COMMONWEALTH OF PENNSYLVANIA	:	**IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA**
	:	
v.	:	
	:	
	:	**CP-67-CR-5365-1997**
KEVIN BRIAN DOWLING, Petitioner	:	**PCRA (CAPITAL HOMICIDE)**
	:	

ORDER

AND NOW, this 22 day of February, 2022, pursuant to the accompanying Opinion, this Court notes and directs as follows:

1. Petitioner's *Motion for Resolution of Claim 15 on Submissions in Light of the Commonwealth's Concession that the Sole Eyewitness' Identification of Petitioner Must Have Been Mistaken* is GRANTED.
2. Petitioner is entitled to a new trial.
3. Under Pa. R.A.P. 341, immediate appeal of this Order will facilitate resolution of the entire case; and
4. Disposition of the remaining claims is deferred pending determination of any Appeal from this Court's Order.

BY THE COURT:

Robert J. Eby, Senior Judge, S.J.

Distribution

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APPEARANCES

Christopher Schmidt, Esq. — For the Commonwealth
Tracy Ulstad, Esq. — For the Petitioner

OPINION BY EBY, S.J., February 22, 2022

Petitioner raises twenty-six (26) claims for relief in his *Second Amended Petition for Writ of Habeas Corpus and For Collateral Relief From Criminal Conviction Pursuant to the Post Conviction Relief Act, 42 PA. C.S. § 9541 et seq.* ("Petition") filed on January 6, 2020.

Before the Court is Petitioner's *Motion for Resolution of Claim 15,* filed on May 26, 2021, as set forth in that Petition. In his Motion, Petitioner alleges that his trial counsel, Gerald Lord, Esquire ("trial counsel"), rendered ineffective assistance in his representation of Petitioner at trial, and that exculpatory evidence was kept from the jury by the Commonwealth— violations of the Sixth, Eighth and Fourteenth Amendment Due Process rights afforded a criminal defendant under the United States Constitution and violations of Article One, §§ 1, 6, 9, 13 and 25 of the Pennsylvania Constitution.

Petitioner has presented a subsequent Motion requesting that this Court permit Claim 15 to proceed to disposition, and reach the remaining claims only if necessary.

This Court granted that Motion and held an Evidentiary Hearing regarding Claim 15 on October 18, 2021. Oral Argument took place on November 17, 2021, and this Opinion follows.

I. Procedural History

As we have noted in previous opinions disposing of prior motions then pending at this action number, the procedural history of the instant case is a torturously protracted one. We will endeavor to once again summarize the fifty pages of docket entries spanning over two decades with only those details necessary to explain this Court's delay in addressing a PCRA action originally filed more than a decade ago.

Following a jury trial conducted between October 26, 1998 and November 6, 1998, Petitioner was convicted by a jury sitting in York County of first-degree murder for the capital murder of art gallery owner, Jennifer Myers, who was to testify against Petitioner as the alleged victim in an attempted rape and robbery trial originally scheduled to begin just days after her untimely murder.[1]

Following a verdict of first degree murder, on November 9, 1998, the jury returned a sentence of death after a penalty hearing was conducted. The jury found a single aggravating circumstance, 42 Pa.C.S. § 9711(d)(5) ("The victim was a prosecution witness to a murder or other felony committed by the defendant and was

[1] Police arrested Petitioner for the murder of Ms. Myers on October 29, 1997. Petitioner went to trial for the robbery and attempted rape charges in April of 1998 and, following that trial, was convicted of robbery, criminal attempt to commit rape and indecent assault. The trial court sentenced Appellant to an aggregate term of imprisonment of 9 to 18 years.

killed for the purpose of preventing his (*sic*) testimony against the defendant in any grand jury or criminal proceeding involving such offenses."), and no mitigating circumstances.

Following the Petitioner's formal sentencing on December 14, 1998, an automatic Notice of Appeal was filed with the Pennsylvania Supreme Court. On July 10, 2001, the Supreme Court issued an Opinion indicating that Petitioner's 1925(b) Concise Statement raised ineffectiveness of counsel claims that could not be addressed without an evidentiary hearing. The case was then remanded to the trial court for that express purpose.

On July 17, 2001, the trial court issued an Order scheduling the evidentiary hearing on the remanded capital case for September 25, 2001. As the result of numerous Motions filed by the Petitioner, including a pro se Post-Conviction Relief Act ("PCRA") Petition on his companion robbery and rape convictions and various Motions requesting changes in counsel and recusal of the appointed trial Judge, the evidentiary hearing was not held until August 1, 2002, as part of a consolidated hearing intended to resolve both the Supreme Court's directive in the instant case and the PCRA Petition in the companion robbery and attempted rape case.

On April 2, 2004, the trial court issued an Opinion denying the claims of ineffectiveness that Petitioner had raised in his appeal to the Pennsylvania Supreme Court, and Petitioner's case was transmitted back to the Supreme Court on April 22, 2004. On September 29, 2005, the Supreme Court affirmed the Petitioner's capital homicide conviction and judgment of sentence.

On January 24, 2007, the Petitioner filed a pro se PCRA Petition at the instant action number. The court appointed counsel, but later vacated that appointment when current counsel with the Federal Community Defender Office for the Eastern District of Pennsylvania ("FCDO") entered an appearance. On July 31, 2007 and August 3, 2007, Petitioner's new counsel filed a three volume Appended PCRA Petition and supporting exhibits, along with a Certification of Witnesses on August 3, 2007.[2] The Commonwealth filed a response to Petitioner's Amended PCRA Petition on March 28, 2008, and Petitioner filed a Reply on July 30, 2008. Petitioner filed an additional Certification of Witnesses and supporting documents on December 19, 2008.

Upon assuming this matter in late 2012, the undersigned Jurist ordered the parties to submit memoranda outlining the procedural history and outstanding issues. Accompanying its memorandum submitted in January 2013, the Commonwealth filed a Motion to appoint alternative counsel for Petitioner, arguing that representation of the Petitioner by counsel with the FCDO was improper. Petitioner's counsel removed that question to the Federal Courts. On April 8, 2013, the undersigned Jurist ordered proceedings in the Commonwealth to be held in abeyance pending resolution of the federal litigation; the Court subsequently struck the Second Amended PCRA Petition that Petitioner attempted to file in May 2013.

The federal suit was resolved in favor of the FCDO; Petitioner then requested—and this Court ordered—that the stay be lifted. Petitioner's Second Amended PCRA Petition, five (5) accompanying Appendices and Supplemental Certification of

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[2] On November 5, 2007, the case was reassigned from the Hon. Sheryl Dorney to the Hon. Michael Brillhart, and eventually reassigned to the Hon. Michael Bortner and, subsequently in 2012, to the undersigned Jurist.

Witnesses were then filed on January 6, 2020,[3] pursuant to this Court's order dated December 17, 2019.

In September 2020, a Status Conference was held by this Court to determine if any claims raised by that Petition could be consolidated for purposes of conducting hearings on the 26 separate claims presented by Petitioner, and therein, this Court gave each party 90 days for the filing of expert witness reports.

Petitioner had previously provided the expert report of Kenneth Hewitt of WSR Consulting Group, LLC ("Hewitt Report") dated May 30, 2010. In December 2019, Petitioner secured his current expert, Christienne Genaro of Paygility Advisors, who independently confirmed the findings of the Hewitt Report and submitted her own report ("Genaro Report"). Both the Hewitt Report and the Genaro Report were filed as Appendices to Petitioner's *Second Amended PCRA Petition* and the instant *Motion for Resolution of Claim 15 on the Submissions in Light of the Commonwealth's Concession that the Sole Eyewitness's Identification of Petitioner Must Have Been Mistaken.*

In his *Motion for Resolution of Claim 15,* Petitioner argued that since the facts of this claim were now uncontested and the claim itself was ripe for disposition, the Court, in the interests of judicial efficiency should rule on Claim 15 before addressing the

[3] Less than two months later, this Court (and the world) came to understand the imminent threat the novel Coronavirus (COVID-19) posed to the health and safety of those gathering in person. Quarantine, masking, and social distancing guidelines were issued to United States citizens by the Centers for Disease Control (CDC) and to the global population by the World Health Organization (WHO). As a result, Court closures, staff reductions and operational changes prevented the undersigned Jurist from bringing the parties in this matter to a Status Conference until some months later, in September 2020. Though masking and social distancing measures continued well into the following calendar year, despite administration of a Covid-19 vaccine administered to nearly 54% of the United States population in the Spring of 2021, a Delta (and now Omicron) variant of this virus still threatens to reduce the safety of in-person meetings and thwart further progression of this matter.

remainder of Petitioner's claims, which would be rendered moot if relief was granted on this claim.

The Commonwealth filed an Answer which claimed that resolution of Claim 15 would be improper pursuant to Pa.R.Crim. P. 910 since partial dispositions are not final appealable orders. Petitioner pointed out, at argument on this motion in July 2021, that Pa.R.Crim. P. 907 specifically allows for partial dispositions of PCRA petitions. Further, Petitioner noted that Rule 341 of the Pennsylvania Rules of Appellate Procedure authorizes the Court to issue a final order disposing of Claim 15, without reaching Petitioner's remaining claims.

In pertinent part, Rule 341 states, "the trial court...may enter a final order as to one or more but fewer than all of the claims and parties only upon an express determination that an immediate appeal would facilitate resolution of the entire case. Such an order becomes appealable when entered." Pa.R.A.P 341.

Therefore, this Court will issue a final order with this accompanying opinion deciding Claim 15, without, at this time, reaching Petitioner's remaining claims.

Understanding that disposition of this claim may well render resolution of Petitioner's remaining claims moot, we proceeded to direct the PCRA Petition process to continue to hearing on Claim 15. On August 30, 2021 the Court accepted a stipulation by the parties that each expert witness, if called to testify, would do so consistent with their own reports. The parties further agreed that in light of their stipulation, the only witness necessary for the evidentiary hearing would be Attorney Lord, trial counsel for the Petitioner.

To summarize that stipulation, the parties agreed that the Commonwealth's expert, if called to testify under oath in court, would testify consistently with the proffer of the testimony contained in the Houser Summary and their full report (the Houser Report), and Petitioner's experts, if called, would testify consistently with their respective reports—the Genaro Report and the Hewitt Report, which were also provided to the Court. Each expert stated they would testify (if called at a PCRA Hearing) that based upon their own review of the credit/debit card purchases surrounding the Kennie's Market purchase made by Eller on the day of the murder, the time on the Kennie's Market register receipt documenting Eller's 10:50 a.m. transaction was accurate. Further, each expert concluded that Eller's testimony that she saw Petitioner outside Kennie's Market following that purchase at around 12:00 p.m. could not be correct, and that Trooper Mowrey's testimony at Petitioner's trial that five days after the murder register six was 20 minutes slow and the other Kennie's registers were also inaccurate and registered different times from one another, was not factual.

Under Pennsylvania law, a hearing cannot be denied on the claims raised in a PCRA Petition as herein presented unless the Court "is certain of the total lack of merit" of the petition. *Commonwealth v. Bennett,* 462 A.2d 772 (Pa. Super. 1983)(quoting *Commonwealth v. Rhodes*, 416 A.2d 1031, 1035-36 (Pa. Super. 1979). Even in "borderline cases Petitioners are to be given every conceivable legitimate benefit in the disposition of their claims for an evidentiary hearing." *Commonwealth v. Pulling,* 470 A.2d 170, 173 (Pa. Super. 1983)(remanding for evidentiary hearing)(quoting *Commonwealth v. Strader*, 396 A.2d 697, 702 (Pa. Super. 1978) and *Commonwealth v. Nahodil,* 239 A.2d 840, 840 (Pa. Super. 1968). Where a PCRA court determines that

an evidentiary hearing is required as to some, but not all, of the issues raised in a petition, the evidentiary hearing may be limited to those issues. *Commonwealth v. Edmiston*, 851 A.2d 883, 889 (Pa. 2004).

Petitioner's Motion for Resolution of Claim 15 was thus granted, and an Evidentiary Hearing on Claim 15 was held on October 18, 2021, where the parties' stipulation was entered onto the record. Briefs were subsequently submitted, Argument was held on November 17, 2021, and this Opinion follows.

II. Factual History

Sandra Sue Eller ("Eller") was the sole eyewitness to testify at Petitioner's trial for the murder of Jennifer Myers which occurred in Ms. Myers' art gallery at 1:00 p.m. on October 20, 1997 at the Spring Forge Shopping Plaza in Spring Grove, Pennsylvania. At Petitioner's Trial for the murder of Ms. Myers in October 1998, Eller testified that she was certain that Petitioner was the man she saw in the parking lot of Kennie's Market (also located in the Spring Forge Shopping Plaza) when she was returning her cart after shopping that day. Eller testified that she had "no doubt at all" that the man that she saw as she was leaving Kennie's Market was Petitioner. (NT 10/29/1998, pp. 41-42). Eller testified that she was unsure of the exact time, but it could have been around 11:20 or 11:30 a.m. (NT 10/29/1998, pp. 57-59). Eller was an independent witness who seemingly had no interest in the outcome of Petitioner's trial. Her testimony was the only testimony placing Petitioner at or near the scene of the murder just prior to its commission at 1 p.m. that day.

Claim 15 of Petitioner's PCRA Petition alleges that evidence proving Petitioner could NOT have been the person Eller saw in the Kennie's Market parking lot the day of the murder was not presented to the jury, in violation of the Sixth and Fourteenth Amendments.

Eller's mistaken eyewitness identification of Petitioner was bolstered by the testimony of Trooper William Mowrey, also offered at Petitioner's Trial. Trooper Mowrey is one of the state troopers who conducted the investigation into the murder of Jennifer Myers. Trooper Mowrey testified that he went to Kennie's Market five days after the murder took place to determine whether the time generated on the register receipts on each of the Kennie's cash registers was correct. His investigation generated no documentation or receipts of its own, but his police report states the following:

> On 10/25/1997 at approx..1130 hrs., this officer, Tpr. Schriver, Tpr. Olweiler and Tpr. Bruchak arrived at Kennies Market for the purpose of checking the register receipts for 10/20/97 for the purpose of determining the time Ms Eller paid for her groceries.
>
> All receipts were checked for that date. Ms. Eller's sale was located on register six's receipts. It was identified utilizing her Gold Card number, which appears on the receipt and by her stated total of $53.52.
>
> The receipt shows the sale on 10/20/97 at 1045 hrs.; however, after checking register number six, it was discovered to be 20 minutes slow on that date. All of the other registers were also checked and it was found that each one displayed a different time.
>
> Four register receipt rolls were collected and placed into evidence reference property number H 7131 K, including the roll containing Ms. Eller's purchase. (*sic*)

(Police Report, 2/06/1998); Petitioner's Exhibit, 10/18/2021).

Trooper Mowrey provided an opinion at Petitioner's Trial that the register which processed Eller's sale, register six, was twenty minutes slow. (NT 11/04/1998, pp. 221-

222). Trooper Mowrey claims to have checked the rest of the registers at Kennie's Market on that visit as well and claims they were all inaccurate. *Id* at 222. He determined, "[T]hey all read different times," although he did not disclose his investigative methodology or how he ultimately reached that conclusion.

About one year later, on September 30, 1998, just prior to Petitioner's murder trial, Trooper Mowrey again visited Kennie's Market to check the cash register times a second time. At trial, he testified that register six was eleven minutes slow. *Id* at 223. ("I checked Register No. 6 again, the one that the journal came from, and on the day I checked it within the last month, it was eleven minutes (*sic*) slow."). Trooper Mowrey's police report for that visit, however, reports a seventeen minute discrepancy on register six, though again, no documentation or receipts from this investigation were generated. (Police Report, 9/30/1998); ("At 2:28 pm it read 2:11 pm.").

Trooper Mowrey was never offered as an expert at Petitioner's trial, nor subject to *voir dire* on his qualifications to render opinions as to the accuracy of the registers at Kennie's Market. However, at Petitioner's Trial, his counsel called upon Trooper Mowrey to testify as to the accuracy of the times on the Kennie's Market registers and did not challenge the investigative methodology or content of his erroneous and baseless opinion.

The Commonwealth now *concedes* the factual predicate for Claim 15: that the times stamped on the Kennie's Market register receipt rolls are correct. The evidence upon which the parties now concur, shows conclusively that Eller indeed checked-out of Kennie's Market at 10:50 a.m and saw the man she later identified as Petitioner within minutes of 10:50 a.m. on the day of the murder—not at noon, as was incorrectly

presented by the Commonwealth at trial (as extrapolated from Eller's testimony that she saw Petitioner at 11:30 a.m.).

By the Commonwealth's own evidence presented at Trial – the testimony of Clarence Hess, the rental boat proprietor at Muddy Run Lake—Petitioner was actually over 40 miles away on Muddy Run Lake at 10:50 a.m. that morning as Eller was checking out of and departing Kennie's Market in Spring Grove, Pennsylvania. Clarence Hess testified that, "[B]y the time Petitioner got into the boat, it would have been about 10:20." (NT 10/27/98, p. 55). Clarence Hess testified that Petitioner was then on the lake for 30-45 minutes that morning. *Id.* at 146. Lastly, the Commonwealth presented testimony that it takes "an hour and three minutes" or "an hour and eight minutes" to travel from Muddy Run Lake to the Spring Forge Shopping Plaza in Spring Grove, Pennsylvania. (10/28/1998, p. 63). By the Commonwealth's evidence then, if Petitioner was on a boat on the lake for 30 minutes that morning (from 10:20 a.m. until 10:50 a.m.), he would not have even departed Muddy Run Lake to make the one hour drive to Spring Grove, PA until *after* Eller checked out of Kennie's Market at 10:50 a.m., *at the earliest.* He could not have arrived to the Kennie's Market parking lot until after 11:50 a.m., a full hour after Eller checked out of and departed Kennie's Market.

Further, if the Kennie's Market register receipt generated for Eller's purchases at Kennie's Market that morning was accurate—which the parties now agree was the case—Eller's identification of Petitioner as the man she saw when she departed Kennie's Market that morning was then mistaken and the man in the parking lot that Eller saw at 10:50 a.m. was simply not Petitioner.

Despite this, the register receipt generated for Eller's purchase at Kennie's Market that day—which depicted that Eller began her transaction at 10:45 a.m. and completed the transaction at 10:50 a.m.—was provided to the jury at Petitioner's trial with the handwritten phrase "20 minutes off" written on it. (Defendant's Trial Exhibit 6, 11/4/1998). However, any remaining Kennie's Market register receipt rolls showing all of the transactions before and after Eller's transaction went unrequested by Petitioner's trial counsel and undisclosed by the Commonwealth, who was in possession of them, at the time of trial.

To support his contention in Claim 15 of the PCRA Petition, Petitioner retained expert Kenneth Hewitt of WSR Consulting Group, LLC and provided his expert report dated May 30, 2010, filed in the Appendices to Petitioner's *Second Amended PCRA Petition* ("Hewitt Report"). By comparing the times on credit and debit card transactions from register six on October 20, 1997, Kenneth Hewitt established that the internal register clock was indeed accurate.[4] (Expert Report of Kenneth Hewitt, May 30, 2010).

Nearly a decade later, Petitioner retained his current expert, Christienne Genaro of Paygility Advisors. Genaro reviewed the Hewitt Report, independently confirmed its findings and submitted her own expert report (the "Genaro Report") in December 2019. The Genaro Report was also filed in the Appendices to Petitioner's *Second Amended PCRA Petition*. Both the Genaro Report and the Hewitt Report were provided to the Commonwealth; they supply exhaustive analyses to establish that the 10:50 a.m. time stamped on the Kennie's Market register receipt generated by Eller's purchase that morning, was accurate.

[4] Kenneth Hewitt is now deceased.

Almost one year later, in October 2020, the Commonwealth proffered its intended expert witness, Dennis L. Houser and Jeffrey D. Houser of Financial Forensic Consultants, LLC, ("FFC"). After receipt of two extensions for the filing of FFC's expert report via Orders of December 7, 2020 and January 6, 2021, the Commonwealth, on March 2, 2021, conceding the core facts comprising Claim 15, provided this Court with a summary of the initial findings of FFC (the "Houser Summary").

The Houser Summary is comprised of a one-page summary compiled by FFC entitled, "Intended Expert Witnesses' Summary of Findings". In its entirety, the Houser Summary is as follows:

> We would testify that we agree with the conclusions of Christienne Genaro, as detailed in her expert report titled *Witness Transaction Time-Frame Analysis*, dated December 2019.
>
> We would testify that we agree with the conclusions of Kenneth Hewitt, as outlined in his expert report dated May 30, 2010.
>
> We would testify that there is no evidence to support Trooper Mowrey's representation that when he checked the time on register 6 at Kennie's Market on October 25, 1997, the register was discovered to be 20 minutes slow. Further, we would testify that there is no evidence to support Trooper Mowrey's representation that when he checked the other register times on October 25, 1997, each register displayed a different time.
>
> We would testify that the Kennie's Market register journal shows that Sandra Sue Eller completed her checkout at register 6 at 10:50 am, minutes before Eller reportedly observed the defendant driving toward her in front of Kennie's Market, as she was returning her shopping cart to the store. We would testify that Eller's statement is inconsistent with the statement of Clarence Hess (boat rental officer worker at Muddy Run Park), who reported to Troopers David Olweiler and James Bruchak that Dowling rented a boat a [*sic*] Muddy Run Park at 10:20 am, and that he observed Dowling's car leaving the Muddy Run Park parking lot approximately 45 minutes later.
>
> When interviewed by Trooper Mowrey on October 25, 1997, Sandra Sue Eller reported that she was at Kennie's Market on October 20,

> 1997, between 12:00 am [*sic*] and 1:00 pm. We would testify that Eller's statement is contradicted by Kennie's Market register journal data, which shows that Eller completed her checkout at 10:50 am.
>
> When interviewed by Trooper Miller on October 24, 1997, Sandra Sue Eller stated that on October 20, 1997, when she was taking her shopping cart back to Kennie's Market, she observed a car traveling in front of Kennie's, towards the Hardees (east) at approximately 12:00 pm to 12:30 pm. Eller stated that she was unsure of the time, but added that she used her credit card to pay at Kennie's, so the register receipt could be checked. We would testify that Eller's statements are contradicted by Kennie's Market register journal data, which shows that Eller completed her checkout at 10:50 am, and that Eller paid by check, not credit card.

(Commonwealth's Notice of Summary of Intended Expert Witnesses' Findings ("Houser Summary"), 3/2/2021).

The *full* Houser Report, later completed and provided by FFC to the Commonwealth on April 8, 2021, was only subsequently provided to this Court in Petitioner's Appendix accompanying the instant Motion for Resolution of Claim 15. Despite having possession of the full Houser Report on April 8, 2021, the Commonwealth inexplicably requested yet an additional 30 days within which to provide the Houser Report to this Court. That third continuance was granted by the Court on April 21, 2021 since this Court was without knowledge that the Houser Report had already been provided to the Commonwealth by FCC on April 8, 2021.

After Petitioner filed his Motion for Resolution of Claim 15 on May 26, 2021 (the Appendix for which Motion included a copy of the full Houser Report), the Commonwealth again inexplicably requested a *fourth* continuance, requesting 14 *additional* days to provide the full Houser report (which they had in their possession since April 8, 2021). That request was denied and a hearing/argument was held in early

July 2021, wherein the parties argued the merits of whether a hearing on Claim 15 was appropriate.

This Court determined that a hearing on Claim 15 was appropriate. That PCRA Hearing on Claim 15 took place on October 18, 2021. Briefs were subsequently submitted, Oral Argument was held on November 17, 2021, and this Opinion follows.

III. Discussion

In his Motion for Resolution of Claim 15, Petitioner requests that this Court permit Claim 15 to proceed based upon the submissions in light of the Commonwealth's concession that both defense and Commonwealth experts now concur that the man identified by Eller as she emerged from Kennie's Market could not have been Petitioner, as he was then over forty miles away at Muddy Run Lake, based upon evidence presented by the Commonwealth at Petitioner's trial.

Claim 15 raises numerous constitutional violations as a result of trial counsel's failure to put this evidence before the jury, including violations of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (suppression of exculpatory evidence); *Giglio v. United States*, 405 U.S. 150, 153-156 (1972) (knowing failure of prosecutor to correct Eller's and Mowrey's materially false testimony); and *Strickland v. Washington*, 466 U.S. 668 (1984) (trial and appellate counsel ineffectiveness).

This Court has thoroughly considered whether trial counsel provided effective assistance of counsel to Petitioner during his trial. We conclude that he did not.

This Court has also thoroughly and extensively considered whether the Commonwealth participated in the suppression of exculpatory evidence prior to

Petitioner's trial in October and November of 1998, as well as whether the Commonwealth failed to correct testimony of both Eller and Trooper Mowrey which it knew or should have known to be materially false. On both of these issues, we concluded that it has.

A. Ineffective Assistance of Counsel

The ineffectiveness by trial counsel meets the Pennsylvania three-part test as well as the federal two-pronged standard of the Sixth and Fourteenth Amendments.

Under Pennsylvania law, to be eligible for relief under the PCRA, a Defendant must plead and prove by a preponderance of the evidence all of the following:

> (1) That the Defendant has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:
>
> (i) currently serving a sentence of imprisonment, probation or parole for the crime;
>
> (ii) awaiting execution of a sentence of death for the crime;
>
> ...
>
> (2) That the conviction or sentence resulted from one or more of the following:
>
> (i) A violation of the Constitution of this Commonwealth or the Constitution or laws of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> (ii) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
>
> ...
>
> (3) That the allegation of error has not been previously litigated or waived.
>
> (4) That the failure to litigate the issue prior to or during trial, during unitary review or on direct appeal could not have been the result of any rational, strategic, or tactical decision by counsel.

42 Pa.C.S.A. § 9543(a).

The law presumes counsel has rendered effective assistance. *Commonwealth v. Rivera*, 10 A.3d 1276, 1279 (Pa. Super. 2010). "The burden of demonstrating ineffectiveness rests on Appellant." *Id.* To satisfy this burden, Appellant must plead and prove by a preponderance of the evidence that:

> (1) his underlying claim is of arguable merit;
> (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and,
> (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different.

Commonwealth v. Fulton, 830 A.2d 567, 572 (Pa. 2003).

Failure to satisfy any prong of the test will result in rejection of the Petitioner's ineffective assistance of counsel claim. *Commonwealth v. Jones*, 811 A.2d 994, 1002 (Pa. 2002).

Under the federal two-pronged standard of the Sixth and Fourteenth Amendments, pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), a petitioner seeking to establish the ineffective assistance of trial counsel must show: (1) that counsel's performance was deficient because it fell below "an objective standard of reasonableness" and (2) that the deficient performance prejudiced the defense because there is a reasonable probability that, but for counsel's errors, the factfinder would have had a reasonable doubt with respect to the defendant's guilt or the appropriate punishment, *id* at 695; *see also Hinton v. Alabama*, 571 U.S. 263, 275 (2014) (prejudice exists because of reasonable probability that new evidence would lead a jury to have reasonable doubt about defendant's guilt); *Sears v. Upton*, 561 U.S. 945, 955-56 (2010).

The duty to thoroughly investigate and reasonably prepare is fundamental to counsel's role as an advocate. *Andrus v. Texas*, 140 s. Ct. 1875, 1881 (2020). In determining whether counsel's investigation was reasonable, the court assesses not only the evidence known to counsel, but also whether a reasonable attorney would investigate further in light of that known evidence. *Wiggins v. Smith,* 539 U.S. 510, 527 (2003).

Petitioner has met the burden of showing trial counsel's ineffectiveness under both standards.

Petitioner's claim is of arguable merit. Petitioner's conviction relied upon Eller's mistaken eyewitness identification and Trooper Mowrey's false testimony bolstering that identification at trial. In fact, the Pennsylvania Supreme Court, in its previous review of this matter on initial appeal, cited Eller's testimony in support of its affirmance. *Commonwealth v. Dowling*, 883 A.2d 570, 573-74 (Pa. 2005)("Sandra Eller positively identified Appellant as the person who almost struck her with his car as he was leaving the shopping center in which Ms. Myers' art gallery was located."). No other witness identified Petitioner and there was no scientific evidence which connected him to the crime. And, the Commonwealth now concedes that the man Eller saw in the Kennie's Market parking lot on the day of Jennifer Myers' murder could not have been Petitioner.

Counsel's trial strategy was not reasonable. The United States Supreme Court has recently held that the duty to thoroughly investigate and reasonably prepare is fundamental to counsel's role as an advocate. *Andrus v. Texas*, 140 S.Ct. 1875, 1881 (2020). In determining whether counsel's investigation was reasonable, the court assesses not only the evidence known to counsel, but whether a reasonable attorney

would investigate further in light of that known evidence. *Wiggins*, 539 U.S. at 527; *see also Porter v. McCollum*, 558 U.S. 30, 40 (2009)(counsel deficient for "ignoring pertinent avenues for investigation of which he should have been aware").

Trial counsel agreed that he would have presented evidence at trial if he had it and that he had no strategic reason for failing to do so:

> [I]f we were going into trial with expert reports from both sides that agree that Sandra Sue Eller could not have seen Kevin Dowling in the parking lot between 10:45 and 10:50 or 11:20 and 11:30, I would have submitted the expert report indicating that she is—it's impossible that she could have seen him.
> Q. So there would be no strategic reason not to present that.
> A. If I had it before trial, correct.

(PCRA Hearing Transcript, 10/18/21, pp. 36-37.)

Trial counsel failed to request access to readily available exculpatory evidence of which he was fully aware (the register receipt rolls collected by Trooper Mowrey and referenced in his police report). Further, trial counsel failed to investigate the accuracy of the Kennie's Market register receipt generated when Eller checked out from and departed Kennie's Market. Trial counsel then called Trooper Mowrey to testify at Petitioner's trial that the register receipts were "off," not that they were, in fact, correct. Trial counsel failed to challenge or question Trooper Mowrey's "expert" (and false) conclusion pertaining to the receipt generated when Eller checked out from Kennie's Market. He also failed to challenge any of his erroneous conclusions regarding the reliability of all of the Kennie's Market registers.

Had trial counsel requested the register rolls and conducted an investigation—an intention he specifically expressed in a memo he wrote to his investigator just days before selecting a jury in this case, which we will address later in this opinion—he would

have been equipped with objective proof that the person Eller identified outside of the Kennie's Market on the morning of the murder was not Petitioner. Such proof would have shown that Trooper Mowrey's conclusions, as provided to the jury through his testimony at trial, were baseless and patently false. Trial counsel, however, did nothing to further his stated investigative intentions to defend Petitioner, and in fact was the sole reason the testimony of Eller was erroneously bolstered by Trooper Mowrey at Petitioner's trial.

As a result of trial counsel's failure to conduct an investigation, he was unable to establish a reasonable basis for his course of conduct at trial on behalf of Petitioner. The jury at Petitioner's trial was provided with false, uncontested, incorrect and erroneous evidence by Trooper Mowrey, bolstering Eller's mistaken identification of Petitioner, instead of evidence that Petitioner could not have been the man Eller identified outside of Kennie's Market that morning since he was, by the Commonwealth's own evidence, still at Muddy Run Lake at 10:50 a.m. that morning.

Further, at Trial, the Commonwealth was then able to argue, based upon Trooper Mowrey's unchallenged testimony, that the Kennie's Market register receipt should be disregarded as inaccurate and that Petitioner was the one identified by Eller as having almost hit her in the Kennie's Market parking lot at noon. As presented in the Commonwealth's closing argument:

> If we confirm she's at the Rite Aid at 1:00, it's 40 minutes she spends, give another 10 minutes to benefit the Defendant, another 10 minutes to and from, we have an hour. At 12:00, she is, as she initially said the first time she spoke to the police, in the parking lot. She almost gets hit. That is just the time that Mr. Dowling is arriving at Spring Forge.

...

> Now, defense counsel will have you take a look at the printout, and they'll suggest to you that that printout says that she was not there at 12:00.
>
> But you've also heard testimony from Trooper Mowrey that that printout, the time on that clock on that register and every single register in Kennie's is wrong. None of them are consistent with each other, and none of them were right with the actual time. They are wrong.
>
> There is nothing correct about those register receipts...

(NT 11/5/1998, pp. 325-326).

The combination of Commonwealth's faulty closing argument timeline, Trooper Mowrey's erroneous, false testimony and "opinion" that the Kennie's Market registers were all "off," and Eller's mistaken testimony that she saw the Defendant after exiting Kennie's Market that day as presented to the jury, is all information we know to be incorrect. Had trial counsel conducted an investigation into the accuracy of Eller's Kennie's Market receipt—or even simply requested and reviewed any of the receipts before or after Eller's transaction—especially knowing time was a critical issue in this case—he would have been prepared to challenge Trooper Mowrey's baseless opinion testimony and provide accurate information to the jury as to Eller's supposed eyewitness sighting.

The Commonwealth went to great lengths at trial to successfully convince the jury that Eller's trip to Kennie's Market was later than stated on her register receipt. However, the Commonwealth's proffer shows that no credence can be given to this assertion or the baseless testimony of Trooper Mowrey. The Commonwealth now concedes that Trooper Mowrey's testimony had to be wrong.

> [The Commonwealth's experts] would testify that there is no evidence to support Trooper Mowrey's representation that when he

> checked the time on register 6 at Kennie's Market on October 25, 1997, the register was discovered to be 20 minutes slow. Further, [the Commonwealth's experts] would testify that there is no evidence to support Trooper Mowrey's representation that when he checked the other register times on October 25, 1997, each register displayed a different time.

(Houser Summary, 3/2/2021).

Trooper Mowrey was not competent to provide an expert opinion as to the accuracy of the registers at Kennie's Market using only his wristwatch (or however he arrived at that determination).[5] He provided no documentation of any procedures he utilized to conduct his investigation. As such, trial counsel was clearly well-aware of the need to hire an expert to review the register receipts, but he failed to do so. (PCRA Hearing Transcript, 10/18/2021, pp. 69, 74).

On October 14, 1998, just days before he picked a jury in this case, trial counsel faxed a memo to his investigator, Bill Donivan, asking Donivan to secure the name of an expert at the register company. Trial counsel's memo to his investigator just prior to trial directed as follows:

> 1) Go to Kennies and buy something through register #6 then keep the receipt—check the receipt against your watch to see how far the time is off
>
> 2) While at Kennies, meet with the manager, or person in charge. Find out all you can about the clock in the register- how often it is reset, when was it last reset, how long it has been off by approx. 20 minutes; does the time fluctuate between resettings

[5] The Genaro Report indicates that, "there were shortcomings in the methodology used, specifically that the officer(s) obtained no physical evidence of the register time, and the comparison time source is not defined or documented with physical evidence." (Genaro Report, December 2019, p. 3) A conclusion of the Genaro Report is that, "[E]fforts by officers investigating the case to establish that the register times were 'slow' lack substantiation…" (Genaro Report, December 2019, p. 17). The Commonwealth's expert, in its Houser Report, *also* independently arrived at this conclusion stating, "[W]e conclude that the PSP [Pennsylvania State Police] failed to obtain and/or produce any objective verifiable evidence to support their claim that Kennie's register number six, the register reflecting the Eller October 20, 1997 purchase for $53.52, was 20 minutes slow." (Houser Report, April 8, 2021, p. 8).

> 3) Get the manager to refer you to an expert at the register co. to get more information about the clock inside the register. Contact this person and verify resetting times, etc.
>
> *This item is very important. If we can establish the clock was definitely off by 20 minutes on 10/20/97, it will establish Dowling could not have been the guy S. Eller saw at Kennies the morning of 10/20/97…

(Court Exhibit 1, 10/18/2021; PCRA Hearing Transcript, 10/18/2021, pp. 72-73.)

It is clear from that memo that it was his intention to use an expert to show that the register receipts were *"off,"* rather than to show that the receipts were *accurate*. Through that memo, this Court has a clear window into trial counsel's flawed thought process, resulting in an unreasonable trial strategy. Whereby, we have been provided with a unique opportunity to see trial counsel's mindset and thought process during trial preparation.

Trial counsel writes in his memo that he would like to establish at trial that the Kennie's Market register was "off". However, he never conducted this investigation. Trial counsel never secured an expert. Trial counsel also never requested or reviewed the register receipt rolls himself.

When asked about this memo at the Hearing on Claim 15 on October 18, 2021, trial counsel agreed with this Jurist that a "better" trial strategy would have been to show that the 10:50 a.m. time on the register receipt should be accepted by the jury as accurate—as opposed to inaccurate—thereby entirely precluding Eller's eyewitness sighting of Petitioner. (PCRA Hearing Transcript, 10/18/2021, pp. 81-82).

Trial counsel offered no strategic reason for failing to obtain an expert other than to state that he was not "familiar with any defense attorney or the Commonwealth hiring

point-of-sale experts." (PCRA Hearing Transcript, 10/18/2021, p. 49). However, use of such experts was common at the time of Petitioner's 1998 trial. And, in this case, there was nothing novel about the area of expertise; both the Commonwealth's and Petitioner's experts specifically explained the technology as it existed in 1998 using the manuals that existed at the time to show that for each transaction at Kennie's Market, one time stamp was generated by the register clock and a second was generated externally by the authorizing company, Concord ESF, Inc. (Hewitt Report, pp. 9-12).

Trial counsel need only have requested and reviewed the register receipt rolls himself to easily see Eller's check transaction (identifiable by her personal "Gold Card" store loyalty number) was sandwiched between two credit card transactions—whose times were independently verified by third party financial institutions outside of Kennie's Market. The last credit card/debit card transaction before Eller's transaction was conducted at 10:45 a.m. and the first credit card/debit card transaction after Eller's transaction was conducted at 11:04 a.m. So, even *if* Kennie's Market registers were "off" and erroneously stamped the "wrong" store time on Eller's receipt that day, Trial counsel himself would have been able to easily determine an accurate, independently verifiable small window of time within which Eller actually checked out of Kennie's Market, simply by requesting the register receipt rolls and reviewing credit card transaction before and after Eller's own check transaction.[6]

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[6] Americans began using credit cards over 70 years ago, as the credit card gained widespread use among many Americans in the 1950s through 1970s. While we claim no expertise on the history of Electronic Funds Transfers (EFTs) made with credit and debit cards, like many Americans in 1998, we utilized credit and/or debit cards and understood then how they operate. It is generally accepted and understood that the credit card is just that—a line of credit extended by a financial institution which provides approval for transactions performed by the holder of the card. This generated a time stamp from that institution and usually even a separate, time-stamped receipt for the shopper to sign. (https://money.usnews.com/credit-cards/articles/the-history-of-credit-cards, January 26, 2021; https://www.creditcards.com/credit-card-news/history-of-credit-cards/ , January 27, 2022).

Trial counsel provided deficient, unreasonable representation in critical areas of the pretrial, trial and direct appeal proceedings; and confidence in the outcome is undermined as a result, establishing prejudice. *Strickland v. Washington,* 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005).

Had trial counsel set out to show that the register receipts were, in fact, accurate, the jury would have had no doubt that Petitioner was not in the Kennie's Market parking lot when Eller emerged from Kennie's Market at 10:50 a.m. Because trial counsel did not conduct any investigation and, in fact, merely relied upon the same theory of the case proffered by the Commonwealth (that the receipt time was "off"), he was quite unprepared to defend Petitioner by providing accurate facts to the jury, and, worse yet, he was neither inclined nor able to challenge the baseless and false "opinion" testimony of Trooper Mowrey.

Trial counsel acknowledges that he did not conduct or follow through with any pre-trial investigation or preparation by requesting the receipt rolls and reviewing the register receipts from Kennie's Market. (PCRA Hearing Transcript, 10/18/2021, pp. 35, 75, 77-78). Trial counsel testified that he did not receive or request *any* documentation regarding any investigation conducted by Trooper Mowrey.

The record is clear that trial counsel, despite knowing the importance of the register receipts and discussing it with his investigator, never hired his own expert and was apparently relying on the wholly unsupported and admittedly inaccurate conclusions of Trooper Mowrey that five days after the murder, all of the registers were

inaccurate. In addition to never hiring an expert as he had discussed and intended, trial counsel never even requested the actual register rolls to review himself. Trial counsel's inaction was patently unreasonable.

Had he done any of these things, it is clear there is a reasonable probability that the outcome of the trial would have been different; Petitioner was prejudiced. It is reasonably probable that had trial counsel conducted *any* pretrial investigation or prevented false testimony from being presented to the jury at trial—at least one juror would have found a reasonable doubt regarding Petitioner's guilt or innocence.

B. Suppression of Exculpatory Evidence by the Commonwealth and Commonwealth Failure to Correct Materially False Testimony it Knew or Should Have Known was False

The Commonwealth has an obligation to disclose to the defense information that is favorable to the guilt or punishment of the defendant. *Brady v. Maryland*, 373 U.S. 83 (1963). This obligation requires that the Commonwealth disclose information that is exculpatory as well as impeaching. *Smith v. Cain*, 565 U.S. 73 (2012). That obligation extends to evidence that could be used to "attack...the thoroughness and even the good faith of the investigation." *Kyles v. Whitley,* 514 U.S. 419, 445 (1995). The standard under *Brady* is whether "disclosure of the suppressed evidence to competent counsel would have made a different result reasonably probable." *See Kyles*, 514 U.S. at 441.

The register receipt rolls were collected by Trooper Mowrey from Kennie's Market on October 25, 1997, five days after the murder of Jennifer Myers at her nearby gallery. According to Trooper Mowrey's Homicide Investigation Action Report, "[F]our

register receipt rolls were collected and placed into evidence...including the roll containing Ms. ELLER'S [*sic*] purchase". The Commonwealth reviewed all of these register rolls to locate and isolate the specific receipt depicting Eller's Kennie's Market transaction. However, outside of Eller's individual single-transaction receipt, the Commonwealth never disclosed the register roll containing Eller's transaction or any of the remaining register rolls to the defense. (NT 10/18/21, pp. 34-35).

Although the seizure of the register rolls was noted in the police report and the Commonwealth would have had to pour through them to locate and isolate Eller's individual receipt, the Commonwealth failed to provide these exculpatory documents to counsel. Disclosure of the rolls by the Commonwealth would have clearly revealed that Eller's "eyewitness sighting" of Petitioner could not have taken place and Eller would have been impeached as a witness. The Commonwealth's failure to provide these exculpatory documents violated the standard established by *Brady*.

The Commonwealth was aware that the timing of Eller's identification of Petitioner was a very important issue in this case. At trial the Commonwealth established a theory of the case and successfully convinced the jury that Eller emerged from Kennie's Market over an hour after the time stamped on her register receipt, when in fact she had not.

In his closing argument to the jury, the Commonwealth prosecutor emphasized both Eller's eyewitness identification of Petitioner and the time that it took place.

> [Eller] looked at you, ladies and gentlemen. She raised her right hand and testified and told you, there is no doubt in my mind that that is the man that almost hit me, I will never forget his eyes, I looked right at him...

(NT 11/5/1998, p. 326).

Arguing and utilizing a reverse timeline of events at Petitioner's trial, the Commonwealth insisted to the jury that Eller saw Petitioner at noon upon leaving Kennie's Market that day, when in fact it was clear from her register receipt that she departed Kennie's Market at approximately 10:50 a.m. (NT 11/5/1998, pp. 325-326).

To further support the baseless assertion that Eller left Kennie's Market at noon that day, the Commonwealth utilized the false testimony elicited of Trooper Mowrey that his investigation revealed the Kennie's Market register receipts were inaccurate. However, it would have been readily apparent to the jury that Eller's observations took place outside of Kennie's Market at approximately 10:50 a.m. had the register rolls been properly disclosed by the Commonwealth and effectively presented by trial counsel at trial.

The Commonwealth may not knowingly use false evidence, including false testimony, to obtain a tainted conviction. *Commonwealth v. Hallowell,* 383 A.2d 909, 911 (Pa. 1978) (*citing Napue v. Illinois*, 360 U.S. 264 (1959)). It is well-settled that a conviction obtained through the knowing use of materially false evidence and testimony may not stand. *Id.; see also United States v. Agurs*, 427 U.S. 97, 103 (1976); *Giglio v. United States*, 405 U.S. 150, 153-56 (1972). A prosecuting attorney has an affirmative duty to correct the testimony of a witness which he knows to be false. *Hallowell*, 383 A.2d at 911. False testimony is considered material—and a new trial is required—if it could "in any reasonable likelihood have affected the judgment of the jury." *Commonwealth v. Wallace*, 455 A.2d 1187, 1190-91 (Pa. 1983).

The Commonwealth and defense experts have now agreed that Trooper Mowrey's testimony could not have been correct at trial. They have agreed that each of

the Kennie's Market registers were accurate on the day of the murder because the internal clock had not been reset (Hewitt Report, pp. 4, 10); the internal clocks on each register were controlled by one master terminal so they each always displayed the same time as one another (Hewitt Report, pp. 4, 10; Genaro Report, pp. 3, 15). They agree that Trooper Mowrey would *not* have seen different times on each register upon inspection at Kennie's Market on October 25, 1997.[7] Despite this, at Petitioner's trial, the jury was presented with evidence by the Commonwealth that Eller's receipt was wrong; and the Commonwealth urged the jury to accept Trooper Mowrey's testimony that the time on Eller's receipt was wrong. In light of the forgoing discussion in this opinion, however, the Commonwealth concedes it was the testimony given by Trooper Mowrey which had to be wrong. The Commonwealth concedes the testimony of Trooper Mowrey was false as the Commonwealth's expert agrees with both defense experts. (Houser Summary, 3/2/2021).

The Commonwealth knew, under its theory, that the time Eller checked out of the market was critical. In fact, the Commonwealth conducted two separate "investigations" in this regard. The Commonwealth knew, or should have known, that Eller's identification of Petitioner had to be mistaken. Upon collection of the undisclosed register rolls, the Commonwealth was aware that this information impeached Eller, and the testimony of Eller and Trooper Mowrey regarding the accuracy of the time on Eller's receipt was false. Nevertheless, at trial, the Commonwealth relied upon the incompetent, unscientific and undocumented investigation of Trooper Mowrey in an

[7] As concluded by all three experts who provided reports in this matter (one of which was retained by the Commonwealth), no basis was provided for Trooper Mowrey's testimony as to the time accuracy on the registers.

attempt to bolster Eller's testimony and convince the jury that her receipt was inaccurate.

Further, the Commonwealth's presentation of this false evidence is a violation of the well-settled law in *Napue* as there is more than a reasonable likelihood that this false testimony could have affected the judgment of the jury. *Id.* At 103. There is a reasonable likelihood that the Commonwealth's presentation of false evidence as to the accuracy of Eller's eyewitness identification of Petitioner as the man she saw when departing Kennie's Market could have affected the judgment of the jury. *Napue* at 103.

Failure to disclose is material if, under *Brady*, there is a reasonable probability the outcome would have been different if the prosecution had disclosed the evidence, *Cone v. Bell*, 556 U.S. 449, 470 (2009), or if, under *Napue* there is a reasonable likelihood it could have affected the judgment. *Kyles*, 514 U.S. at 434. A reasonable probability does not mean the defendant would more likely than not have received a different verdict with the evidence, only that a likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Id.* False testimony is material and necessitates a new trial if it could "in any reasonable likelihood have affected the judgment of the jury." *Wallace*, 455 A.2d at 1190-91.

The materiality of the undisclosed evidence and false testimony under both *Brady* and *Napue* necessitates relief. Petitioner's conviction was the result of the jury's acceptance of Eller's mistaken identification, bolstered by Trooper Mowrey's false testimony. Had the register receipt rolls been disclosed by the Commonwealth and effectively presented by trial counsel, it would have been apparent to the jury that Eller's transaction at Kennie's Market and her observations upon departing the store occurred

within minutes of 10:50 a.m., not noon. Thus, her identification of Petitioner as the person she saw near the crime scene before Jennifer Myers was murdered, had to be mistaken. And, it would have been apparent to the jury that the testimony of Trooper Mowrey that the registers at Kennie's Market were "off," was entirely incorrect and false.

Petitioner is entitled to a new trial as a result of trial counsel's ineffective assistance and failure to investigate under the *Strickland* analysis above, and for the Commonwealth's failure to comply with its obligations under *Brady.* Petitioner is also entitled to relief under the more relaxed *Napue* standard as the Commonwealth knew, or should have known, that Eller and Trooper Mowrey's testimony regarding the accuracy of the Kennie's Market register receipts was false and there was a reasonable likelihood that the false testimony could have affected the judgment of the jury.

IV. Conclusion

Petitioner's *Motion for Resolution of Claim 15 on Submissions in Light of the Commonwealth's Concession that the Sole Eyewitness' Identification of Petitioner Must Have Been Mistaken* is granted and Petitioner is entitled to a new trial.

Under Pa. R.A.P. 341, an immediate appeal of this Order will facilitate resolution of the entire case; and disposition of the remaining claims is deferred pending determination of any Appeal filed by the parties from this Court's Order.