: In order to swear to something, you would have had to at least read it, isn't that right?

A: No, sir.

Q: Do you know John Davidson?

A: Yes, sir.

Q: And who is he?

A: From what I understand, that he's a private investigator for [Petitioner Austin's trial counsel] Mr. Gentile.

Q: And he's involved in this case?

A: Yes, sir.

Q: And you've called him on several times and set up meetings with him?

A: Yes, sir.

Q: And you set up meeting with him 'cause you wanted to talk to him about this case?

A: Yes, sir.

Q: And you told him that you had information about this case?

A: No, sir.

Q: So you called him to talk about this case but you didn't have any information about this case?

A: Yes, sir, I guess so, yes sir.

[...]

Q: And you wanted to give him that information; that's why you kept calling him, isn't that right?

A: Yes, sir.

Q: And you told him that you had information that could free the defendants, didn't you?

A: No, sir.

[...]

Q: Okay. And you told Mr. Davidson in the presence of your son that the police made you lie.

A: No, I did not.

Q: You told Mr. Davidson in the presence of your son that Neesie Gaines threatened you if you didn't testify.

A: No, I did not.

N.T., Vol. 4, 11/14-17/1997, at 656-660.

Peggy Franks denied telling investigator John Davidson much of the contents of the handwritten statement dated November 4, 1997. *Id.* at 669-675. Peggy Franks admitted that John Davidson was writing down things while she was speaking. *Id.* at 678. Peggy Franks admitted her signature was on the statement. *Id.* at 679. Peggy Franks denied reading the handwritten statement prior to signing it. *Id.* at 684.

Defense counsel impeached Peggy Franks with prior testimony at the first trial where she previously testified that if she "didn't admit to it, [she was] going down too" and where she answered, "they told me I would go to jail for murder." *Id.* at 693. Peggy Franks was shown her statement to police in January 1997 and questioned whether she told police that Capone (Petitioner Austin), came to the house and gave her pieces of crack, to which Peggy Franks testified she did not tell the police that information. *Id.* at 700-703. On re-direct examination, the Assistant District Attorney highlighted the January 1997 statement and what Peggy Franks indicated about "Capone and the dubs." *Id.* at 753.

Defense Attorney Gittleman called Aaron Franks, son of Peggy Franks, to testify in the second trial. N.T., Vol. 5, 11/14/1997, at 893. Aaron Franks testified that Peggy Franks told him that codefendants Ronnie Austin, Stanley Brown, and Edward Monroe had nothing to do with the murder of Flossie Malec. *Id.* Aaron Franks identified John Davidson as an investigator working for Attorney Gentile, Petitioner Austin's trial counsel. *Id.* at 894-895. Aaron Franks testified that he was with his mother, Peggy Franks, and investigator John Davidson at the Rainbow Lounge and that Davidson "prepared" what his mother was saying, meaning Davidson was writing as his mother

talked. *Id.* at 895. Aaron Franks identified his mother's signature on the third page of the statement dated November 4, 1997. *Id.* at 897. Aaron Franks also testified that prior to his mother signing the statement that Davidson read it out loud to both himself and Peggy Franks. *Id.* at 897. After Davidson read the statement, Aaron Franks testified that Peggy Franks acknowledged that was what she said, read the document for herself, and then signed the document. *Id.* at 897. Under questioning about Peggy Franks actually reading the document, Aaron Franks testified that she looked at each page, that it appeared that she was reading it, and that she indicated to him and Davidson that she had read it. *Id.* at 898. Upon this testimony, the handwritten statement dated November 4, 1997, was admitted at trial as Defense Exhibit A. *Id.* at 899.

Aaron Franks testified that in his presence and in Peggy Franks' presence, the state police told Peggy Franks that unless she cooperated in this investigation that he would be arrested. *Id.* at 904.

John Davidson was called to testify for the defendants. *Id.* at 944. Davidson identified himself as an investigator for Defense Attorney Gentile and his client, Petitioner Ronnie Austin. *Id.* at 945. At their initial meeting in October 1997, Peggy Franks indicated to Davidson that the defendants, Monroe, Brown, and Austin, were not involved in this crime. *Id.* at 948. Peggy Franks told Davidson that she sold drugs to an undercover police officer and that her son was present, but not involved. *Id.* at 949. Peggy Franks suggested the Rainbow Bar as a meeting place and she, Aaron Franks, and Davidson convened inside. *Id.* at 954. According to Davidson, Peggy Franks was not intoxicated, appeared to be of sound mind, and was responsive to his questions. *Id.* Davidson acknowledged that it was his handwriting on the statement dated November 4, 1997. *Id.* at 953.

After concluding the writing, Davidson handed the papers to Peggy Franks, asked her to read it, gave her a pen, and advised her to make any corrections that she saw fit. *Id.* at 955. It appeared to Davidson that Peggy Franks reviewed the document and when she handed it back, she indicated that she had read it. *Id.* at 956. Peggy Franks made no corrections with the pen. *Id.* Thereafter, Davidson read the statement out loud to her and it appeared to him that Peggy Franks and Aaron Franks were listening. *Id.* Then, Davidson asked Peggy Franks that if she agreed with the statement and if she thought it was true, then to please sign it. *Id.* Peggy Franks signed the statement. *Id.* at 957. Davidson testified that all the information that is contained in the statement was told to him by Peggy Franks. *Id.*

Defense Trial Exhibit A, the handwritten statement dated November 4, 1997, recites in full:

I, Peggy Franks, do give the following statement today, November 4, Tuesday, 1997, of my own free will. No one has forced or coerced me, and I have not been promised anything in return for my statement.

First, I wish to state that all of my prior statements regarding the death of Flossie Malec have been untrue. I was forced to make them by members of the State Police and FBI agent Tom Hoy. I had sold drugs to undercover State Trooper Diana Brown and arrested. They threatened to charge my son Aaron unless I cooperated in the Malec investigation. This was on January 15th '97 or thereabouts. It was after they arrested Denise Gaines and got her statement. They forced me to state and verify Gaines statement. I tried to tell them that Eric Cook committed the murder but they refused to listen. I was made to lie about the case and repeat Gaines statement. They said if I did they would not charge Aaron and cut a deal with me.

They boys, Austin & Brown, come to Neesies house often. Everyone did! It was a known hangout. She kept guns and drugs at the house. She had all of them call her Aunt Neesie. The only time I was at the house (Neesie's) with Flossie was also the first and only time I met her. I know Neesie was looking for her, but I did not know why. This was on the first or second of June '95. I know that because she had gotten her check on the 1st of June. Also, I had to drop Jim Thomas off at a magistrates office so he could get a continuance, and Greg Thomas (Grapee) was at the city police station the night before and we were trying to get him out. Anyway, while we (Neesie, me and Flossie) were at Neesies house, Casper stopped by and had a drink and left. I did not see Ed Monroe or Capone that day until later. Anyway, after Casper left Neesies, I went inside and Neesie wanted to go to the Mountain. I found out she had stolen Flossie's purse. I don't know where Flossie went. We went up the mountain to get rid of the purse. On the way we ran into Casper and Capone. We stopped and B.S.ed with them. No one was with them. I believe Flossie was with Neesie and some other girl later the next week and that's when Erik Cook got her. I really never knew Ed well until after '95. I may have met him once or twice. I did know the boys (Casper and Capone) but they were just two of many kids who hung around Neesie's. They talked shit and acted tough but they are harmless.

If you noticed many of my prior statements conflict, that is because they were not true. I could not keep all of what they and Neesie kept telling me straight. Neesie kept threatening me to get it straight. I will testify to this on the stand and I'm glad to get it off my shoulders. Neesie can't scare me anymore.

Sworn to and attested this 4th day of November, 1997.

Peggy Franks [signature]

Peggy Franks [name]

The Commonwealth presented several other witnesses at the November 1997 trial and particularly the testimonies of William Rondale Rivers, Georgia Gaines, and Denise Gaines were relevant to the jury's determination of Appellant's guilt.

William Rondale Rivers testified that he was friends with Petitioner Austin and co-

defendants Stanley Brown and Edward Monroe, seeing the men on a daily basis in 1995. N.T., Vol. 3, 11/13/1997, 436-444. In May 1995, co-defendant Monroe inquired whether Rivers knew “a prostitute named Flossie or Flo”, which Rivers did not know. Id. at 445. Co-defendant Monroe told Rivers to “keep a lookout” for Flossie. Id. On June 6, 1995, Rivers was in the blue car with Petitioner Austin and co-defendant Edward Monroe, who was driving. Id. at 449, 454. On the way to Denise Gaines’ house, Petitioner Austin said, “We are going to get this bitch, we are going to get this bitch.” Id. at 455.

Rivers testified that he inquired who they were talking about and co-defendant Monroe responded that, “She tried to set me up. [...] Over some coke. She tried to snitch on me.” Id. at 455. To which, Petitioner Austin responded, “We can get Diggs to do it. [...] All you got to do is pop her in the head, get in the car and be out.” Id. Diggs was William Rondale Rivers’ nickname. Id. at 455-456. Co-defendant Monroe declined, instead saying they would get Casper to do it. Id. at 456.

The blue car stopped in front of Denise Gaines’ house, and Denise “Neesie” Gaines and Peggy Franks came outside where co-defendant Monroe told Gaines to keep Flossie in the house. Id. at 461. The men left and headed towards Lemonwood when co-defendant Monroe told Petitioner Austin to drop Rivers off and pick Casper up. Id. at 461-462. The three co-defendants left together in the car, and Petitioner Austin and co-defendant Brown returned in the same blue car without co-defendant Monroe. Id. at 463. Rivers testified that Petitioner Austin and co-defendant Brown went inside the house in Lemonwood and changed into two layers of clothes, tucked handguns inside their pant, and donned bandanas. Id. 463-464. Petitioner Austin told Rivers to stay there, stating, “You don’t know nothing, don’t say nothing. We’ll be back.” Id. at 465. Two hours later, Petitioner Austin and co-defendant Brown returned and changed out of their clothes. Id. at 465. Rivers described them as “a little bit jumpy” and “more or less like paranoid.” Id. at 466.

About two weeks later, Rivers testified Petitioner Austin and co-defendant Brown placed their clothes in the trunk of the car and that he rode with them to a dumpster across from the dance school where they put their clothes in the dumpster. Id. at 473. Rivers asked Petitioner Austin if he could have his sneakers because they “were practically new” and Petitioner responded, “You don’t want nothing coming back on you, do you?” Id. at 473.

In January 1997, Rivers testified that Petitioner Austin and co-defendant Monroe inquired of him whether he “snitched” on them. Id. at 474-475.

Georgia Gaines also testified consistently with Peggy Franks’ trial testimony, specifically stating that she saw “Casper and Capone [Petitioner Austin] putting Flossie in the car” from Denise Gaines’ house. N.T., Vol. 1, 11/12/1997, at 274.

Denise Gaines was also a witness for the Commonwealth who suffered a stroke in

between the first and second trials, nonetheless, the Court permitted Denise Gaines to begin her testimony, which implicated Petitioner Austin. N.T., Vol. 4, 11/14-17/1997, at 763-764. The trial Court permitted the Commonwealth to read into evidence the testimony of Denise Gaines from Petitioner's first trial. Id. at 769.

Denise Gaines testimony identified Petitioner Austin and co-defendant Edward Monroe as being at her house in a blue Oldsmobile. Id. at 778. Denise Gaines also identified "Casper, Capone [Petitioner Austin] and Flossie [the victim]" as being alone in her house. Id. at 783. Denise Gaines confirmed that Casper and Capone were wearing "hoodies" and bandanas. Id. Denise Gaines testified that she "seen Capone and Casper carrying her [the victim], putting her in the car." Id. at 784. Denise Gaines described that Petitioner Austin "had [the victim's] bottom half, which is the legs, and they put her in the car [...] and Capone got in the driver's seat and they drove off." Id. at 786. Denise Gaines testified consistently with Peggy Franks about the blue Oldsmobile car being backed up with the trunk open towards the house. Id. at 785-787.

Denise Gaines continued her testimony explaining how she rode with Peggy Franks to a gas station to get "gas in a Maxwell House can to burn the clothes and purse." Id. at 789. Denise Gaines identified Petitioner Austin and co-defendant Brown as being in the blue Oldsmobile with the victim. Id. at 790. Denise Gaines testified that the area they found the body is where Petitioner Austin and co-defendant Brown had stopped their car. Id. at 791. Denise Gaines heard a gunshot come from "down toward where Capone and Casper was at." Id. at 792. Denise Gaines and Peggy Franks "jumped back in the car" and "they was behind us." Id. Denise Gaines testified that Petitioner Austin changed clothes after this. Id. at 792-793. Denise Gaines testified that Petitioner Austin and co-defendant Brown were in the car right behind them but that Patricia Malec was no longer in their car. Id. at 793. Denise Gaines further testified that about one week after, Petitioner Austin came to her and "said he was having nightmares about he had – killed Flossie, and he said he just pointed a gun and went like this and said, 'Bam-bam.'" Id. at 794. Denise Gaines told the jury that Petitioner Austin held his hand out to show her how he did it. Id. at 794.

Upon this evidence, Petitioner Austin was convicted at his November 1997 trial.

2017 STATEMENTS

Petitioner Austin attached as Exhibit C to his PCRA Petition a six-page document entitled "Ronnie Austin – Video of Witness Testimony" that appears as a typewritten transcript of Peggy Franks' April 22, 2017 statement. At the PCRA hearing, Petitioner also submitted a copy of the video recording showing Peggy Franks speaking with investigator Barry Fox on April 22, 2017, and a copy of a video recording again of Peggy Franks speaking to Barry Fox on June 4, 2017.

It is during the April 2017 statement that Petitioner Austin alleges Peggy Franks recanted for the first time. The Court has reviewed the video recording as compared to

the typewritten transcript provided by Petitioner and notes a significant, material difference. At the 1:31 mark in the video, Peggy Franks stated “I seen Casper and Capone down there with Ed Monroe.” The transcript that Petitioner Austin submitted to the Court excluded “Capone” and instead purported that Peggy Franks said, “I seen Casper go down there with Edmond (Roe)?”

In his Petition, Austin alleges that “Ms. Franks stated that she never saw Defendant Ronnie Austin at the scene of the crime and that she has knowledge that, in fact, Defendant Ronnie Austin was never at the scene of the crime.” The Court disagrees that Peggy Franks unequivocally recanted seeing Petitioner Austin on the day of the homicide. The Court will highlight the relevant portions of the April 2017 statement, that is alleged to be the recantation.

My name is Peggy Franks and I am here for the investigation of a murder that happened in 1995, I think that’s when it happened. No date was ever established on when the child was, whenever the woman was, was murdered. They never, um, had a, uh no evidence at all except for hearsay.

[...]

But anyways, we go up to the mountains ... no, we went through Lemont we was coming through Lemont and I seen the boys’s car pull up and I see, uh, Casper, and um, Casper yells “Where are you going?” Now the windows are tinted. I don’t know how many people was in that car. Um, I couldn’t really see too many people in that car. I supposed it was Capone that was in the car that day.

Peggy Franks then recited how she saw her son, Aaron Franks, after she came from the mountain where she burnt the victim’s belongings. Peggy Franks recites that her son, Aaron Franks, told her that he was with Capone. Peggy Franks stated “So whether he... I can’t, you know, I’m pretty sure that my son wouldn’t lie to me[...].”

The statement continues,

The police kept telling us this is what happened, this is what happened, and I couldn’t remember what happened because for one thing, I was two shits to the wind, I was drinking so much that day. You figure we was in bars that day, drinking. Uh, Denise Gaines bought her a fifth of liquor and I probably drank most of that, you know, and we just, how can you get a confession out of drunk? That’s all I want to know.

[...]

Rondale Rivers was never there. I never seen him that day. Um, uh... Georgie Gaines testified that Capone and Casper never even committed the murder. Um, uh, Georgie also uh I think testified in one of her testimonies, testified that Capone was not even there. Um, and which I never seen him. To tell you the truth I just assumed that he was the other one because they all wore their hoodies, you know, they all wore the hoodies, you couldn’t see their faces, all the car windows are tinted, so I didn’t see him. I really, I really would have to say that, uh, after you look

back in your memory that you don't, you don't, you know did you see this person? No. I really don't think he was there but I can't say for sure because I didn't see him. I didn't see his face. All I seen was the hoodies. I know I seen Casper's face for the fact [...]. That's the face that I remember.

[...]

I don't think I ever signed anything. I don't even remember half of that. Um, I just, I just don't think that Capone was even involved in all this. Um, I didn't see him til later that night, his face. I seen hoody. Now I thought that that was him, that was, uh, underneath of the hoody. Like I said, they wore them hoodies, the windows are tinted on the ... on the cars, um, but I don't think so.

[...]

Listen, it's been twenty years since them kids went to jail. They were kids. Now whatever happened and whoever did the shooting or anything else like that, I didn't see it, so I can't say. I didn't see it. Nobody seen it. So who can say who? But I can say that I didn't see Casper, I mean Capone in the car that day and I mean, I seen somebody in the car that day, which I supposed was thinking it was Capone because Casper and Capone was buddy-buddy, they're brothers, they were always together, so if you see one, you seen the other one. So I was thinking but then later on that night, when my son came ... we was talking and my son said "No mom," he said "Capone's been with me half the day and all night." And they were probably together all night long, you know, they hung around real tight. So to tell you the truth, I don't think he was there at all, you know. I told you that when I went back in the house, the only one I seen was Casper. I seen Casper from the car. Um, I didn't see Capone."

PCRA HEARINGS

Barry W. Fox, a licensed private investigator, testified that he was contacted by Petitioner Austin's sister, Daveena Harris, in February 2017, who informed him that "there's a witness who had some information" and that witness "turned out to be Peggy Franks." N.T., 11/15/2017, at 10-11. Fox arranged two or three meetings with Peggy Franks in Uniontown, Pennsylvania, and had two or three telephone calls with her. Id. at 12-14, 22. One meeting occurred on April 22, 2017, in the lobby at the Hilton Garden Inn where Fox video-recorded Peggy Franks. Id. at 16-18. The date of the other meeting or meetings was not presented in evidence at the hearing. Fox copied the video recording of Peggy Franks and sent it to Daveena Harris within one week of the statement. Id. at 18.

Daveena Harris testified at the hearing on the instant PCRA Petition that she is Petitioner Austin's sister and that she employed Barry Fox as an investigator because she believed Peggy Franks had information that could help Austin's case and she wanted Fox to document it. Id. at 22-24. When Daveena Harris reviewed the videotape of Peggy Franks obtained by Fox, she relayed the contents to her brother, Petitioner Austin, by telling him "we had new information that could help his case." Id. at 27.

Petitioner Ronnie Austin testified that he spoke to his sister, Daveena Harris, in May 2017, regarding the statement of Peggy Franks to investigator Barry Fox. *Id.* at 35-36. Austin testified that Daveena Harris told him that “Peggy Franks recanted.” *Id.* at 38.

On cross-examination, the Commonwealth presented to Austin the three-page written statement given by Peggy Franks from November 1997 that Austin identified as “[h]er previous statement that she allegedly recanted.” *Id.* at 42; Commonwealth’s Exhibit 1.

Petitioner Austin then presented at the PCRA proceedings the testimony of Peggy Franks. *Id.* at 45. Peggy Franks testified that she and Austin were friends “back in the day in ’97, ’96.” *Id.* Peggy Franks testified regarding her statement:

“Well, I was explaining to [Fox] that Ronnie Austin wasn’t at the scene that day at the house. I explained to [Fox] that there was other people at the house, but I couldn’t remember who and exactly what happened. Um, we were drinking a lot and that’s what happened, you know, um, I, I, I couldn’t remember.”

Id. at 46.

Under questioning whether she had information regarding not seeing Petitioner Austin in the car that day, Franks responded,

“Well I explained to [Fox] that, that um, there was another individual that was in the car that day, um, that I couldn’t remember a whole lot that happened that day so, um, I couldn’t tell him too much about it, the whole thing, you know what I mean, I couldn’t remember.”

Id. at 46-47.

Petitioner’s counsel inquired of Peggy Franks what “kind of details” did she provide that she “believed were new.” To which, Franks responded, “[t]hat Ronnie Austin wasn’t at the house that day, that he wasn’t even indicated in the murder.” *Id.* at 49.

Peggy Franks testified that Denise Gaines known as “Neisey” was not well at the second trial having suffered a stroke that prevented her from speaking. *Id.* at 47-48.

The video recording taken by Fox of Peggy Franks in April 2017 was viewed by the Court and admitted into evidence. *Id.* at 51-52; Petitioner’s Exhibit A.

On cross-examination, Peggy Franks testified that she came forward now because of “guilt.” *Id.* at 53. Peggy Franks conceded that her current statement is the same as her testimony at the preliminary hearing and trial, except that now she is leaving Petitioner Austin out of her testimony. *Id.* at 53. Peggy Franks explained,

I tried to leave Ronnie [Austin] out the first time. I told them I wasn't really sure who was all in there together that day. You've got to understand, there wasn't just Casper and whoever was in the house, there was three or four or five, six people in that house that day. Everybody had hoodies on, okay? I am drinkin all day, Denise Gaines is drinkin all day, they're getting this girl drunk, okay, so I really can't recognize who is who, all I see is the hoodies, all I remember is the hoodies. So when I tell the police, okay, you know, before – when I was being, what do you call that, interrogation, or whatever it is, I was telling them I wasn't really sure who did what that day and everything else. They're telling me, well, that ain't what Denise Gaines said. Denise Gaines said this, this is what happened, so I agreed with it.

Id. at 53-54.

Peggy Franks agreed that she doesn't remember much from that day. Id. at 54. Peggy Franks did remember giving the victim, Ms. Malec, cocaine to keep her there and she testified that she took her shirt and burned it, not her purse. Id. at 54. Peggy Franks denied going through the victim's purse, denied purchasing gasoline to burn the purse, and denied Denise Gaines' shoes caught on fire when they were trying to burn the purse. Id. at 55.

When questioned by the Commonwealth as to how she relayed these “vivid images” to the judge and jury in 1997, and inquired whether the police told her to say them, Peggy Franks responded, “I wouldn't say the police told me exactly what to say, what I'll say is that what they said was, well, you know Denise Gaines said that Capone was there, too, and this one there was there, too, like they told me Rondale Rivers was there. The police told me that Rondale Rivers was in the house at that same time and I don't remember Rondale Rivers being in there. I didn't see Rondale Rivers.” Id. at 55. Again, Peggy Franks confirmed that Capone is Petitioner Ronnie Austin. Id. at 61.

The Commonwealth inquired as to Peggy Franks' statements to the Pennsylvania State Police, to which she responded, “I don't remember half that. [...] I don't remember half the stuff that was said.” Id. at 56. The Commonwealth inquired further of Peggy Franks regarding her recantation to investigator John Davidson weeks before the second trial, to which Franks responded, “No, I mean, I don't remember what I said, but I remember being, you know what I mean? I don't even think that if that guy was standing here right in front of me, I wouldn't remember.” Id. at 57.

The Commonwealth questioned, “Now, you accused the police of threatening you and telling you what to say?” Peggy Franks answered,

They did. Well, no, I didn't say they said – the only thing they told me was that this is what Neisey Gaines said so you had to have – so this is what must have happened, this is what Neisey Gaines said happened. So I'm not saying that they put words in my mouth, but I'm saying that they thought whatever Neisey – you know, whatever Neisey said was the truth.

Id. at 57.

The Commonwealth questioned who told Peggy Franks what to testify to, in response she pointed to James Custer, former Pennsylvania State Police, in the courtroom and also named then Trooper Gary Brownfield. Id. at 58. The Commonwealth asked for specifics as to what the police told her to say, Peggy Franks responded,

That – um, exactly what happened, you know, like Neisey Gaines said that yins went up to the mountains and you burned the purse, but we didn’t burn the purse, we burnt the shirt. But they wanted me to say that – remember that, you know, go back in your memory, Peggy, because you have to remember that it was the purse they burnt, and I don’t remember burning any purse. I remember taking the shirt up to – with whiskey – it had whiskey on it or something, she spilled it.

Id. at 58.

At the second hearing on the PCRA Petition, Petitioner called Aaron Franks and the Commonwealth presented the testimony of James Custer. The Court notes inconsistency in the transcripts between November 2017 and February 2018 regarding the spelling of Petitioner’s first name. The Court will use “Ronnie” as that is how Petitioner articulated his name. N.T., 11/15/2017, at 35.

Aaron Franks testified that he was friends with Petitioner Austin in the 1990s and that he testified at Austin’s second trial. N.T., 2/26/2018, at 5-6. Aaron Franks is the son of Peggy Franks. Id. at 6. Aaron Franks is aware of his mother’s testimony at Austin’s second trial. Id. at 7. Aaron Franks testified that Petitioner Austin was with him on the day that Flo Malec died. Id. at 8. On questioning as to how he would remember this, Aaron Franks testified that he and his mother, Peggy Franks, had “conversations that night” that “had to have [him] kind of rewind [his] day.” Id. at 10. Aaron Franks was asked, “And so it’s your belief that Mr. Austin was with you for most of the day the day Ms. Malec passed away, correct?” Aaron Franks responded, “Yes.” Id. at 10. Aaron Franks stated he and Petitioner were “[j]ust riding around hanging out.” Aaron Franks testified, as he did in the second trial, that he believes Eric Cook killed the victim. Id. at 11. Aaron Franks admitted that even though he testified at the second trial, he never told the jury that he was with Petitioner Austin on the day of the homicide. Id. at 12. Aaron Franks purports to have dropped Austin off around eleven o’clock at night on the date of the homicide. Id. at 12.

Under cross-examination, Aaron Franks could not recall a specific date of the homicide and could not recall where he had gone with Petitioner Austin, instead responding, they “just drove around, probably, I couldn’t tell you for sure.” Id. at 16. With regards to the duration of time spent together, Aaron Franks estimated “probably around six, seven hours.” Id. at 16. Aaron Franks admitted at the PCRA hearing that his prior testimony at the second trial indicated that his mother, Peggy Franks made “all this up.” Id. at 17.

The Commonwealth presented only one witness at the PCRA hearings. James Custer, now Sheriff of Fayette County, testified for the Commonwealth, that he was the Criminal Investigator with the Pennsylvania State Police assigned as the lead investigator for the murder of Patricia Malec. *Id.* at 19, 26. Custer testified that Peggy Franks was incarcerated on drug charges when she requested a meeting with police. *Id.* at 20-22. Custer did not force Peggy Franks to testify or to say anything. *Id.* at 22. Custer did not promise Peggy Franks anything or threaten her with anything. *Id.* at 22. Trooper Gary Brownfield was also present during the interviews with Peggy Franks, and Custer did not observe him threaten Peggy Franks, promise her anything, or tell her what to say. *Id.* at 23. Custer testified that during the interview, Peggy Franks offered information that she and another woman had taken the contents of Malec's purse and the purse itself and disposed of them just a short distance down the road from where they had left the body. *Id.* at 23. Custer and Brownfield drove to location at Peggy Franks' direction showing them where to go on Old Braddock Road, a short distance from where the victim's body was recovered. *Id.* at 24. Custer testified that a few days prior, Denise Gaines had taken them to the same location. *Id.* at 24. The area was covered with snow and ice, and once the ground thawed around the end of February, Custer returned to the area and recovered the items described as the victim's personal belongings. *Id.* at 24. The location was right where Denise Gaines and Peggy Franks had both independently shown the police. *Id.* at 25.

Custer denied ever observing anyone force Peggy Franks or any other person who testified at the trial to implicate Petitioner Austin. *Id.* at 25. Custer denied neither Peggy Franks nor Aaron Franks ever saying that Petitioner Austin was not involved. *Id.* at 26.

JURISDICTIONAL BURDEN OF PROOF

To prevail on the newly-discovered fact exception, 42 Pa.C.S.A. § 9545(b)(1)(ii), Petitioner Austin must establish that "(1) the facts upon which the claim was predicated were unknown and (2) they could not have been ascertained by the exercise of due diligence." *Cox, supra*. As an initial jurisdictional threshold, Section 9545(b)(1)(ii) requires a petitioner to allege and prove that there were facts unknown to him and that he exercised due diligence in discovering those facts. The "new facts" exception set forth at Section 9545(b)(1)(ii) does not require any merits analysis of an underlying after-discovered-evidence claim. *Commonwealth v. Brown*, 111 A.3d 171, 179 (Pa. Super. 2015).

Upon review of the evidence adduced at trial as compared to the April 2017 statement of Peggy Franks and her subsequent testimony at the PCRA hearing, the Court concludes that Petitioner has not met his jurisdictional burden. At trial, Petitioner Austin's codefendant presented the jury with evidence that Peggy Franks recanted her identification of Petitioner Austin as a perpetrator of the homicide of Patricia Malec when she gave a statement to Defense Investigator, John Davidson in November 1997.

The November 1997 recantation statement of Peggy Franks was admitted into evidence at Petitioner Austin's trial in November 1997. Although Peggy Franks denied the recantation at trial, Defense Counsel presented as witnesses the Defense Investigator, John Davidson, and Aaron Franks, Peggy Franks' son, who both testified to the jury that the contents of the November 1997 were accurately reflective of Peggy Franks' statement given approximately one week prior to trial.

Peggy Franks' 2017 recantation is disconcertingly similar to her 1997 recantation. For this reason, the April 2017 statement cannot be described as "new facts", especially where as here, the jury was presented the testimony of two witness who swore under oath that Peggy Franks did issue a recantation in November 1997.

Further, Petitioner Austin has not shown due diligence in timely presenting the April 2017 statement. Petitioner Austin was well aware of the existence of Peggy Franks as a purported witness as she testified against him at trial. Petitioner Austin was also well versed in Peggy Franks' propensity for telling multiple conflicting versions of the facts of this case. Thus, not only was the witness, Peggy Franks, known to Petitioner, the claim that Peggy Franks had exculpatory evidence in the form of recantation was extensively litigated at trial and already presented to the jury, who rejected the same.

The facts alleged by Petitioner Austin are not "new" and accordingly, Petitioner fails to meet his burden of proof that his seventh Petition was timely filed.

Upon extensive review of Pennsylvania appellate case law, this Court could find no similar fact pattern where a trial eyewitness recanted prior to trial, denied the recantation at trial, and then subsequently recanted again. For this reason alone, we will continue our analysis. Assuming, *arguendo* that Petitioner Austin demonstrated that he discovered "new facts" by way of Peggy Franks' April 2017 statement and that he was diligent in discovering those facts, a proposition with which this Court disagrees, and further still, assuming that Petitioner complied with filing his seventh Petition within 60 days as required, this Court will now examine whether Petitioner Austin would be entitled to post conviction relief upon this evidence.

AFTER-DISCOVERED EVIDENCE

Once jurisdiction has been properly invoked by the timely filing of the PCRA petition, the petitioner seeking relief under subsection 9543(a)(2)(vi) based upon "after-discovered evidence" must prove by a preponderance of the evidence that the conviction or sentence resulted from "[t]he unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial if it had been introduced." 42 Pa.C.S. § 9543(a)(2)(vi). To prevail on an after-discovered evidence claim, the petitioner must demonstrate that the exculpatory 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 compel a

different verdict if a new trial was granted. *Commonwealth v. Small*, 189 A.3d 961, 972 (Pa. 2018). Since this four-part test is stated in the conjunctive, the petitioner “must show by a preponderance of the evidence that each of these factors has been met in order for a new trial to be warranted.” *Commonwealth v. Padillas*, 997 A.2d 356, 363 (Pa.Super. 2010). In determining whether the evidence would likely produce a different verdict, the PCRA court “should consider the integrity of the alleged after-discovered evidence, the motive of those offering the evidence, and the overall strength of the evidence supporting the conviction.” *Commonwealth v. Sandusky*, 203 A.3d 1033 (Pa. Super. 2019).

Petitioner Austin submitted as the evidence he alleges to be exculpatory the type-written statement of Peggy Franks from April 2017 as an Exhibit to his Petition, and at the time set for hearing, he also introduced the video recording of the statement. It is the Court’s duty to address the believability of such testimonial affidavits, as such, it is essential that the Court hold an evidentiary hearing to hear the testimony and make credibility determinations. *Commonwealth v. D’Amato*, 856 A.2d 806, 825 (Pa. 2004); *Commonwealth v. Henry*, 706 A.2d 313, 321 (Pa. 1997) (evidentiary hearing was held after testimonial affidavit was submitted so that PCRA court could judge the credibility of the recantation testimony).

PCRA hearings are held specifically to assess credibility, “were the analysis otherwise, the initial trial would lose its status as the main event, and final criminal judgments would be subject to vacatur based on mere affidavits.” *Commonwealth v. Johnson*, 966 A.2d 523, 539-40 (Pa. 2009). It was necessary to hold evidentiary hearings so that the parties could move the testimony of their witnesses into the record and this Court could assess credibility.

Here, Petitioner Austin contends Peggy Franks’ April 2017 statement is recantation evidence. It is well-established that recantation testimony is inherently and notoriously unreliable evidence upon which to predicate the granting of a new trial. *Commonwealth v. McNeil*, 487 A.2d 802 (Pa. 1985); *Commonwealth v. McCracken*, 659 A.2d 541 (Pa. 1995); *Commonwealth v. Nelson*, 398 A.2d 636 (Pa. 1979); *Commonwealth v. Coleman*, 264 A.2d 649 (Pa. 1970). Recantation evidence is extremely unreliable, particularly where the witness claims to have committed perjury. See *D’Amato*, 856 A.2d 806. When the recantation involves an admission of perjury, it is the least reliable form of proof. *Commonwealth v. Coleman*, 264 A.2d 649 (Pa. 1970); *Commonwealth v. Detman*, 770 A.2d 359, 360 (Pa. Super. 2001). The trial court has the responsibility of judging the credibility of the recantation. *Commonwealth v. Nelson*, 398 A.2d 636 (Pa. 1979). Unless the trial court is satisfied that the recantation is true, it should deny a new trial. *Id.*

“As the test clearly assumes, after-discovered evidence existed at the time of trial, it was just not discovered until later. Recantation is new evidence, withdrawing, or repudiating that which went before; by definition, this ‘new’ evidence was nonexistent at the time of trial.” See *D’Amato*, 856 A.2d at 827 (Eakin, J., concurring). However, a post-

verdict recantation “may ‘fall under the heading’ of after-discovered evidence, but this is only because it is ‘discovered after’ trial. True ‘after-discovered evidence’ is evidence that was existent but undiscovered at the time of trial as opposed to recantation evidence which did not exist at trial.” *Id.* at 826. We will follow the majority opinion of the Supreme Court of Pennsylvania in *D’Amato* and analyze this recantation evidence under the four-prong test for the after-discovered evidence exception, see *Id.* at 823–24.

Turning now to the four prongs of the after-discovered evidence test, the first prong requires Petitioner Austin to prove the recantation of Peggy Franks could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence. The Court again finds that Peggy Franks’ recantation of April 2017 is nearly identical in substance to her alleged November 1997 recantation. The only distinction now being that Peggy Franks has adopted her recantation under sworn testimony to this Court at the PCRA hearing, whereas before, she denied the prior recantation under oath at Petitioner’s trial. The material changes in testimony, under oath each time, throughout these proceedings leads the Court to find as a fact that Peggy Franks is not a credible witness. Nonetheless, having Peggy Franks previously deny this same recantation under oath, would permit the finding that Petitioner has met his burden as to the first prong – that he could not have obtained this recantation prior to the conclusion of the trial.

As to the second prong, the Supreme Court of Pennsylvania recently clarified the “merely corroborative or cumulative” element of the standard for granting a new trial based on after-discovered evidence. Evidence is corroborative or cumulative, but not “merely” so, if the new evidence is of a higher grade or character than what was previously presented on a material issue. This clarification supports one of the goals of the after-discovered evidence rule, which is to limit continued litigation without being so rigid as to shut out newly discovered evidence from a credible source which may lead to a true and proper judgment. *Commonwealth v. Small*, 189 A.3d 961, 968 (Pa. 2018).

Petitioner Austin meets the second prong as Peggy Franks is now adopting her recantation under oath that is neither corroborative nor cumulative of her trial testimony which implicated Petitioner.

The third prong is met because the evidence is not being used solely to impeach credibility. The “new” testimony has relevance beyond impeachment. If believed, which the Court does not find credible, the “new” statement of Peggy Franks would have played a role in the defense strategy for Petitioner Austin.

At the fourth prong, whether Peggy Franks’ recantation would likely compel a different verdict if a new trial was granted, Petitioner Austin fails.

Recanting testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial where it is not satisfied that such testimony is true. There is no less reliable form of proof, especially when it involves an admission of perjury. *Commonwealth v. Loner*, 836 A.2d 125, 135 (Pa. Super. 2003). As the PCRA court is provided a unique

opportunity to observe the witness's manner and demeanor during an evidentiary hearing, "a prerequisite to such relief is that the evidence upon which the relief is sought must be credible to the trial court." *Id.*

Peggy Franks' statement of April 2017 is rife with uncertainty and failing memory. Peggy Franks was not even sure of the year of the homicide:

"I am here for the investigation of a murder that happened in 1995, I think that's when it happened."

Peggy Franks admitted to being drunk and not sleeping for three days:

"[...]and I couldn't remember what happened because for one thing, I was two shits in the wind, I was drinking so much that day. You figure we was in bars that day, drinking. Uh, Denise Gaines bought her a fifth of liquor and I probably drank most of that, you know, and we just, how can you get a confession out of drunk? That's all I want to know."

"No, I don't do drugs but I was drinking a lot, um, with no sleep for three days."

Peggy Franks admitted to making assumptions:

"To tell you the truth I just assumed that he [Petitioner Austin] was the other one because they all wore their hoodies [...]."

Peggy Franks repeatedly used the verbiage "I don't think" rather than unequivocally denying Petitioner Austin's presence:

"I really don't think he was there but I can't say for sure because I didn't see him. I didn't see his face. All I seen was the hoodies. I know I seen Casper's face for the fact [...]. That's the face that I remember."

"I don't even remember half of that. Um, I just, I just don't think that Capone was even involved in all this. Um, I didn't see him til later that night, his face. I seen hoody. Now I thought that that was him, that was, uh, underneath of the hoody. Like I said, they wore them hoodies, the windows are tinted on the ... on the cars, um, but I don't think so. [...]."

"So to tell you the truth, I don't think he was there at all, you know. I told you that when I went back in the house, the only one I seen was Casper. I seen Casper from the car. Um, I didn't see Capone."

At the evidentiary hearing, Peggy Franks' believability fared even worse in person. Peggy Franks testified, "Ronnie Austin wasn't at the house that day, that he wasn't even

indicated in the murder.” N.T., 11/15/2017, at 49. Yet, she also admitted that she doesn’t remember much from that day. Id. at 54. Testifying, she stated:

“Well, I was explaining to [Investigator Fox] that Ronnie Austin wasn’t at the scene that day at the house. I explained to [Investigator Fox] that there was other people at the house, but I couldn’t remember who and exactly what happened. Um, we were drinking a lot and that’s what happened, you know, um, I, I, I couldn’t remember.”

Id. at 46.

“Well I explained to [Fox] that, that um, there was another individual that was in the car that day, um, that I couldn’t remember a whole lot that happened that day so, um, I couldn’t tell him too much about it, the whole thing, you know what I mean, I couldn’t remember.”

Id. at 46-47.

Peggy Franks’ testimony was neither credible nor believable. Peggy Franks offers no explanation as to the identity of the person in the “hoody” and fails to credibly counter her assumption that it was Petitioner Austin present. Peggy Franks’ memory of a hoody matches the description Rivers provided as being worn by Petitioner Austin.

Peggy Franks now also contorts other uncontested details. Peggy Franks’ burning of the victim’s purse was central to her trial testimony, placing her at the scene in the mountains where the victim was shot and where she identified Petitioner Austin in the mountains. The trial testimony reveals Peggy Franks testified in regard to burning the victim’s purse and purchasing gasoline as follows:

Q: And then what did you do?

A: Then I told Denise Gaines that we would have to get rid of the purse. We would have to take the purse and burn it.

[...]

A: When me and Denise was getting ready to leave to burn the purse, I seen the blue car headed towards Coolspring Street.

Q: Okay. Why did you want to go and burn the purse?

A: ‘Cause I didn’t want involved. Well, I didn’t want her involved either.

Q: Did you do anything with the blue purse prior to taking it?

A: Yes.

Q: What did you do with it?

A: We left there, we went to a gas station on Connellsville Street --

Q: No. I mean did you look inside the blue purse at any time?

A: Oh, yeah.

Q: When did you do that?

A: We did that when she was – after she had spilt stuff on her shirt, and that’s when

we went through the purse.

Q: Did you know – what do you recall about the contents of the purse?

A: There was some sunglasses, makeup, lipstick.

Q: What else?

A: There was one of them eyelash things, there was –

Q: What do you mean by an eyelash thing?

A: It's an eyelash curler. Girls use it for eyelash curler.

Q: Okay. And did you take the purse with the eyelash curler in it?

A: Yes.

Q: Okay. And did you at some point leave Denise Gaines' house?

A: Yes.

Q: And where did you go to from there?

A: We went to a gas station on Connellsville Street, right across from Garry's Auto.

[...]

Q: How much gas?

A: Fifty cents' worth.

Q: What was it put in?

A: A Maxwell House can.

N.T., Vol. 3, 11/13/1997, at 625-627.

At trial, Peggy Franks admitted to taking Trooper Custer and Trooper Brownfield back to the same location she described in the mountain area, testifying, "I showed them where we took the purse and burned it." *Id.* at 639.

Now at the PCRA proceedings, Peggy Franks denies taking the victim's purse and burning it and denies that she testified to the same:

Q: Do you also remember taking her purse and burning it?

A: No, I didn't testify to that.

Q: No?

A: I testified that I took her shirt and burned it, not her purse.

Q: You don't recall going through her purse after she had been taken away by Capone and Casper?

A: No.

Q: You don't recall going to the gas station buying 50 cents worth of gas and then taking her purse and burning it?

A: No.

N.T., 11/15/2017, at 54.

Whether Peggy Franks suffers from a faulty memory or is intentionally perjuring herself is of no moment, as either explanation leads to an unbelievable recantation. The April 2017 statement wherein Peggy Franks declares herself a liar would not compel a different jury verdict.

The PCRA court must make credibility determinations on recantation testimony. *Commonwealth v. Small*, 189 A.3d 961, 978 (Pa. 2018). As fact-finder, we are “in a superior position to make the initial assessment of the importance of [the recantation] testimony to the outcome of the case.” *Commonwealth v. Williams*, 732 A.2d 1167 (Pa. 1999). The PCRA court must “render its own, independent findings of fact and conclusions of law concerning [the recanting person’s] credibility and the impact, if any, upon the truth-determining process which can be discerned from such testimony.” *Id.*

The Supreme Court has instructed that, “even as to recantations that might otherwise appear dubious, the PCRA court must, in the first instance, assess the credibility and significance of the recantation in light of the evidence as a whole.” *Commonwealth v. D’Amato*, 856 A.2d 806, 825 (Pa. 2002). An appellate court may not interfere with the denial or granting of a new trial where the sole ground is the alleged recantation of Commonwealth witnesses unless there has been a clear abuse of discretion. *Commonwealth v. Williams*, 732 A.2d 1167, 1180 (Pa. 1999).

Accordingly, it is our finding of fact that the testimony of Peggy Franks at the evidentiary hearings on the instant PCRA Petition was not credible. First, Peggy Franks has nothing to lose and will suffer no repercussions from recanting her testimony. Second, Peggy Franks’ explanation of suffering “guilt” is enough motive to now lie about Petitioner’s involvement. Peggy Franks was well-versed with the court system and knew the implications of her testimony at the time of trial, including an understanding of perjury. Peggy Franks newest statement that Petitioner Austin was not present when the victim was killed is not plausible considering the other specific details of the killing that she testified to in depth at trial.

It is further this Court’s finding of fact that the testimony of Trooper, now Sheriff, James Custer was credible and believable. Trooper Custer testified credibly at the PCRA hearing that Peggy Franks requested to meet with police, that the police did not promise her anything or threaten her to testify and did not tell her what to say. Trooper Custer further testified credibly that Peggy Franks independently directed the police to the location in the mountain where the victim’s purse was recovered.

Further still, it is the finding of this Court that the PCRA testimony of Aaron Franks that he was with Petitioner Austin at the time of the homicide is not credible. Aaron Franks was a witness at the trial for the defense and did not testify to being an alibi witness. A material change in Aaron Franks’ testimony between the trial and PCRA hearings of this magnitude is not credible.

After review of Peggy Franks’ 1997 testimony, it is evident that the trial testimony given by her was not the result of coercion or fabrication. Peggy Franks was subjected to lengthy cross examination by three defense attorneys. Peggy Franks was confronted with and denied her first recantation at the time of trial. The April 2017 statement is not truly exculpatory and would not compel a different verdict.

Further still, the testimony of Peggy Franks alone did not result in Petitioner Austin's conviction. The Commonwealth presented more than adequate other evidence of Petitioner's guilt beyond a reasonable doubt notwithstanding Peggy Franks' delayed proclamation of Petitioner Austin's innocence. Petitioner Austin cannot overcome the unequivocal testimonies of William Rondale Rivers, Denise Gaines, and Georgia Gaines, all of whom presented damaging trial testimony against him, and testimony which would render it unlikely that any of the PCRA claims, whether singularly or cumulatively, would compel a different verdict.

While Peggy Franks' April 2017 statement and her PCRA testimony, if believed by a jury, would certainly weaken the Commonwealth's case, it does not vindicate or exonerate Petitioner Austin. Together with the other testimony offered in the trial, as well as Peggy Franks' original testimony, evidence exists beyond a reasonable doubt that a jury could and would still convict Petitioner Austin at trial. Even if a sliver of truth permeated Peggy Franks' recantation statement and testimony, the Commonwealth presented other credible witnesses – witnesses who place Petitioner Austin at the scenes of the crime at Denise Gaines' house, carrying the victim to the car, and on the mountain where her body was found.

Since the verdict would not differ if a new trial were granted, Petitioner Austin has failed to meet his burden with regard to after-discovered evidence. We therefore conclude that Petitioner Austin has failed to demonstrate a meritorious claim for which PCRA relief can be granted.

BRADY VIOLATIONS AND PCRA SECTION 9545

In his Petition for Post-Conviction Relief, Petitioner also asserts Brady violations and that Post Conviction Relief Act §9545 is void for vagueness. Initially, we find Petitioner has failed to develop his blanket assertion that the Section 9545 of Post Conviction Relief Act is vague and the same is denied.

Under Brady, the prosecution's failure to divulge exculpatory evidence is a violation of a defendant's Fourteenth Amendment due process rights. *Commonwealth v. Ly*, 980 A.2d 61, 75 (Pa. 2009). A Brady claim challenges the Commonwealth's failure to produce material evidence. Specifically, Petitioner must plead and prove that "(1) the prosecutor has suppressed evidence; (2) the evidence, whether exculpatory or impeaching, is helpful to the defendant; and (3) the suppression prejudiced the defendant." *Commonwealth v. Carson*, 913 A.2d 220, 244 (Pa. 2006). See also *Commonwealth v. Gibson*, 951 A.2d 1110, 1126 (Pa. 2008). Petitioner bears the burden of demonstrating that the Commonwealth withheld or suppressed evidence. See *Ly*, 980 A.2d at 75; *Commonwealth v. Porter*, 728 A.2d 890, 898 (Pa. 1999). In the PCRA context, a petitioner must demonstrate that the alleged Brady violation "so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place." *Ly*, 980 A.2d at 75.

As for the Brady violations, Petitioner Austin initially argued in his Petition that Peggy Franks' recantation describes a situation where she was threatened by police to testify that she saw Austin at the scene of the crime. Following the evidentiary hearings, in his Post-Hearing Memorandum, Petitioner Austin further alleges Brady violations to have occurred during the November 1997 trial in that he alleges Peggy Franks improperly denied receiving favorable treatment in return for her testimony against him and the Commonwealth failed to correct her testimony.

The evidence is contrary to these arguments. As to the first allegation, the Court finds credible the testimony of Trooper James Custer when he testified that Peggy Franks was neither threatened nor promised anything to induce her to speak to police.

As to the testimony at trial, at the conclusion of the Commonwealth's direct examination, the following inquiry occurred between the Assistant District Attorney and Peggy Franks:

Q: Now, have you been charged with anything relative to this incident?

A: No.

Q: And you received a plea bargain relative to a drug offense, is that correct?

A: Yes, I did.

Q: Did you do time in jail for that?

A: Six to 23 I had.

N.T., Vol. 3, 11/13/1997, at 638-639.

In highlighting her plea bargain for the unrelated drug case, under questioning by a defense attorney, Peggy Franks testified:

Q: Does the paper that you signed and swore to say that you have to testify against Monroe, Austin and Brown in order to get your plea bargain?

A: Does the paper say that?

Q: Yea. Is that a condition of that sentence?

A: Yes.

Q: It does?

A: Yes, sir.

Q: And you know without that plea bargain you very well could go to a state prison?

A: Yes, sir.

[...]

Q: And there were several other crimes involving this that you weren't charged with as well, right? Were you charged with tampering with evidence?

A: Huh-uh. No, sir.

Q: Were you charged with obstruction of justice?

A: No, sir.

Q: Were you charged with an accessory before and after the fact of murder?

A: No, sir.

Q: Were you charged as an accomplice to murder:

A: No, sir.

Q: And you purposefully with a clear intent destroyed evidence in this case, didn't you?

A: Yes, sir.

N.T., Vol. 4, 11/14-17/1997, at 724-725.

Objections by the Assistant District Attorney were highlighted in Petitioner's Post-Hearing Memorandum which he alleges resulted in "false testimony" to the jury. These assertions are patently inaccurate. At trial, the Assistant District Attorney objected when the questions presented called for a speculative answer, and at appropriate times, those objections were sustained by the trial judge.

Petitioner Austin has failed to prove that evidence of a plea bargain with Peggy Franks had been suppressed by the Commonwealth. Instead, the Commonwealth did disclose Peggy Franks was required to testify against Petitioner Austin and his codefendants as evidenced by trial defense attorney questioning from her plea agreement sheet. A Brady violation will not afford a defendant relief if the defendant either knew of the existence of the evidence in dispute or could have discovered it by exercising reasonable diligence. *Commonwealth v. Miller*, 987 A.2d 638, 655 (Pa. 2009).

The terms of the plea agreement were readily available to defense counsel at trial. There is no indication whatsoever that the Commonwealth suppressed any evidence. As such, the Court finds that violations of Brady did not occur, and these issues are denied.

WHEREFORE, we will enter the following Order denying the Petition for Post-Conviction Relief pursuant to 42 Pa.C.S. § 9541 et seq. filed by Petitioner, Ronnie Austin.

ORDER

AND NOW, this 28th day of August, 2019, upon consideration of the seventh Petition for Post-Conviction Relief pursuant to 42 Pa.C.S. § 9541 et seq. filed by Petitioner, Ronnie Austin, it is hereby ORDERED and DECREED the Petition is DENIED.

BY THE COURT:
NANCY D. VERNON, JUDGE

ATTEST:
Clerk of Courts

LUNCH & LEARN SERIES

FCBA LUNCH & LEARN SERIES

The Fayette County Bar Association's next presentation in its Lunch & Learn Series will be:

- Date: **Wednesday, September 18th from 12:00 p.m. to 1:30 p.m.**
- Location: Courtroom No. 1 of the Fayette County Courthouse
- Discussion topic: **Basics of Powers of Attorney and Living Wills**
Form POA and Living Will will be provided
- Presenter: Timothy J. Witt, Esquire

CLE Credit

1.5 hours of Substantive CLE credit for the program. The fees are as follows:

Members of the FCBA

- No charge for attendance without CLE Credit
- \$10 fee for attendance with CLE Credit

Attorneys admitted to practice in Pennsylvania after January 1, 2012

- No charge for attendance with CLE Credit

Non-members of the FCBA

- \$10 fee for attendance without CLE Credit
- \$20 fee for attendance with CLE Credit

**** All fees to be paid at the door ****

A light lunch will be provided.

RSVP

If interested in attending, please call Cindy at the Bar office at 724-437-7994 or by email to cindy@fcbar.org on or before Monday, September 16th

Evan's Destination Day Camp 5k Run/Walk

Dear Colleagues:

As part of a new community outreach initiative, the Bar Association will be a major sponsor of this year's Evan's Destination Day Camp 5K Walk/Run for Autism which will take place on Saturday, September 14th at Sheepskin Trail, Hutchinson Park, Hopwood. 100% of all funds raised go to the students at the Highlands Hospital Regional Center for Autism in Connellsville. A brochure for the Walk/Run is attached and for more information regarding Evan's Destination Day Camp please go to: <https://www.facebook.com/EvansDestinationDayCamp/>.

In support of our sponsorship, the FCBA would encourage you, your family and friends to participate in this fun (non-timed) Walk/Run to benefit local children with Autism. I had the privilege of participating in last year's event; and, it was a lot of fun. It was especially rewarding to see the local children with Autism who participated in the event. The joy on their faces was heartwarming and contagious.

If you would like to participate, please mail the completed registration form, along with a check made payable to "Highlands Hospital Regional Center for Autism" for the registration fee, to John Carom, c/o Abby's, 197 Morgantown Street, Uniontown, PA 15401.

Let's join together and have a great showing. Thank you very much for your support of this worthy endeavor. I'm looking forward to seeing you on the 14th!

Jim Higinbotham
FCBA President

EVAN'S DESTINATION DAY CAMP
5K RUN/WALK
FOR AUTISM

Benefits
The Highlands Hospital Regional Center for Autism

SATURDAY, SEPTEMBER 14, 2019

www.evansdestinationdaycamp.com

[EvansDestinationDayCamp](https://www.facebook.com/EvansDestinationDayCamp)

EVAN'S DESTINATION DAY CAMP

Highlands HOSPITAL

BENCH BAR SAVE THE DATE



FAYETTE COUNTY

BAR ASSOCIATION

LOCAL LAWYERS SERVING OUR COMMUNITY | FCBAR.ORG

SAVE THE DATE
Bench Bar Conference
Wednesday, October 16th
8:30 a.m. - 1:00 p.m.
The Historic Summit Inn

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