IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Respondent	:	
v.	:	No. CP-22-CR-1544-1996
LORENZO JOHNSON, Petitioner	:	

COMMONWEALTH OF PENNSYLVANIA'S RESPONSE TO LORENZO JOHNSON'S THIRD SET OE COUNSELED PCRA CLAIMS

The Commonwealth of Pennsylvania ("the Commonwealth"), through undersigned counsel, hereby respectfully files this consolidated answer and legal memorandum addressing the factual averments and legal arguments contained in Petitioner Lorenzo Johnson's ("Johnson") third set of counseled PCRA claims.

I. INTRODUCTION

A. Background

As this Court is aware, the current proceedings relate to the brutal, treacherous, and senseless slaying of 24-year-old Taraja Williams ("the victim") in an alley on the 1400 block of Market Street in Harrisburg, Pennsylvania in the early morning hours of December 15, 1995. On March 17, 1997, following a three-day jury trial presided over by the Honorable Todd Hoover, Johnson was convicted of first-degree murder and criminal conspiracy to commit murder. The Court sentenced Johnson the same day to mandatory life imprisonment on the first-degree murder conviction. Johnson's co-defendant, Corey Walker ("Walker"), was also convicted in the same proceedings of first-degree murder and criminal conspiracy and received

the same sentence. The theory presented to the jury by the Commonwealth was that Walker fired the gun that killed the victim and that Johnson was an accomplice and co-conspirator to the crime.

On direct appeal, Johnson, with the assistance of his trial counsel,[1] argued that the verdicts were not supported by sufficient evidence and were against the weight of the evidence. The Pennsylvania Superior Court ("Superior Court"), in a 2-1 decision, affirmed the judgment of sentence on the merits and rejected Johnson's claims. Johnson filed a petition for allowance of appeal in the Pennsylvania Supreme Court, which was denied on February 26, 1999.

On December 1, 1999, Johnson filed in this Court a *pro se* petition for relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541 *et seq.* He later filed a counseled amended PCRA petition authored by new PCRA counsel[2] that advanced two grounds for relief: (1) that he had been denied his state and federal due process rights per the *Brady* rule because the Commonwealth had failed to disclose the existence of a plea agreement in connection with Commonwealth witness Victoria Doubs' ("Doubs") testimony at Johnson's trial; and (2) that he had been denied his federal and state constitutional right to counsel due

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[1] Johnson was initially represented by retained counsel Jerry Russo, Esquire. Following the preliminary hearing, he was represented by appointed counsel Edward Brandenstein, Esquire of the Dauphin County Public Defender's Office. Prior to trial, Deanna Wagner (later Muller) of that office was appointed to replace Mr. Brandenstein in that capacity, and she represented Johnson in pre-trial, trial, and post-trial proceedings through to the completion of his direct appeal.

[2] Johnson's appointed counsel for the PCRA proceedings was Francis Socha, Esquire.

to numerous alleged failings on the part of his trial/direct appeal counsel ("the first set of PCRA claims").

Following an evidentiary hearing, this Court denied the first set of PCRA claims on February 14, 2002. The Superior Court affirmed on the merits this Court's determination regarding the myriad counsel ineffectiveness claims. However, the Superior Court ruled that the allegation of a due process *Brady* violation caused by an undisclosed plea agreement had not been raised on direct appeal as required by the governing statute and therefore was waived and unreviewable at the PCRA stage. Johnson filed a petition for allowance of appeal of that ruling with the Pennsylvania Supreme Court, which was denied on April 2, 2004.

Johnson filed a second PCRA petition on May 20, 2002 – while the first one was pending -- that raised a claim of after-discovered evidence, namely that Commonwealth witness Brian Ramsey ("Ramsey") had recanted his trial testimony indicating that he observed Johnson standing on the street outside the Midnight Special Bar ("the bar") shortly after the murder occurred.[3] This Court dismissed that petition without a hearing on May 26, 2005, holding that: (1) Johnson failed to establish the threshold requirements for relief based upon recantation testimony; (2) the proffered statement did not truly qualify as a recantation; (3) the proffered statement was wholly lacking in credibility; and (4) Ramsey was not a crucial witness for the Commonwealth and was arguably of some assistance to the defense.

[3] Attorney Socha filed the second PCRA petition. Thereafter, the Court appointed Jeffrey Engle, Esquire to replace Mr. Socha as PCRA counsel.

This determination was affirmed by the Superior Court on June 15, 2006. Johnson did not seek review of that order in the Pennsylvania Supreme Court.

On July 19, 2004, Johnson filed a *pro se* petition for *habeas corpus* relief in the United States District Court for the Middle District of Pennsylvania ("the District Court") pursuant to 28 U.S.C. § 2254. Thereafter, with the assistance of his current counsel, Michael Wiseman, Esquire, he filed a memorandum of law in support of his habeas petition that advanced three grounds for relief: (1) that the evidence presented at trial was insufficient to support the guilty verdicts, thereby violating petitioner's federal due process rights per *Jackson v. Virginia*, 443 U.S. 307, 324 (1979); (2) that the Commonwealth failed to disclose the existence of a plea agreement with its trial witness Victoria Doubs, thereby violating petitioner's federal due process rights per *Brady v. Maryland*, 373 U.S. 83 (1963); and (3) that trial counsel's performance in connection with this Court's jury instructions constituted a violation of Johnson's federal Sixth Amendment right to effective assistance of counsel.

On March 31, 2008, following lengthy litigation, the District Court issued a thoughtful and comprehensive 97-page memorandum opinion denying habeas corpus relief. The Court found that each of the claims advanced by Johnson was without merit.[4] Johnson persuaded the District Court to issue a certificate of

[4] More specifically, with regard to the *Brady* claim, the District Court found that: (a) the claim had been procedurally defaulted and was ineligible for review absent a showing of cause and prejudice; (b) although it was a very close call, the Commonwealth failed to disclose to the defense prior to trial circumstances that may have given rise to a subjective hope on the part of Doubs that her testimony at trial would help her in an unrelated case, thereby establishing cause to excuse the

appealability on the evidentiary sufficiency issue, and on May 15, 2008, Johnson filed a counseled notice of appeal on that issue in the United States Court of Appeals for the Third Circuit ("the Third Circuit").

The issue accepted for review by the Third Circuit was whether Johnson's federal due process rights per *Jackson* had been violated by a verdict not supported by sufficient evidence, and more precisely, whether the determination on that point by this Honorable Court and the Pennsylvania appellate courts was objectively unreasonable. On October 4, 2011, following briefing and argument, a divided 2-1 panel of the Third Circuit issued its judgment reversing the District Court's denial of habeas relief. In a non-precedential opinion, the panel majority found that the state courts' adjudication of Johnson's first-degree murder and criminal conspiracy charges violated Johnson's federal due process rights under *Jackson* because the evidence of record was insufficient to prove beyond a reasonable doubt that Johnson had an intent to kill the victim. According to the panel majority, the factual inference of an intent to kill that was drawn by the state courts from the trial record was unreasonable because it did not "more likely than not flow from" the direct evidence presented at trial. Therefore, the majority concluded that no rational trier of fact could possibly have found proof beyond a reasonable doubt of the requisite intent to kill.

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default; and (c) notwithstanding this, the suppression of this information was not material and did not cause Johnson to suffer any prejudice, thereby precluding excusal of the default and rendering the *Brady* claim non-meritorious.

The Commonwealth thereafter sought rehearing *en banc* in the Third Circuit, and that request was denied, as was a request by the Commonwealth to submit an Opinion of the United States Supreme Court that had been filed after the request for reargument and militated in favor of denying habeas corpus relief. On November 16, 2011, the Third Circuit issued its mandate in the case, which the Commonwealth determined to appeal. Subsequently, per a motion filed by Johnson's counsel and following briefing, an evidentiary hearing, and argument, the District Court entered an order on January 17, 2012 which, among other things, immediately released Johnson from custody and held in abeyance the issuance of a writ of habeas corpus until the case was considered by the United States Supreme Court.

On February 21, 2012, the Commonwealth filed a petition for writ of certiorari in the United States Supreme Court seeking review and reversal of the Third Circuit's decision. On May 29, 2012, the United States Supreme Court filed a **unanimous** *per curiam* Opinion and Order granting the Commonwealth's petition, summarily reversing the Third Circuit Court of Appeals' grant of habeas corpus relief and reinstating Johnson's state court judgment of sentence of life imprisonment for first-degree murder. The High Court chastised the Third Circuit for ignoring governing Supreme Court precedent and applying the governing law in a patently invalid manner. In the words of the Court:

> Affording due respect to the role of the jury and the state courts, we conclude that the evidence at Johnson's trial was **not nearly sparse enough to sustain a due process challenge under *Jackson*. The evidence was sufficient to convict Johnson as an accomplice and a co-conspirator in the murder of Taraja Williams.**

Coleman v. Johnson, 132 S.Ct. 2060, 2065 (2012) (emphasis added). Johnson's counsel sought reconsideration by the United States Supreme Court; that request was denied. Thereafter, in conformity with an order of the District Court, Johnson voluntarily returned to state prison to continue serving his sentence.[5]

On August 5, 2013, more than 14 years after his judgment of sentence became final on direct appeal and more than a year after being returned to prison by the Highest Court in the Land, Johnson filed another PCRA petition in this Court advancing 27 new PCRA claims. These claims aver the existence of after-discovered evidence -- including witnesses who have purportedly been in hiding for years who can now exonerate him and reveal nefarious misconduct by evil law enforcement officers -- that he argues invalidate his judgment of sentence and entitle him to a new trial.

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[5] Regrettably, Johnson and his counsel have, in their filings with this Court, to the public, and to the press, disrespectfully mischaracterized the nature of the Supreme Court's determination, inaccurately describing the High Court's decision as "based on narrow legal technicalities regarding the application of the federal habeas corpus statute" (August 5, 2013 PCRA Petition at 2). Quite to the contrary, the Supreme Court Justices unanimously held that the Third Circuit had reached the wrong result by **fundamentally misapplying the governing law pursuant to *Jackson* as well as pursuant to the governing statute.** According to the Justices, the Third Circuit abused its power by ignoring the well-established statutory and Supreme Court decisional authority that requires federal courts, in sufficiency of the evidence habeas corpus reviews per *Jackson*, to show proper respect and deference to the legal rulings of state courts and the factual findings of juries, which means reviewing the rulings of state court judges on federal questions for objective reasonableness and refraining from brazenly substituting their own subjective opinions and interpretations about the factual record for the determinations of state court juries. Indeed, the United States Supreme Court's Opinion constituted a great victory for the principle of federalisms and the rule of law that are enshrined in the United States Constitution.

On March 3, 2014, Johnson filed a counseled supplement to the PCRA petition advancing an additional claim of after-discovered evidence and prosecutorial misconduct. On August 7, 2014, Johnson filed a counseled second supplement to the PCRA petition advancing three more claims of after-discovered evidence and prosecutorial misconduct. On November 12, 2014, Johnson filed a counseled third supplement to the PCRA petition alleging one more claim of after-discovered evidence and prosecutorial misconduct.

The Commonwealth requested, and was graciously granted by this Court, sufficient time to conduct a thorough investigation into the multitude of explosive new claims.

B. Johnson's Latest Claims

Johnson presents 32 wide-ranging claims which he contends constitute grounds for a new trial (collectively, "the third set of PCRA claims"). In an effort to assist the Court, these claims have been summarized by the Commonwealth in a document entitled "Table of Third Set of PCRA Claims," which has been attached hereto as Exhibit A. The exhibit identifies each separate claim by its own number, and the Commonwealth uses this numbering system to address Johnson's claims in this brief.[6]

[6] Johnson's filings present his claims in multiple parts that often contain subparts comprising more than one allegation of error. The Commonwealth has separated out each individual claim for ease of reference and to enable cogent discussion of the issues raised.

C. The Commonwealth's Investigation in Response to the Claims

In light of the profoundly serious nature of the allegations now being advanced by Johnson and his counsel - essentially that new and previously-unavailable information has emerged that Johnson was in New York at the time of the murder and was framed by law enforcement officials -- the Commonwealth felt it was necessary to undertake a serious, meaningful, and good faith investigation of Johnson's claims notwithstanding the facial untimeliness of the filings. The Commonwealth of Pennsylvania would **never** want an innocent man to serve a prison sentence for criminal offenses he did not commit. By the same token, the Commonwealth would **never** want to be duped by lies and cynical manipulation of the criminal justice system into releasing from prison a man guilty of murder and lawfully convicted of that crime. Because truth is the cornerstone of our judicial system and because the prosecutor has a sacred obligation to transcend the role of a mere courtroom adversary and to ensure that justice is done in every case, *see Commonwealth v. Willis*, 46 A.3d 648, 669 (Pa. 2012), the Commonwealth has approached Johnson's third set of PCRA claims with an open and cautious mind and with a genuine desire to see that right prevails.

Accordingly, multiple agents of the Office of Attorney General ("OAG") were assigned to assist undersigned counsel in investigating Johnson's allegations of impropriety by former Commonwealth agents and of alleged new and previously unavailable evidence firmly establishing Johnson's innocence. Those agents conducted an extensive investigation which included reviewing all of the relevant

files and information currently in the Commonwealth's possession as well as attempting to interview approximately 30 different individuals who were either identified by Johnson in his filings or who were believed by the agents to have knowledge relevant to the claims. The agents successfully interviewed 20 of those people.[7] **Eight persons identified by Johnson as crucial to his claims -- Lillian Alexander, James Bowman, Adrian Fluellen, Clifton Germaine, Lashawnya Jackson, Brian Ramsey, Theresa Thomas, and Freddie Williams -- refused to meet or talk with OAG agents about the case.** The agents made repeated efforts in person and via telephone to speak with these witnesses but were repeatedly ignored and/or rebuffed.[8]

In evaluating Johnson's claims, undersigned counsel and the OAG agents reviewed, for each of these 30 individuals, prior statements to police; prior testimony at the preliminary hearing, prior testimony at trial, and/or prior testimony at the PCRA evidentiary hearing; purported post-conviction statements given to Johnson's counsel and/or investigator; any statements given to OAG

[7] OAG agents interviewed the following individuals: Christopher Abruzzo, Marlon Anderson, Carla Brown, Eric Chambers, Richard Curtis, Tina Darden, William Davenport, Jesse Davis, Laura Davis (now Green), Robert Dillard, Kevin Duffin, Trent France, Wendell Harris, Shawn McArthur, Gary Miller, Jr., Towana Poteat, Suquan Ripply, Nakia Wallace, Carl Williams, and Freddie Williams.

[8] Throughout the period of the Commonwealth's investigation, counsel for the parties have been in contact. Counsel for Johnson agreed to a request by the Commonwealth that he communicate with the affiants referenced in the PCRA filings and encourage them to cooperate with OAG's investigation. To the best of undersigned counsel's knowledge, Johnson's counsel fulfilled that promise, and yet these eight witnesses refused to cooperate, answer questions, or confirm the veracity of and elaborate upon the averments contained in their purported affidavits.

investigators during the course of the investigation; criminal history information; and any other relevant information that could be gleaned about them. The evaluation also required a review and digestion of the voluminous record created in the state and federal courts over the past 18 years as well as a review of the correspondence sent and pleadings, briefs, and opinions filed over the years as well as the legal authority that governs the current claims.

D. The Commonwealth's Conclusions

Following a thorough investigation and a careful, open-minded analysis of Johnson's claims based on all available information, the Commonwealth has concluded that Johnson is not entitled to relief from his judgment of sentence. From a procedural standpoint, this Court lacks the authority to consider the claims because: (1) they are facially untimely; (2) with the exception of claims 29 and 32, Johnson has failed to **plead with the required specificity** (much less prove) that a statutory exception to the time limitation is applicable to any of the claims; (3) Johnson has failed to verify the truth of the factual averments contained in his filings as required by the governing law; and (4) Johnson has failed to make a strong *prima facie* showing that a miscarriage of justice may have occurred in this case which would permit review of a third round of PCRA claims. On the merits, the pleadings are disquieting but ultimately anemic.

Rather than present compelling new and previously unattainable evidence of his innocence and/or of true misconduct by the police and/or prosecutor that undermined in fundamental fashion the fairness of his judicial proceedings, Johnson

has presented a wide-ranging buffet of alarming criticisms of the Commonwealth's handling of this case which, **upon meticulous examination with a view towards identifying a legitimate basis for PCRA relief**, evaporate into insubstantiality. The claims are replete with exaggeration and hyperbole. Many of them rely on assertions that are misleading, implausible, self-serving, and frivolous. Sadly, some of the claims are demonstrably fraudulent. Johnson's resort to distortion in his pleadings severely undermines the credibility of any of his claims.

Furthermore, Johnson's everything-but-the-kitchen sink approach is a telling sign that the third set of PCRA claims -- which follow on the heels of the High Court's May 2012 ruling reinstating Johnson's convictions and sending him back to prison -- is an act of desperation rather than a principled stand for justice. If persuasive information exists proving that Johnson has been wronged by the system, why has it been cloaked in and obscured by a myriad of patently non-meritorious claims?

Moreover, if such information exists, why will not the very individuals cited by Johnson in his filings as the reliable sources of that information come forward and confirm this to Commonwealth investigators? What are the statistical odds that so many witnesses who allegedly hold keys to Johnson's exoneration would simultaneously secrete their vital knowledge from Johnson when he needed it most and simultaneously render themselves undiscoverable for years? What are the odds that all of these individuals would simultaneously come forward voluntarily all of these years later in such a coordinated manner? For that matter, why did all of these

witnesses decide to come forward with purportedly new information at this precise time, 19 years after Johnson was committed to prison?

The Commonwealth has discovered that the pending claims: (1) cynically exploit the fact that an important Commonwealth witness is now deceased, attacking her credibility with full knowledge that she cannot respond to the new allegations at a PCRA hearing and will not be available for the Commonwealth in the event that a new trial is granted; (2) heavily rely on a defense "investigator's" affidavit representing what other witnesses told her -- i.e. blatant hearsay -- that has been expressly and vigorously repudiated by one of those witnesses as utterly false and fraudulent; (3) present information out of context; (4) disregard and/or mischaracterize documented facts of record; (5) disregard and/or mischaracterize governing law; (6) rely heavily on the statements of at least one facially non-credible witness; and (7) frequently mischaracterize the meaning of statements made by individuals. If the truth is on Johnson's side, why is it necessary to dissemble?

Perhaps most disturbing, however, is the fact that Johnson has recklessly unleashed the hounds of defamatory hell, publicly accusing and branding the career prosecutor and career police detective primarily responsible for his prosecution and conviction as corrupt and malevolent. The facts available to the Commonwealth's investigators simply do not support these allegations. Notably, only one of the proffered witnesses allegedly claiming to have been coerced by the lead criminal investigator into thwarting Johnson's defense at trial was willing to talk with OAG agents (Suquan Ripply), and **he testified at Johnson's trial, had a full opportunity**

to tell the jury about such coercion, and in fact told the jury that the officer had utilized threats to coerce him into changing his statement to investigators! The others have refused to come forward and substantiate Johnson's charges, raising the specter of vile character assassination masquerading as moral indignation.

The Commonwealth has given serious, good faith consideration to the substance of the arguments presented by Johnson and has concluded that the averments cannot serve as a basis for the grant of PCRA relief. For the reasons explained below, the Commonwealth requests that the Court do the following:

(1) Dismiss the third set of PCRA claims without an evidentiary hearing on the grounds that the Court lacks jurisdiction to consider them because they are facially untimely and: (a) with the exception of claims 29 and 32, Johnson has failed to plead with the requisite specificity the grounds upon which he claims that he has satisfied an exception to the time bar for each claim (without prejudice to Johnson's right pursuant to Pa.R.Crim.P. 905(B) to amend his pleadings to cure this defect); and (h) Johnson's specifically-pleaded contentions that claims 29 and 32 satisfy 42 Pa.C.S.A. § 9545(b)(1)(ii) are meritless;

(2) Dismiss and deny the third set of PCRA claims without an evidentiary hearing on the grounds that Johnson has failed to provide the required verification that his pleadings are truthful and accurate (without prejudice to Johnson's right pursuant to Pa.R.Crim.P. 905(B) to amend his pleadings to cure this defect);

(3) Dismiss and deny the third set of PCRA claims without an evidentiary hearing on the grounds that Johnson has failed to make a strong *prima facie* showing that a miscarriage of justice may have occurred which would permit review of his third set of PCRA claims;

(4) Dismiss and deny the third set of PCRA claims without an evidentiary hearing on the grounds that Johnson's delay in filing the 32 pending claims is unwarranted and severely prejudices the Commonwealth's ability: (a) to respond to a portion of the claims; and (b) to retry Johnson in the event that a new trial would be granted;[9]

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[9] As noted *infra*, prior to the Court reaching this determination, a hearing on this specific issue would have to be conducted following the filing by the

(5) If and only if the following conditions are satisfied, conduct an evidentiary hearing and permit development of the record on claim 28: (a) the Court finds that it has jurisdiction to consider the claim because an exception to the time limitation has been properly pleaded via an amended pleading and proved in a hearing on the issue of timeliness; (b) the Court finds that Johnson has amended his pleadings to satisfy the statutory pleading verification requirement; (c) the Court finds that Johnson has made the required threshold showing of a miscarriage of justice; and (d) the Court finds that Johnson is not precluded from proceeding on his claims due to unwarranted delay in filing them that has severely prejudiced the Commonwealth.

(6) Ultimately, deny all of Johnson's claims as lacking in merit.

II. LAW GOVERNING THE CLAIMS

Johnson's claims implicate a number of significant legal issues. A review of the relevant legal principles is appropriate and necessary before wading into the claims themselves.

A. PCRA Time Restrictions

As the Court is obviously aware, the PCRA statute contains the following time limitation:

> **(b) Time for filing petition.--**
>
> (1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:
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> > (i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution

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Commonwealth of a motion to dismiss on this basis. *See Commonwealth v. Renchenski*, 52 A.3d 251 (Pa. 2012). The Commonwealth intends to file such a motion.

> or laws of this Commonwealth or the Constitution or laws of the United States;
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> (ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence; or
>
> (iii) the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.
>
> (2) Any petition invoking an exception provided in paragraph (1) shall be filed within 60 days of the date the claim could have been presented.

42 Pa.C.S.A. § 4595(b).

A court lacks jurisdiction to hear an untimely PCRA petition, and therefore **must first determine whether the petition is timely before it proceeds to consider the merits of the claims.** *Commonwealth v. Williams*, --- A.3d ----, 2014 WL 7102767, *4 (Pa. Dec. 15, 2014). When a PCRA petition is facially untimely, it is the petitioner's burden to allege and prove that one of the timeliness exceptions applies. *Id.* "Furthermore, any PCRA petition filed under a timeliness exception must be filed within 60 days of when the petition could have first been presented. [T]he 60-day rule requires a petitioner to plead and prove that the information on which he relies could not have been obtained earlier, despite the exercise of due diligence." *Id.* (citations and internal quotation marks omitted).

The PCRA statute's timeliness requirements for filing a petition are mandatory and jurisdictional in nature, are strictly construed, and the courts are

absolutely prohibited from addressing the merits of issues raised in an untimely-filed petition. *Commonwealth v. Taylor*, 67 A.3d 1245, 1248-1249 (Pa. 2013); *Commonwealth v. Abu-Jamal*, 941 A.2d 1263, 1267-68 (Pa. 2008). The courts have no power to grant equitable exceptions to the filing deadlines; equitable tolling does not apply except to the extent that it is articulated in the statute itself. *Commonwealth v. Robinson*, 12 A.3d 477, 480 (Pa. Super. 2011). **When a petitioner's claims fall outside the one-year time bar and he has failed to plead and prove that one of the three exceptions applies, the claims shall be dismissed by the court without reaching the merits.** *Taylor*, 67 A.3d at 1249. The purpose of this rule is to accord some measure of finality to the collateral review process. *Medina*, 92 A.3d at 1215.

B. PCRA Pleading Requirements

The Pennsylvania Supreme Court has stated emphatically that the pleading requirements of the PCRA are mandatory and that a petition which fails to satisfy those requirements **will not be reviewed on the merits but instead will be dismissed.** *Commonwealth v. Rivers*, 786 A.2d 923 (Pa. 2001); *see also Commonwealth v. Wilson*, 861 A.2d 919 (Pa. 2004) (pleading requirements of PCRA statute must be enforced); *Commonwealth v. Chazin*, 873 A.2d 872 (Pa. Super. 2005) (PCRA claims must satisfy elements set forth in PCRA statute). In simple and straightforward language, the Court has stated that "[w]e will no longer address the merits of claims which do not comply with the requirements of the PCRA." *Rivers*, 786 A.2d at 933. This rule applies to capital cases. *Id.* at 923.

Pennsylvania Rule of Criminal Procedure 902 sets forth the required content of a PCRA petition, which includes, *inter alia*, the following:

> (11) the grounds for the relief requested;
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> (12) the facts supporting each such ground that:
>
> > (a) appear in the record, and the place in the record where they appear; and
> >
> > (b) do not appear in the record, and an identification of any affidavits, documents, and other evidence showing such facts;
>
> (13) whether any of the grounds for the relief requested were raised before, and if so, at what stage of the case;
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> (14) **a verification by the defendant that:**
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> > **(a) the facts set forth in the petition are true and correct to the best of the defendant's personal knowledge or information and belief and that any false statements therein are made subject to the penalties of the Crimes Code, 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities; and**
> >
> > (b) the attorney filing the petition is authorized by the defendant to file the petition on the defendant's behalf;

Pa.R.Crim.P. 902(A)(11)-(14) (emphasis added).

Petitions that lack **particularity** or that fail to allege **specific facts** that would support the granting of relief are defective and subject to dismissal. Comment to Pa.R.Crim.P. 905. An undeveloped argument that fails to meaningfully discuss how the governing standard applies to specific facts is defective and does not satisfy a petitioner's burden of establishing that he is entitled to relief. *See Commonwealth v. Bracey*, 795 A.2d 935, 940 n. 1 (Pa. 2001).

By way of example only, all three prongs of an ineffective assistance of counsel claim ("arguable merit," "no objectively reasonable basis," and "prejudice") must be articulated **with sufficient detail and depth of analysis to constitute a legitimately-developed claim rather than mere boilerplate verbiage.** *Commonwealth v. Natividad*, 938 A.2d 310, 324 (Pa. 2007); *Bracey*, 795 A.2d at 940 n. 1; *Commonwealth v. Pierce*, 786 A.2d 203, 221 (Pa. 2001). In the unambiguous words of our High Court, "A PCRA petitioner must exhibit a concerted effort to develop his ineffectiveness claim and may not rely on boilerplate allegations..." *Natividad*, 938 A.2d at 322 (emphasis added).

By way of further example, in the context of an after-discovered evidence claim like the instant one, a petitioner fails to meet his burden merely by alleging that a particular fact was previously unknown to him. Rather, he must **plead with specificity**: (1) why his asserted fact could not have heen ascertained by him earlier with the exercise of due diligence; and (2) how he has satisfied the statutory "60-day rule" in connection with that claim. *Commonwealth v. Taylor*, 933 A.2d 1035, 1041 (Pa. Super. 2007). Similarly, a petitioner alleging a *Brady* violation and the government interference exception to the statutory one-year time bar must articulate **with specificity**: (1) when and how he discovered the *Brady* material that the Commonwealth allegedly withheld from him; (2) why this information, with the exercise of due diligence, could not have been obtained earlier; and (3) the basis upon which he relies in arguing that he presented the claim within 60 days of becoming aware of its existence. *Commonwealth v. Breakiron*, 781 A.2d 94, 98 (Pa.

2001). **Boilerplate claims that an exception to the time bar applies are not sufficient to trigger the right to an evidentiary hearing.**

When a PCRA petition is "defective" as originally filed, a trial court must notify the petitioner of such defects, provide an opportunity to correct the defects through the filing of an amended petition, and specify the time within which such amendment must occur. Pa.R.Crim.P. 905(B). A petitioner's failure to rectify the defects may result in dismissal of the petition. Pa.R.Crim.P. 905(B). For purposes of this rule, the term "defective" refers to petitions that are **inadequate, insufficient, or irregular as pleaded,** for example due to a lack of particularity, a failure to comply with the "contents" requirement of Pa.R.Crim.P. 902, or a failure to allege facts that would support the granting of relief. Comment to Pa.R.Crim.P. 905.

C. PCRA Requirements for Second and Subsequent Petitions

Courts will not entertain a second or subsequent request for PCRA relief unless the petitioner makes a strong *prima facie* showing that a miscarriage of justice may have occurred. *Commonwealth v. Marshall*, 947 A.2d 714, 719 (Pa. 2008). To make such a showing, the petitioner must demonstrate "either that the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes for which he was charged." *Commonwealth v. Ali*, 86 A.3d 173, 177 (Pa. 2014); *Commonwealth v. Allen*, 732 A.2d 582, 586 (Pa. 1999).

D. Dismissal Due to Prejudicial Delay in Filing PCRA Claims

"In certain instances of substantial delay [in advancing PCRA claims], the prejudice suffered by the Commonwealth as a result of that delay, as demonstrated at an evidentiary hearing, justifies dismissal of an original or amended petition." *Commonwealth v. Renchenski*, 52 A.3d 251, 260 (Pa. 2012). This rule is clearly articulated in the PCRA statute itself:

> Even if the petitioner has met the requirements of subsection (a), the petition shall be dismissed if it appears at any time that, because of delay in filing the petition, the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner. A petition may be dismissed due to delay in the filing by the petitioner only after a hearing upon a motion to dismiss. This subsection does not apply if the petitioner shows that the petition is based on grounds of which the petitioner could not have discovered by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth.

42 Pa.C.S.A. § 9543(b).

The appellate courts have found this provision to be applicable when unwarranted delay by the petitioner in raising his claims results in an inability of the Commonwealth to proceed due to the loss of key evidence, including the fading memories of witnesses and the unavailability of key witnesses. *See Commonwealth v. Weatherill*, 24 A.3d 435 (Pa. Super. 2011); *Commonwealth v. Markowitz*, 32 A.3d 706 (Pa. Super. 2011); *Commonwealth v. Bell*, 706 A.2d 855 (Pa. Super. 1998); *Commonwealth v. Young*, 695 A.2d 414 (Pa. Super. 1997); *Commonwealth v. McAndrews*, 520 A.2d 870 (Pa. Super. 1987). This is particularly true when a defendant intends to introduce a new defense theory at the second trial that went unaddressed at the

first one, a situation which renders the reading of an unavailable witness' testimony from the transcript of the first trial completely unavailing:

> The Commonwealth lost two files and a key witness. Over twenty years have lapsed since Appellant committed this crime, and we concur with the trial court's observation that this lengthy period will necessarily have affected the memories of any remaining Commonwealth witnesses. The prosecution should not be required to present its evidence through reading a cold trial transcript when Appellant would have the ability to present live witnesses. Furthermore, Appellant refused to relinquish the right to present new defense theories and witnesses, and the Commonwealth would not be able to respond to such a defense.

Weatherill, 24 A.3d at 440.

E. Disposition of PCRA Claims Without a Hearing

Beyond a dismissal for lack of jurisdiction, inadequate pleadings, and prejudicial delay, a court may also deny PCRA claims without a hearing where: (1) there are no issues concerning any material fact; (2) the petitioner is not entitled to relief as a matter of law; and (3) no purpose would be served by any further proceedings. Pa.R.Crim.P. 907(1); *Commonwealth v. Morrison*, 878 A.2d 102 (Pa. Super. 2005); *Commonwealth v. Johnson*, 841 A.2d 136 (Pa. Super. 2003).

Even where there is a genuine issue of material fact, a court may deny a PCRA claim without a hearing if it determines that the filing is "patently frivolous" or that the facts alleged would not, even if true, entitle defendant to relief under the law. Comment to Pa.R.C.P. 907; *Commonwealth v. Holmes*, 905 A.2d 507 (Pa. Super. 2006); *Commonwealth v. Mays*, 675 A.2d 724 (Pa. Super. 1996); *Commonwealth v. Brimage*, 580 A.2d 877 (Pa. Super. 1990).

When a court summarily determines upon initial review that a PCRA petition should be dismissed and/or denied in its entirety, the petitioner is entitled to notice of the intent to dismiss, the court's reasons therefore, and an opportunity to respond within 20 days. Pa.R.Crim.P. 907(1); *Commonwealth v. Albrecht*, 720 A.2d 693, 709-710 (Pa. 1998). The court thereafter may dismiss or permit the proceedings to continue. *Id.* Furthermore, a court may dismiss/deny some PCRA claims while conducting an evidentiary hearing on others. Pa.R.Crim.P. 907(3).

F. "After-Discovered Evidence"

The Pennsylvania Supreme Court has clearly articulated the four-prong test to be applied when determining whether an after-discovered evidence claim is sufficient to justify the grant of a new trial:

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

Commonwealth v. Pagan, 950 A.2d 270, 292 (Pa. 2008); *see also Commonwealth v. Randolph*, 873 A.2d 1277, 1283 (Pa. 2005); *Commonwealth v. Dennis*, 715 A.2d 404, 415 (Pa. 1998); *Commonwealth v. McCracken*, 659 A.2d 541, 545 (Pa. 1995); *Commonwealth v. Padillas*, 997 A.2d 356, 363 (Pa. Super. 2010).[10]

[10] Remarkably, and perhaps not coincidentally, Johnson's third set of PCRA claims omits any reference to this governing legal authority, and Johnson fails to address how this mandatory legal standard applies to his particular factual allegations and the underlying record.

In 2010, the Superior Court elaborated on this standard and provided an excellent summary and synthesis of the related decisional authorities governing this subject:

> **The test is conjunctive; the defendant 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.** *See Pagan, supra; Commonwealth v. Rivera*, 939 A.2d 355, 359 (Pa.Super.2007), *appeal denied*, 598 Pa. 774, 958 A.2d 1047 (2008).
>
> To obtain a new trial based on after-discovered evidence, **the petitioner must explain why he could not have produced the evidence in question at or before trial by the exercise of reasonable diligence.** *Commonwealth v. Jones*, 266 Pa.Super. 37, 402 A.2d 1065, 1066 (1979). A defendant may unearth information that the party with the burden of proof is not required to uncover, so long as such diligence in investigation does not exceed what is reasonably expected. *Commonwealth v. Brosnick*, 530 Pa. 158, 166, 607 A.2d 725, 729 (1992). *See also Argyrou v. State*, 349 Md. 587, 709 A.2d 1194, 1202–03 (1998) **(holding due diligence requires that defendant act "reasonably and in good faith to obtain the evidence, in light of the totality of the circumstances and facts known to [him]"). Thus, a defendant has a duty to bring forth any relevant evidence in his behalf.** *Commonwealth v. Johnson*, 228 Pa.Super. 364, 323 A.2d 295, 296 (1974). A defendant cannot claim he has discovered new evidence simply because he had not been expressly told of that evidence. *Commonwealth v. Crawford*, 285 Pa.Super. 169, 427 A.2d 166, 175 (1981). Likewise, **a defendant who fails to question or investigate an obvious, available source of information, cannot later claim evidence from that source constitutes newly discovered evidence.** *Commonwealth v. Chambers*, 528 Pa. 558, 583, 599 A.2d 630, 642 (1991), *cert. denied*, 504 U.S. 946, 112 S.Ct. 2290, 119 L.Ed.2d 214 (1992). The concept of reasonable diligence is particularly relevant **where the defendant fails to investigate or question a potential witness with whom he has a close, amicable relationship.** *See Commonwealth v. Parker*, 494 Pa. 196, 200, 431 A.2d 216, 218 (1981) (holding defendant did not exercise reasonable diligence where he failed to learn before or during trial of girlfriend's confession to murder for which he was on trial). *See also United States v. Vigil*, 506 F.Supp.2d 571, 578 (D.N.M.2007) (observing defendant likely knew content of new witness' testimony where defendant had long-standing personal relationship with witness, worked with witness, and

witness was member of defendant's family); *Commonwealth v. Weichell*, 446 Mass. 785, 847 N.E.2d 1080, 1092 (2006) (stating defendant who learned of exculpatory witness testimony after trial did not exercise due diligence, where he maintained contact with witness and circumstances should have alerted him to existence of evidence claimed to be newly discovered). **Absent a plausible explanation for the failure to discover the evidence earlier, evidence obtained after trial should not be deemed "after-discovered"**; to allow the defendant to claim information actually or constructively within his knowledge and available to him is after-discovered. *Crawford, supra* **(stating to invalidate conviction because defendant was not expressly told facts he already believed to exist would be tantamount to allowing evidence within the knowledge of defendant and available to him at trial can still be considered "after-discovered").** *See also United States v. Sims*, 72 Fed.Appx. 249, 252, 2003 WL 21500184, *2 (6th Cir., 2003) (reiterating that under federal law, "where a witness who has indicated to the defendant either an unwillingness to testify truthfully at trial, or has indicated an intention to assert the Fifth Amendment privilege against self-incrimination at trial, but later supplies an affidavit exonerating the defendant of the offense, the affidavit is merely newly available evidence, but it is not newly discovered evidence"; rejecting post-trial affidavit exonerating defendant as newly discovered evidence, reasoning **defendant "should not be allowed to sandbag the fairness of the trial by withholding or failing to seek out material, probative evidence and then collaterally attacking his conviction").**

[Before a court grants a new trial on the basis of after-discovered evidence, **the defendant must also show the alleged after-discovered evidence is not just corroborative or cumulative of the evidence already presented at trial.** *See Pagan, supra.* Whether new evidence is corroborative or cumulative in this context depends on the strength of the other evidence supporting the conviction. *Commonwealth v. McCracken*, 540 Pa. 541, 549–50, 659 A.2d 541, 545 (1995). New evidence to support a defendant's claim of innocence is less likely to be deemed cumulative if the conviction is based largely on circumstantial evidence. *Id. See also State v. Cline*, 275 Mont. 46, 53, 909 P.2d 1171, 1176 (1996) (holding post-verdict discovery of third-party confession to crime was not cumulative, where defendant's conviction rested almost entirely on circumstantial evidence). **Where the new evidence, however, supports claims the defendant previously made and litigated at trial, it is probably cumulative or corroborative of the evidence already presented.** *See Rivera, supra; Commonwealth v. Nocero,*

399 Pa.Super. 346, 582 A.2d 376, 381 (1990), *appeal denied*, 527 Pa. 643, 593 A.2d 416 (1991).

Further, **a defendant seeking a new trial must demonstrate he will not use the alleged after-discovered evidence solely to impeach the credibility of a witness.** *See Pagan, supra.* **"Whenever a party offers a witness to provide evidence that contradicts other evidence previously given by another witness, it constitutes impeachment...."** *Commonwealth v. Weis*, 416 Pa.Super. 623, 611 A.2d 1218, 1229 (1992). **Where eyewitness identification tied the defendant to the crime charged and the defendant challenged the identification in his trial, third-party testimony exculpating the defendant impeaches the eyewitness.** *Commonwealth v. Moore*, 534 Pa. 527, 561, 633 A.2d 1119, 1136 (1993), *cert. denied*, 513 U.S. 1114, 115 S.Ct. 908, 130 L.Ed.2d 790 (1995) (rejecting witness' statement against penal interest as reliable after-discovered evidence, where sole purpose of statement was to impeach testimony connecting defendant to crime).

Finally, **before granting a new trial, a court must assess whether the alleged after-discovered evidence is of such nature and character that it would likely compel a different verdict if a new trial is granted.** ***See Pagan, supra; Moore, supra.*** In making that determination, a 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. *Parker, supra* (stating conflicting accounts are inherently unreliable and would not compel different verdict in new trial). *See also Commonwealth v. Washington*, 592 Pa. 698, 717, 927 A.2d 586, 597 (2007) (stating exculpatory accomplice testimony should be viewed with suspicion where accomplice has already been tried and has nothing to lose); *Argyrou, supra* at 1204 (noting "cases that have addressed [newly-discovered evidence] have focused not simply on the credibility of the person offering the exculpatory evidence, but on the credibility or trustworthiness of the evidence itself, as well as the motive, or other impeaching characteristics, of those offering it"); *Hopkins v. Commonwealth*, 20 Va.App. 242, 456 S.E.2d 147, 151 (1995) (holding after discovered evidence was insufficient to support the grant of a new trial where verdict was "based on uncontradicted, corroborated, and reaffirmed eyewitness testimony" and evidence is "self-contradictory, perjured at least in part, and plainly untrustworthy of belief"); *State ex rel. Smith v. McBride*, 224 W.Va. 196, 681 S.E.2d 81, 95–96 (2009) (noting due to strength of evidence against defendant, third party's confession was unlikely to change verdict).

Padillas, 997 A.2d at 363-365 (emphasis added).

A new trial is not warranted under this rule if the evidence at issue was known by, available to, or could have been obtained through reasonable diligence by the defendant prior to trial. *Commonwealth v. Glover*, 419 A.2d 681, 682-683 (Pa. Super. 1980); *Commonwealth v. Johnson*, 323 A.2d 295 (Pa. Super. 1974); *Commonwealth v. Hayward*, 263 A.2d 330 (Pa. Super. 1970). **If the identity of a witness was known to the defendant at the time of trial, the witness' affidavit cannot later be regarded as after-discovered evidence on which a new trial may be based.** *Hayward*, 263 A.2d at 331.

Although a witness' recantation of testimony that he previously gave at trial may be a form of after-discovered evidence, it is well-established that the courts review such evidence with a great deal of skepticism because recantation testimony is inherently extremely unreliable. *See Commonwealth v. Birdsong*, 24 A.3d 319, 327 (Pa. 2011); *Commonwealth v. Abu-Jamal*, 720 A.2d 79, 99 (Pa. 1998). "[R]ecantation testimony is "exceedingly unreliable," and "there is no less reliable form of proof, **especially when it involves an admission of perjury**." *Birdsong*, 24 A.3d at 327 (emphasis added).

E. *Brady* Violations

The *Brady* rule is well-established:

> To prove a *Brady* violation, Appellant must demonstrate that: (1) the prosecution concealed evidence; (2) which evidence was either exculpatory or impeachment evidence favorable to him and; (3) he was prejudiced by the concealment. *Commonwealth v. Paddy*, 569 Pa. 47, 800

> A.2d 294, 305 (Pa.2002); *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). In order to prove prejudice, Appellant must show a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Commonwealth v. Burke*, 566 Pa. 402, 781 A.2d 1136, 1141 (Pa.2001). Stated differently, the undisclosed evidence must be "material to guilt or punishment." *Paddy*, 800 A.2d at 305. Further, "[i]mpeachment evidence which goes to the credibility of a primary witness against the accused is critical evidence and it is material to the case whether that evidence is merely a promise or an understanding between the prosecution and the witness." *Commonwealth v. Strong*, 563 Pa. 455, 761 A.2d 1167, 1175 (Pa.2000). **Mere conjecture as to an agreement between the prosecution and witness is insufficient to establish a *Brady* violation, however.** *Commonwealth v. Chmiel*, 612 Pa. 333, 30 A.3d 1111, 1131 (Pa.2011). Finally, we note that **"[t]here is no *Brady* violation when the appellant knew, or with reasonable diligence, could have uncovered the evidence in question."** *Commonwealth v. Paddy*, 609 Pa. 272, 15 A.3d 431, 451 (Pa.2011).

Commonwealth v. Bomar, --- A.3d ----, 2014 WL 6608963, *5 (Pa. Nov. 21, 2014) (emphasis added); *see also Commonwealth v. Davido*, -- A.3d --, 2014 WL7182086, * 21 (Pa. Dec. 15, 2014) ("[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish materiality in the constitutional sense.") (citation omitted).

III. THE THIRD SET OF PCRA CLAIMS SHOULD BE DISMISSED IN THEIR ENTIRETY WITHOUT AN EVIDENTIARY HEARING ON THE GROUNDS THAT THE COURT LACKS JURISDICTION TO CONSIDER THEM BECAUSE THEY ARE FACIALLY UNTIMELY AND:

(A) WITH THE EXCEPTION OF CLAIMS 29 AND 32, JOHNSON HAS FAILED TO PLEAD WITH THE REQUISITE SPECIFICITY THE GROUNDS UPON WHICH HE CLAIMS THAT HE HAS SATISFIED AN EXCEPTION TO THE TIME BAR FOR EACH CLAIM (WITHOUT PREJUDICE TO JOHNSON'S RIGHT PURSUANT TO PA.R.CRIM.P. 905(B) TO AMEND HIS PLEADINGS TO CURE THIS DEFECT); AND

(B) JOHNSON'S CONTENTIONS THAT CLAIMS 29 AND 32 SATISFY 42 PA.C.S.A. § 9545(B)(1)(II) ARE MERITLESS.

1. Claims Other Than Nos. 29 and 32

Johnson filed his third set of PCRA claims during the period of August 5, 2013 through November 12, 2014. Hence, they were all filed more than 14 years after his judgment of sentence became final on direct appeal on May 27, 1999. All of the claims are thus facially untimely and must be dismissed unless Johnson both pleads and proves to this Court, **with specificity on a claim-by-claim basis**, that one of the three statutory exceptions applies and that the claim was raised within 60 days of the date that it could have first been presented. *See* 42 Pa.C.S.A. § 4595(b).

With the exception of claims 29 and 32, Johnson has utterly failed to do this. Instead, for these claims, Johnson has merely invoked the time bar exceptions in the most general manner with non-specific boilerplate assertions that the information at issue was not discoverable previously through the exercise of reasonable diligence or that government interference prevented earlier discovery and that the claims

were raised within 60 days of their discovery (Aug. 5, 2013 PCRA Petition at 5-6, 12-13). Apparently Johnson and his counsel believe -- or at least want this Court to believe -- that the **mere invocation** of the statutory exceptions without detailed factual elaboration on a claim-by-claim basis entitles him to an evidentiary hearing on each claim to address the question of timeliness as well as the merits.

To the contrary, the law requires Johnson to **plead with factual specificity** his basis for alleging that each and every separate and distinct claim satisfies: (1) the government interference exception per 42 Pa.C.S.A. § 4595(b)(i) ("the GIE") or the after-discovered evidence exception per 42 Pa.C.S.A. § 4595(b)(ii) ("the ADE"); and (2) the requirement that a claim be raised within 60 days of the date it could have been presented ("the 60 day rule"). *See Breakiron*, 781 A.2d at 98 (petitioner alleging a *Brady* violation and the government interference exception to the statutory one-year time bar must articulate with specificity when and how he discovered the *Brady* material that the Commonwealth allegedly withheld from him; why this information could not have been obtained earlier; and the basis upon which he relies in arguing that he presented the claim within 60 days of becoming aware of its existence); *Taylor*, 933 A.2d at 1041 (petitioner alleging after-discovered evidence exception must plead with specificity why his asserted fact could not have been ascertained by him earlier with the exercise of due diligence and how he has satisfied the statutory "60-day rule" in connection with that claim); *Bracey*, 795 A.2d at 940 n. 1 (undeveloped argument regarding how the governing standard applies to the specific facts fails to satisfy petitioner's burden). The law is clear that Johnson

"must exhibit a concerted effort to develop his ineffectiveness claim and may not rely on boilerplate allegations..." *Natividad*, 938 A.2d at 322.

Johnson's petition -- except for claims 29 and 32 -- relies on vague, boilerplate pronouncements in an attempt to bypass the pleading rules and get right to an evidentiary hearing. *See* Aug. 5, 2013 PCRA Petition at 12-13 (asserting that because he has averred that the statutory exception provisions apply for each claim, "Petitioner must be afforded an opportunity to prove the timeliness of his Petition"). This is false. The law is quite clear that a petitioner must properly PLEAD his claims before he may be given an opportunity to properly PROVE them in an evidentiary hearing. *Rivers*, 786 A.2d 923; *Wilson*, 861 A.2d 919; *Chazin*, 873 A.2d 872. In the words of our Supreme Court, "petitioner must not only state what his issues are, but also he must demonstrate in his pleadings...how the issues will be proved [before being given an opportunity to prove them]." *Rivers*, 786 A.2d at 927.

Because these claims fail to satisfy the governing pleading specificity/particularity requirement, they must be dismissed. However, prior to dismissal, Pa.R.Crim.P. 905(B) requires the Court to provide notice to Johnson of this defect in his pleadings, order him to amend the pleadings to address the defect, and indicate the timeframe in which such written amendment must be filed. Failure to amend and/or failure to cure the defect will compel dismissal of the claims.

2. Claim 29

Johnson has alleged with some specificity the particular grounds upon which he relies to claim satisfaction of an exception to the time-bar for claim 29. He avers

that on June 13, 2014, the Commonwealth provided him with a copy of the first eight pages of the police report that was generated in this case. According to Johnson, the Commonwealth had never previously produced pages one through eight of the police report to Johnson and neither he nor any of his counsel past or present had ever seen them prior to June 13, 2014. Johnson filed this claim on August 7, 2014. **Notably, the claim was not accompanied by affidavits from Johnson's prior attorneys Mr. Brandenstein, Ms. Wagner, Mr. Socha, and/or Mr. Engle corroborating Mr. Wiseman's contention that Johnson's file never contained these pages. It is also remarkably and disturbingly coincidental that the first eight pages of the police report list the names, addresses, telephone numbers, and other identifying information about people interviewed by the police, some of which Johnson now claims were unavailable to him prior to and at the time of trial.**[11]

The Commonwealth agrees that on June 13, 2014, in an act of good faith and a gesture of good will by undersigned counsel, the Commonwealth provided a copy of pages one through eight of the police report to Attorney Wiseman. This act was not required by any governing legal authority, and was done because: (1) Mr. Wiseman had indicated both in the court filings and in communications with undersigned counsel that the files he had inherited from Johnson's prior chain of

[11] If the eight pages were in fact turned over to the defense prior to trial as averred by the Commonwealth, Johnson's new claims relating to Jesse Davis, Adrian Fluellen, Brian Ramsey, Scott Holloway, and Tina Darden cannot be timely because the identity and contact information for each of these individuals was known by the defense prior to trial.

attorneys were incomplete and did not contain those specific pages;[12] and (2) **these pages of the report had been produced and/or made available for inspection and copying by the Commonwealth to Johnson's counsel prior to trial.**

The latter fact is borne out by the transcript for the PCRA hearing conducted in 2001, during which Attorney Wagner testified that the prosecutor had made the Commonwealth's entire file available to her prior to trial:

> Q: Now, in that regard, is it fair to say that you were given complete discovery by Mr. Abruzzo about this case, it was an open file?
>
> A: Yes. I went to his office and he pretty much let me look at everything.

(3/7/01 NT at 39).

Because the documentation at issue was made available to Ms. Wagner prior to trial, Johnson cannot satisfy the ADE exception to the one-year time limitation and the 60-day pleading requirement. Moreover, it is illogical and defies common sense to suggest that the Commonwealth disclosed **the paginated** police report to the defense prior to trial but withheld the first eight pages, and that Johnson's trial counsel (both Attorney Brandenstein and later Attorney Wagner) failed to notice -- or simply accepted the fact -- that the critically important document they received from the Commonwealth detailing the Commonwealth's criminal investigation of the murder **began on page nine.** *See* copy of police report, attached as Exhibit G.

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[12] In Johnson's counsel's own words, "[t]he file in counsel's possession has passed through the hands of a number of attorneys, and **accordingly it is far from complete**" (Aug. 7, 2014 Second Supplement to PCRA Petition at 2 n.2) (emphasis added).

In light of the foregoing, the Court can reliably conclude that the pages of the police report in question were disclosed to Johnson prior to trial, and therefore that he has failed to satisfy ADE exception to the statutory time-bar, including the requirement that the claim be raised within 60 days of the date that it first could have been presented.

3. Claim 32

Claim 32 alleges that the Commonwealth violated the *Brady* rule by failing to disclose prior to trial the 10-page statement given by Carla Brown to Detective Duffin on March 27, 1996 ("the Brown statement"). According to Johnson, on September 12, 2014, the Commonwealth provided the Brown statement to Johnson's counsel, and this was the very first time that the statement had ever been disclosed to him or his attorneys. Johnson filed this claim on November 12, 2014.

Johnson's representation to the Court that the Brown statement was never disclosed or made available to him prior to September 2014 is patently false. In addition to the prosecutor making his entire file available to Ms. Wagner prior to trial, *see supra*, the following facts expose the fraudulent nature of claim 32: (1) Detective Duffin's police report was provided by District Attorney Abruzzo to Attorney Brandenstein on October 7, 1996, i.e. prior to the trial that occurred between March 13, 1997 and March 17, 1997; *see* copy of letter regarding pretrial discovery attached as Exhibit B; (2) Detective Duffin's police report specifically states that he interviewed Carla Brown on March 27, 1996, describes the nature of the statement Brown gave to him at that time, and clearly indicates with the

language "SEE ATTACHED STATEMENT" that the Brown statement is attached to his report, *see* copy of report attached as Exhibit C;[13] (3) at Johnson's preliminary hearing, Johnson's counsel reflected a specific awareness of this March 27, 1996 interview and the nature of Brown's statement to police, an awareness that was unambiguously revealed by his cross-examination of Carla Brown questioning her directly about her comments to the police on March 27, 1996, *see* copy of preliminary hearing transcript attached as Exhibit D; and (4) at the PCRA hearing in 2001, Attorney Wagner testified that at the time of trial, she was aware of Brown's prior inconsistent statements, including a prior statement given to Detective Duffin, *see* copy of March 7, 2001 PCRA hearing transcript at 8-9 attached as Exhibit E. **In light of these indisputable facts, Johnson's representation to this Court that neither he nor any of his counsel were aware of the Brown statement prior to September 12, 2014 is incredibly reckless at best and unethical at worst.**[14]

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[13] Exhibit C is contained within Exhibit G.

[14] At the time that Johnson's counsel filed the August 5, 2013 PCRA petition, he was fully aware of Carla Brown's testimony at Johnson's preliminary hearing (which included specific references by both Brown and Attorney Russo to her statement to Detective Duffin on March 27, 1996). This fact is revealed by current counsel's own assertions to this Court. *See* August 5, 2013 PCRA Petition at 16 n. 10 (characterizing Brown's testimony at the preliminary hearing). No less significantly, Johnson's counsel's November 12, 2014 filing specifically refers to Brown's testimony at Johnson's preliminary hearing. *See* Nov. 12, 2014 Third Supplement to PCRA Petition at 4. Having read the preliminary hearing transcript, which reflects Attorney Russo's awareness of both the existence and content of the Brown statement, Johnson's current counsel's allegation that the Commonwealth hid the existence and content of the statement is inexplicable and deeply troubling.

Putting the foregoing information aside, Johnson's *pro se* PCRA petition filed on December 1, 1999 recites the following:

> Detective Curtis went to interview Carla Brown. During this first interview Ms. Brown denied any knowledge of the shooting (NT, 114-114). **About one week later Detective Duffin interviewed Ms. Brown a second time, and Ms. Brown's memory seemed to become restored...**

(Dec. 1, 1999 *Pro Se* PCRA Petition at 4) (emphasis added). This pleading -- which is consistent with Brown's testimony at the preliminary hearing -- reveals that on **December 1, 1999**, Johnson himself was aware of the Brown statement. Yet he waited more than 14 years to file this particular (fraudulent) claim.

In light of the foregoing, this Court must conclude that Johnson has failed to satisfy the ADE exception to the statutory time-bar for this claim, including the requirement that the claim be raised within 60 days of the date that it first could have been presented.

IV. THE THIRD SET OF PCRA CLAIMS SHOULD BE DISMISSED WITHOUT AN EVIDENTIARY HEARING ON THE GROUNDS THAT JOHNSON HAS FAILED TO PROVIDE THE REQUIRED VERIFICATION THAT HIS PLEADINGS ARE TRUTHFUL AND ACCURATE (WITHOUT PREJUDICE TO JOHNSON'S RIGHT PURSUANT TO PA.R.CRIM.P. 905(B) TO AMEND HIS PLEADINGS TO CURE THIS DEFECT).

As noted *supra*, a PCRA petition must contain a verification by the petitioner himself that the facts set forth are true and correct, that he understands any false statements made therein are subject to criminal penalties pursuant to 18 Pa.C.S.A. § 4904, and that he has authorized his attorney to file the petition on his behalf. Neither Johnson's counseled PCRA petition filed in August 2013 nor any of the three

subsequently-filed counseled supplements contain the mandatory verification required by Pa.R.Crim.P. 902(A)(14). PCRA claims are not to be cavalierly advanced, but instead are "extraordinary assertions that the system has broken down" which must conform to the governing statutes and rules. *Rivers*, 786 A.2d at 929.

For this reason alone, the Court must dismiss the third set of PCRA claims. *See Rivers*, 786 A.2d 923; *Wilson*, 861 A.2d 919; *Chazin*, 873 A.2d 872. However, prior to dismissal, Pa.R.Crim.P. 905(B) requires the Court to provide notice to Johnson of this defect in his pleadings, order him to amend the pleadings to address the defect, and indicate the timeframe in which such written amendment must be filed. Failure to amend and/or failure to cure the defect will compel dismissal of the claims.[15]

V. THE THIRD SET OF PCRA CLAIMS SHOULD BE DISMISSED BECAUSE JOHNSON HAS FAILED TO MAKE OUT A STRONG *PRIMA FACIE* CASE THAT A MISCARRIAGE OF JUSTICE MAY HAVE OCCURRED.

As noted *supra*, because this is Johnson's third set of PCRA claims, he is not entitled to judicial review of them unless he makes a strong *prima facie* showing that a miscarriage of justice may have occurred. *Marshall*, 947 A.2d at 719. The level of proof required is that which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence. Black's Law Dictionary, Fifth Ed. (1979). Therefore,

[15] If Johnson files an amended set of pleadings that contain the required verification, and if those amended pleadings contain false statements of fact, the Commonwealth may charge and prosecute Johnson with violations of 18 Pa.C.S.A. § 4904. Because Johnson is serving a sentence of life imprisonment, this fact is likely to have little or no utility in connection with the Court's search for the truth in this case.

Johnson cannot obtain consideration of his claims by this Court unless his pleadings give the Court sufficient reason to believe "either that the proceedings which resulted in his conviction were so unfair that a miscarriage of justice occurred which no civilized society could tolerate, or that he was innocent of the crimes for which he was charged." *Ali*, 86 A.3d at 177; *Allen*, 732 A.2d at 586.

For the following reasons (explicated in more detail *infra*), Johnson has failed to meet this burden, and the Court should therefore deny merits consideration on this basis:

> (1) Johnson's purported new evidence in support of his alibi/Duffin coercion claim relies on a proffered statement by Suquan Rippley, who **testified at Johnson's trial and explicitly told the jury that he was in New York with Johnson at the relevant time and had been coerced by Duffin into changing his statement**, and a proffered statement by Attorney Wiseman's investigator Shara Davis that purports to relate what Lillian Alexander and Theresa Thomas told her at some point. To the extent that Johnson relies on the Shara Davis affidavit, it is **pure inadmissible hearsay** and has obviously been filed because Alexander and Thomas are unwilling to say what Johnson wants them to say;
>
> (2) To the extent that Johnson relies on a purported second recantation by Brian Ramsey of his trial testimony indicating that he knowingly and intentionally lied under oath to the jury about numerous relevant facts including his observation of Johnson at the crime scene shortly after the murder, this Court previously considered in a prior PCRA proceeding Ramsey's first "recantation" indicating that he did not actually observe Johnson at the crime scene shortly after the murder and found not only that the statement was not a recantation but also that Ramsey's averments were **wholly lacking in credibility.** Ramsey's continually changing version of events renders him patently unreliable;
>
> (3) To the extent that Johnson relies on the proffered statement by defense investigator Shara Davis purporting to relate what William Davenport and Towana Poteat told her at some point, this is **pure**

inadmissible hearsay and has obviously been filed because Davenport and Poteat are unwilling to say what Johnson wants them to say;[16]

(4) With the exception of claims 29 and 32, Johnson has failed to plead specific facts that explain to the Court why the information upon which the claims are advanced was not previously discoverable through the exercise of reasonable diligence and/or how the government interfered with the discovery of the information; and document that the claims were filed within 60 days of the date that the claims could first have been presented;

(5) Claims 29 and 32 are directly contradicted by the existing record;

(6) Claim 22 alleging that a *Brady* violation occurred because the Commonwealth failed to disclose that witness Gary Miller, Jr. "had been implicated in a police killing when his car was used to rob the store where the officer was shot and ammunition had been found in the car" is **patently frivolous.** The averment that because Mr. Miller's car was used (apparently by others) in the commission of a crime, Mr. Miller is "implicated" in the crime which in turn triggers a duty of disclosure under Brady is preposterous;

(7) the claims averring ineffective assistance of counsel are **boilerplate and undeveloped**; and

(8) the remainder of the claims rely on exaggeration, hyperbole, and distortion.

In light of the foregoing, Johnson has failed to make a "strong *prima facie* showing" that a miscarriage of justice may have occurred.

[16] As noted *infra*, Davenport was interviewed by Commonwealth investigators and told them that the Davis affidavit is false and misleading in numerous ways, including on points specifically relied upon by Johnson in asking this Court for PCRA relief.

VII. THE THIRD SET OF PCRA CLAIMS SHOULD BE DISMISSED FOLLOWING A HEARING PURSUANT TO 42 Pa.C.S.A. § 9543(b) BECAUSE JOHNSON'S SUBSTANTIAL DELAY IN FILING THEM SEVERELY PREJUDICES THE COMMONWEALTH'S ABILITY TO RESPOND TO THE CLAIMS AND TO RETRY JOHNSON IN THE EVENT THAT A NEW TRIAL IS GRANTED.

As previously discussed, Section 9543(b) of Title 42, Pa.C.S.A., authorizes this Court to dismiss a PCRA petition regardless of whether it is *pro se* or counseled, a first or subsequent petition, and whether amended or not, in the event that there was an unwarranted delay in the filing of the petition that results in severe prejudice to the Commonwealth's ability to respond to the petition and/or to retry the petitioner in the event of a new trial. *See Renchenski*, 52 A.3d 251; *Weatherill*, 24 A.3d 435; *Markowitz*, 32 A.3d 706; *Bell*, 706 A.2d 855; *Young*, 695 A.2d 414; *McAndrews*, 520 A.2d 870. Again, the statute states:

> Even if the petitioner has met the requirements of subsection (a), the petition shall be dismissed if it appears at any time that, because of delay in filing the petition, the Commonwealth has been prejudiced either in its ability to respond to the petition or in its ability to re-try the petitioner. A petition may be dismissed due to delay in the filing by the petitioner only after a hearing upon a motion to dismiss. This subsection does not apply if the petitioner shows that the petition is based on grounds of which the petitioner could not have discovered by the exercise of reasonable diligence before the delay became prejudicial to the Commonwealth.

42 Pa.C.S.A. § 9543(b).

In the instant case, Commonwealth witness Victoria Doubs passed away in 2003. *See* copy of newspaper obituary, attached as Exhibit F. From that point forward, the Commonwealth has been without the witness who testified at trial that:

(1) she was with Johnson and Walker on the morning of December 14, 1995; (2) the three of them hung out together and were close; (3) while the three were standing in the Kentucky Fried Chicken parking lot ("the KFC lot") that day, Walker approached the victim about a drug debt; (4) in the presence of Johnson and her as well as others, Walker and the victim got into an altercation during which the victim beat Walker with a broomstick; and (5) as a result, Walker was humiliated and enraged, stating multiple times thereafter in the presence of Johnson and her that he was going to kill the victim as an act of retribution.

Doubs' testimony was important to the Commonwealth's case in establishing the close personal relationship that existed between Johnson and Walker as well as the existence of a specific motive on the part of both of the men to kill the victim. If the Court were to grant PCRA relief in the form of a new trial, the Commonwealth's case against Johnson would be profoundly and unfairly weakened by Doubs' unavailability. The appellate courts have stated that such prejudice is not cured by the mere fact that the prosecution could read the unavailable witness' prior trial testimony at the new trial. *See Weatherill*, 24 A.3d at 440 ("The prosecution should not be required to present its evidence through reading a cold trial transcript when Appellant would have the ability to present live witnesses).

In addition, Johnson alleges for the first time in claim 28 that Doubs and Detective Kevin Duffin had a close personal relationship, that she regarded him as a brother, that she felt beholden to him, and that this information should have been disclosed to the defense prior to trial per *Brady* because it would have tipped the

scales in Johnson's favor regarding her credibility in the eyes of the jury. Because Doubs is deceased, the Commonwealth is severely prejudiced in its ability to rebut this allegation, which it expressly denies. It would be fundamentally unfair and a denial of justice to: (1) allow Johnson to proceed with this claim making self-serving characterizations about Doubs' state of mind that arguably undermine the Commonwealth's case notwithstanding the fact that Doubs -- the only person to actually know what her state of mind was regarding her relationship with Detective Duffin during the relevant time period -- is unavailable to testify at a PCRA hearing to shed light on the subject; and (2) to grant Johnson a new trial, to require the Commonwealth to rely on Doubs' 1997 trial testimony which did not address her relationship with Duffin in any manner, and to permit Johnson to argue to the jury this new theory that she had a motive to lie based on her relationship with Duffin. *See id.*

For all of these reasons, the Court should, following an evidentiary hearing addressing Johnson's filing delay and the impact that delay has had on the Commonwealth, dismiss the claims in accordance with 42 Pa.C.S.A. § 9543(b).

VIII. THE COMMONWEALTH'S CLAIM-BY-CLAIM RESPONSE

Claim 1

In claim 1, Johnson avers the discovery of previously unavailable evidence, namely that Jesse Davis ("Davis") was with the victim on the morning before the shooting and intermittently throughout the afternoon and evening and: (1) he never saw the victim in the KFC lot during that time; and (2) he never saw the victim

engaged in an argument with anyone. According to Johnson, this information contradicts Doubs' testimony indicating that there was a confrontation between the victim and Walker in the KFC lot on the day before the murder. Also according to Johnson, Davis secreted his personal knowledge on the subject from everyone for years and it was not available for discovery until Davis recently "found God."

This claim is untimely and cannot qualify for the ADE exception because: (1) Davis was interviewed by the police on the morning of the murder and his name and address as well as the substance of his statement to police were listed in the police report;[17] and (2) the police report as well as a copy of Davis' statement (which recited his address and phone number) was disclosed by the Commonwealth to Johnson prior to trial.[18] Because Johnson was aware of Davis' identity, contact information, and statement given to police, he cannot plead and prove that he could not have discovered this information previously through the exercise of due diligence and that he filed his claim within 60 days of the date when the claim first could have been presented.

To repeat, a new trial is not warranted under the after-discovered evidence rule if the evidence at issue was known by, available to, or could have been obtained through reasonable diligence by the defendant prior to trial. *Glover*, 419 A.2d at 682-683; *Johnson*, 323 A.2d 295; *Hayward*, 263 A.2d 330. If the identity of a witness was

[17] *See* Exhibit G at p. 2, 12, 18.

[18] *See* Exhibit B as well as copy of Jesse Davis statement, attached as Exhibit H.

known to the defendant at the time of trial, the witness' affidavit cannot later be regarded as after-discovered evidence on which a new trial may be based. *Hayward*, 263 A.2d at 331.

On the merits, the information contained in the Jesse Davis affidavit submitted by Johnson fails to satisfy prongs 1, 3, and 4 of the *Pagan* test.[19] As already noted, Johnson is unable to show that the proffered information could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence. In addition, the information is being offered solely to impeach the credibility of Doubs (regarding what happened at the KFC lot) and Brown (regarding her allegedly poor character and unreliability).

Finally, the information would not likely result in a different verdict if a new trial were granted. Contrary to the hyperbole in Johnson's petition, Davis' affidavit does not actually contradict Doubs' trial testimony because even according to Davis' affidavit, **he was not with the victim continuously throughout the day**. Because he was only with the victim intermittently (assuming the affidavit is truthful), Davis cannot state with certainty what transpired for the victim during those periods of time that Davis was out of his presence. It is also noteworthy that the affidavit presented by Johnson saying that Davis was with the victim continuously until 3:00 pm contradicts Davis' statement to police on the morning of the murder in which he simply stated that he had been with the victim "on and off" throughout the day.

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[19] *See Commonwealth v. Pagan*, 950 A.2d 270, 292 (Pa. 2008).

The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 2 and 5

In claims 2 and 5, Johnson avers that Carl Williams: (1) was a drug dealer on the streets of Harrisburg; (2) regularly positioned himself in the vicinity of the KFC lot; (3) did not see a confrontation between the victim and Walker on the day in question; (4) just prior to the murder, drove a vehicle down Market Street in the vicinity of the murder and did not observe any person or car on the street; (5) although he was eventually interviewed by Detective Duffin, Duffin only questioned him about the whereabouts of Walker; (6) Duffin used aggressive and improper tactics in conducting his investigation; and (7) in 2002, he ended up in prison with Walker, at which time he signed an affidavit for Walker saying that Duffin had stolen money from his house in order to coerce Williams into going to the police station to be interviewed.

According to Johnson, this information contradicts Doubs' testimony about a fight between Walker and the victim on the day prior to the murder and purportedly demonstrates that Duffin behaved improperly. Also according to Johnson, this evidence only recently became available because Williams was not referenced in the police reports that were provided to him.[20]

[20] Significantly, in this claim, Johnson admits that the Commonwealth produced the police reports to him prior to trial.

Procedurally, Johnson has failed to allege specific facts which give the Court jurisdiction to consider this claim. Johnson fails to articulate the precise date of and circumstances surrounding his discovery of this information, why he could not have discovered it previously through the exercise of reasonable diligence, and how it is that the claim was filed within 60 days of the date that it first could have been presented. More importantly, in the affidavit submitted by Johnson, Williams indicates that he knew Johnson at the time of the murder well enough that "when I would see Lorenzo, we'd say hi or ask each other what's up." In light of this, the claim cannot be ADE and should be dismissed on that basis.

Substantively, the claims are weak and without merit. Even assuming, *arguendo*, that Williams did not see a confrontation in the KFC parking lot or people on Market Street at the relevant times, this is not evidence that an altercation in fact did not occur between the victim and Walker or that Walker and Johnson did not in fact march the victim down Market Street and into an alley to his cruel and inglorious death. It is mere evidence that Williams did not see what other witnesses who testified at trial did see.

In this regard, it is notable that when Williams was interviewed by a OAG agent, he stated that just because he did not see the victim and Walker get into a fight at the KFC lot, **"that does not mean it didn't happen."** *See* copy of OAG agent report, attached as Exhibit I. Also notable is Williams' report to the OAG agent that **"word on the street was Rameek and Taraja got into an argument over $200.00 that**

Taraja owed Rameek...That is why Taraja got killed" (Exhibit I at 2). This statement strongly corroborates the trial testimony of Doubs and Brown.[21]

Ultimately, the information contained in the Carl Williams affidavit submitted by Johnson fails to satisfy prongs 1, 3, and 4 of the *Pagan* test. As already noted, Johnson is unable to show that the proffered information could not have been obtained prior to the conclusion of the trial by the exercise of reasonable diligence. In addition, the information is being offered solely to impeach the credibility of Doubs (regarding what happened at the KFC lot) and Brown (regarding the events immediately preceding the murder and her alleged unreliability). Finally, the information would not likely result in a different verdict if a new trial were granted because according to Williams' own affidavit, he simply did not see events that were testified to at trial.

The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 3

In claim 3, Johnson avers that after midnight on December 15, 1995, Jesse Davis and Tina Darden ("Darden") were standing outside of the bar engaged in a 10-minute argument and that they did not see Brown enter or exit the bar and did not see the victim exit the bar and walk past them. According to Johnson, this "new" information undermines the evidence presented at trial that Johnson, along

[21] These significant observations by Williams somehow were omitted from the affidavit prepared by Johnson's counsel, signed by Williams, and filed as one of Johnson's PCRA exhibits.

with Walker, engaged in an argument with the victim inside the bar after which the three of them exited the bar and walked down Market street trailed by Brown.

This claim is untimely and cannot qualify for the ADE exception because: (1) both Davis and Darden were interviewed by the police following the murder and their names, addresses, and phone numbers as well as the substance of their statements to police were listed in the police report;[22] and (2) the police report as well as a copy of Davis' statement (which recited his address and phone number) was disclosed by the Commonwealth to Johnson prior to trial.[23] Because Johnson was aware of each witness' identity, contact information, and statement given to police, he cannot plead and prove that he could not have discovered this information previously through the exercise of due diligence and that he filed his claim within 60 days of the date when the claim first could have been presented.

On the merits, the claim is weak and unpersuasive. Assuming, *arguendo*, that Davis and Darden did not see Brown enter or exit the bar while they were standing in front of it and that they did not see the victim exit the bar prior to the murder, it signifies only that they did not see these things. Such a fact would not be surprising given that they were, according to the accounts they provided to police as documented in the police report, engaged in an argument with each other. Johnson's argument that the failure of these two people engaged in an argument to

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[22] *See* Exhibit G at p. 2, 5, 12, 18, 22-23.

[23] *See* Exhibits B and H.

see Brown or the victim go into and out of the bar is proof that Brown's testimony was false is exaggerated and illogical.

Notably, Darden did not sign an affidavit for Johnson and Johnson relies on inadmissible hearsay in the form of investigator Shara Davis' representation of what Darden purportedly told her. Moreover, Darden was interviewed by an OAG agent and told him that:

> Darden knew Taraja Williams. She did not recall seeing him the night of the shooting. However, she did not go in the bar. **Taraja could have come out of the bar without her seeing him, when she was arguing with Davis.**

See copy of OAG agent report at 2, attached as Exhibit J.

For the foregoing reasons, this claim fails prongs 1 and 4 of the *Pagan* test. The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

D. Claim 4

In claim 4, Johnson avers that a woman named Towana Poteat ("Poteat") observed the victim in the bar with Walker before the murder (apparently in contradiction to the affidavits of Davis and Darden, which Johnson says signify that the victim was **not** in the bar just before the murder). Johnson avers that according to Poteat: (1) she knew Johnson at that time and did not observe Johnson or Brown in the bar at that time; (2) Walker did not depart the bar with the victim and did not depart following a fight; (3) Walker was with Lashawnya Jackson and her in the bar until they received the news that the victim had been shot; and (4) she later told

Officer Curtis that Walker was in the bar when the victim was murdered. Allegedly, Poteat refused to tell anybody about her observations out of fear.

This claim is untimely and cannot qualify for the ADE exception because, according to Johnson's own pleading, he and Poteat knew each other. Because Johnson was aware of her identity at the time of trial, he cannot plead and prove that he could not have discovered this information previously through the exercise of due diligence and that he filed his claim within 60 days of the date when the claim first could have been presented.

On the merits, the claim is weak and unpersuasive. First, Poteat did not sign an affidavit for Johnson, and Johnson relies on inadmissible hearsay in the form of investigator Shara Davis' representation of what Poteat purportedly told her.[24] Moreover, Darden was interviewed by an OAG agent and told him that while they were in the bar, **Walker left for a while, then returned.** *See* copy of OAG agent report, attached as Exhibit K. When this observation by Poteat is combined with the statement of Carl Williams provided to the OAG agent, *see* Exhibit I, that after the shooting, his friend Michael "Playboy" McBride observed Walker exiting the bar and behaving strangely, it is possible that Poteat's recollection essentially conforms to the version of events presented by the Commonwealth at trial: at some point Walker exited the bar (with Johnson and the victim), the murder occurred (perpetrated by Walker and Johnson), Walker returned to the bar, shortly after

[24] The integrity of that affidavit is in serious doubt, see Commonwealth's response to claim 11, *infra.*

which news arrived at the bar that a shooting had occurred, at which time Walker exited the bar and encountered McBride.

Ultimately, this proffered evidence fails all four prongs of the *Pagan* test. Prong 1 has been addressed *supra*. The evidence is merely corroborative of the trial testimony of Lashawnya Jackson and Eric Chambers, both of whom told the jury that they were in the bar on the night in question and did not see Johnson there. The evidence is offered to impeach the testimony of Brown and Miller, who testified at trial that Walker and the victim got into an altercation in the bar prior to the murder. Finally, for all of these reasons, Johnson cannot establish the reasonable probability of a different trial outcome if Poteat were to testify at a new trial. The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 6

In claim 6, Johnson avers that Brian Ramsey ("Ramsey") has, for the second time, recanted his trial testimony. In addition to resurrecting the claim **already rejected by this Court** that Ramsey has "recanted" his statement to the jury that he observed Johnson near the crime scene immediately following the murder (he only assumed that Johnson was there because he saw Walker and he knew that Johnson and Walker always hung out together), he now purportedly states in an affidavit that: (1) he **now** has a clear memory of the night of the murder; (2) he was standing next to the victim and saw two men -- not Johnson or Walker -- plus Carla Brown come towards them from 15th and Market Streets -- not the bar -- exiting out of a

vehicle; (3) the victim walked towards the three of them, then all four entered the alley; (4) there were rumors on the street that Brown had set the victim up for murder; (5) when questioned at the police station later that morning, he was fearful that the police would discover his outstanding warrant and avoided saying anything that might jeopardize his interests; (6) he knew that the guys that he "saw shoot" the victim did not match the descriptions of Johnson and Walker; (7) his trial testimony that the people with the victim wore hats was a lie; (8) his trial testimony that he did not know if Brown was the third person to enter the alley was a lie; and (9) if lawyers for either Johnson or Walker had asked him, he would have told them that did not see either of those men at the scene.

This claim is untimely and cannot qualify for the ADE exception because his identity was known to Johnson prior to and during trial: (1) Ramsey testified at Johnson's trial and was subject to cross-examination; and (2) the police report that was produced to the defense pre-trial contained Ramsey's name, contact information, and the statement Ramsey gave to the police during the investigation. Johnson cannot plead and prove that he could not have discovered the proffered evidence previously through the exercise of due diligence and that he filed his claim within 60 days of the date when the claim first could have been presented.

The Ramsey affidavit submitted by Johnson is PATENTLY UNRELIABLE AND BORDERS ON THE ABSURD. It blatantly and repeatedly contradicts the statement he gave to the police and the testimony he gave at trial, **which were consistent with each other**. *See* Exhibit G and copy of police statement, attached as

Exhibit L. If Johnson is to be believed, Ramsey is now ready to conveniently undermine virtually every aspect of his trial testimony that was helpful to the Commonwealth's case, and confesses to committing multiple criminal acts of perjury at Johnson's trial. As this Court previously found during the second PCRA proceedings, **Ramsey is a wholly non-credible witness.** *See Birdsong*, 24 A.3d at 327 (emphasis added) (recantation testimony is "exceedingly unreliable" and "there is no less reliable form of proof, **especially when it involves an admission of perjury**"). **Notably, an OAG agent made three attempts to meet and talk with Ramsey but was unsuccessful on every occasion; Ramsey failed to call the OAG agent as requested.** *See* copy of OAG agent report, attached as Exhibit M.

Ultimately, the "new" Ramsey evidence fails prongs 1, 3, and 4 of the *Pagan* test. For obvious reasons, Johnson could have discovered this purported information at or before trial through the exercise of reasonable diligence. Ramsey's personal knowledge of what he observed at the time of the murder was readily available to Johnson at the time of trial. Ramsey is now being offered to impeach not only Brown's trial testimony, but his own as well! Moreover, in light of his ever-changing version of events, Ramsey's testimony at a new trial would be patently unreliable and would not likely compel a different verdict.

The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 7

In claim 7, Johnson avers that Adrian Fluellen ("Fluellen") was near the scene of the murder at the relevant time and saw the victim with Brown, Scott Holloway, and an unidentified man. According to the Fluellen affidavit attached to the PCRA petition, Fluellen observed the victim walk between houses with the three others and Johnson was not one of them, after which the shooting occurred.

This claim is blatantly untimely and fails to satisfy the standard for after-discovered evidence. As Johnson's counsel well knows, Fluellen gave information to the police and the police report containing Fluellen's name and contact information as well as the statement by Fluellen were disclosed to Johnson prior to trial. *See* Exhibit G at 23-24. As reflected in Exhibit G -- which was in Johnson's hands at time of trial -- Fluellen provided information consistent with the contents of the affidavit attached to the current supplemented PCRA petition and: (1) as documented in the police report, the police followed up on the information and had Fluellen identify the people he believed were involved in the murder; and (2) the criminal investigators ultimately determined that Fluellen's version of events was simply not credible.

This entire matter was addressed by this Honorable Court during the first PCRA proceedings, which adjudicated whether Attorney Wagner had been ineffective for failing to call Fluellen as a witness at trial. The PCRA hearing transcript reflects that Fluellen testified that he was available and willing to testify at the time of trial, *see* Exhibit N, and Attorney Wagner thoroughly explained that

although she was fully aware of Fluellen's identity and report to the police, he would have made a horrible witness that would have jeopardized Johnson's case because his version of events contradicted numerous irrefutable items of evidence, including the testimony of disinterested witnesses, presented to the jury. *See* March 7, 2001 NT at 23-29. Ultimately, this Court found that trial counsel was not ineffective for failing to call Fluellen as a witness, a determination that was affirmed by the Superior Court.

For obvious reasons, Johnson cannot plead and prove that he could not have discovered the information underlying claim 7 previously through the exercise of due diligence and that he filed his claim within 60 days of the date when the claim first could have been presented. **For that matter, the essence of claim 7 has already been presented to the courts and has been rejected as a basis for relief from Johnson's judgment of sentence!** *See* copy of this Court's February 25, 2002 Opinion denying PCRA relief and Pennsylvania Superior Court's Opinion affirming, attached as Exhibits O and P, respectively.

For these reasons, claim 7 is patently frivolous. It fails to satisfy prongs 1 and 4 of the *Pagan* test.[25] The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

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[25] At OAG agent made four attempts to talk with Fluellen. Fluellen did not return the agent's messages. *See* copy of OAG agent report attached as Exhibit Q.

Claim 8

In claim 8, Johnson avers that Officer Laura Davis heard a gunshot as she drove on Market Street at the time of the murder and saw a man with a limp and a woman crying hysterically. Cryptically, Johnson complains that apparently Davis did not obtain the names of those two people as part of her investigation.

This claim illustrates the true nature of Johnson's third set of PCRA claims: he and his counsel want to RETRY THE CASE. The allegations in claim 8 do not constitute a claim of after-discovered evidence or of government interference. They do not constitute any basis for the grant of PCRA relief. They are, purely and simply, an averment that -- in Johnson's opinion -- the Commonwealth's investigation was imperfect. Such an allegation, even if true, does not set forth a basis to excuse the untimeliness and the utter lack of merit on the part of this "claim." The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 9

In claim 9, Johnson avers via an affidavit signed by Attorney Amy Donnella, Esquire of the Federal Community Defenders Office of Philadelphia (which has represented Johnson in related federal habeas corpus litigation) that **on an undetermined date** she and Attorney Wiseman went to Carla Brown's home, at which time: (1) Brown indicated that she did not wish to speak with them; (2) **Brown became hostile** and ordered them to leave; (3) after they began to depart, Brown recalled Ms. Donella and told her she had previously told an investigator

working for Ms. Donella that **she never wanted to speak with anyone from their office**; (4) Ms. Donella responded that she just wanted to confirm that Johnson was one of the people Brown had seen in the bar on the night the victim was killed; and (5) **Brown began yelling** at Ms. Donnella and said that she had never been in any bar on the night the victim was murdered.

As an initial matter, this claim is untimely. Johnson has failed to identify the date that this alleged encounter occurred or explain to the Court why Ms. Donnella could not have approached Carla Brown sooner through the exercise of reasonable diligence than she did. The truth is that Brown was a witness identified in the police report, who gave a statement to police that was turned over to the defense pre-trial, whose contact information was known to the defense, and who testified and was thoroughly cross-examined at Johnson's preliminary hearing and trial. To suggest that Johnson could not have obtained this "information" previously, or more than 60 days prior to the filing of claim 9, is false and disingenuous.

Moreover, this allegation that Brown has now recanted her previous testimony that she was inside the bar just prior to the murder is obscene. It is a self-serving misrepresentation of fact that apparently relates words that were uttered by Brown but blatantly ignores the context in which the words were uttered. More specifically, it is plainly apparent that Brown was provoked by Ms. Donella and Mr. Wiseman into being upset, stressed, and angered, at which time she lashed out that and exclaimed that she wanted the attorneys to leave her alone, she did not want to discuss the murder with them, and they did not know what they were talking ahout.

In other words, Brown lost her temper and in a fit of emotional outrage, made a false and irrational statement. Corroboration for this explanation of what happened (assuming the veracity of Ms. Donella's proffered statement) can be found in the transcript of Johnson's preliminary hearing. At the hearing, Brown testified that when she was first questioned by the police regarding her knowledge about the murder, she was crying and upset and therefore "I didn't even probably pay attention" to what was being said and "I just was crying and I told him I ain't know nothing" (5/20/96 NT at 41). In other words, she was emotionally distraught and therefore lied to the police. Brown's alleged encounter with Ms. Donella fits the same pattern.

Most importantly, Johnson has failed to proffer to the Court an affidavit signed by Brown recanting her trial testimony. Instead, he relies on inadmissible hearsay in the form of Ms. Donnella's affidavit. **This inexplicable situation raises the specter of bad faith.** If Brown was truly recanting her trial testimony and now contends that she was never in the bar on the night of the murder, why does Johnson not present this Court with an affidavit signed by Brown clearly stating this?

The reason is obvious: the notion of a recantation is a deception. Brown does not agree to this characterization of her exchange with Ms. Donella. When interviewed about this by an OAG agent, Brown stated that "a female came to her residence and **tried to turn things around**...She (Brown) told the truth at the trial

and she did not want to discuss it anymore." *See* copy of OAG agent report, attached as Exhibit Q (emphasis added).

In light of the foregoing, the Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing. Claim 9 is disingenuous and fails prongs 1 and 3 of the *Pagan* test.

Claim 10

In claim 10, Johnson avers that according to Detective Dillard: (1) Carla Brown was placed in a patrol vehicle and taken from the scene to police headquarters for questioning; and (2) Brown initially denied any knowledge about the murder, but police did not believe her and they worked on her until she told them the truth. According to Johnson, this contradicts Brown's trial testimony that she ran away from the scene and did not speak to police for several weeks. Johnson also argues that it demonstrates corrupt police tactics.

This claim is untimely and cannot qualify for the ADE exception because the police report disclosed to Johnson prior to trial as well as correspondence from the Commonwealth identified Detective Dillard as an officer involved in the criminal investigation. *See* Exhibits B and G. Because Johnson was aware of Dillard's identity at the time of trial, he cannot plead and prove that he could not have discovered this information previously through the exercise of due diligence and that he filed his claim within 60 days of the date when the claim first could have been presented.

Beyond the untimeliness of the claim, the portrait Johnson has painted of a police department nefariously plotting to mercilessly coerce Brown into identifying Johnson and Walker as the perpetrators is a gross distortion of the truth. Reasonable police encouragement to obtain a true version of the events from a reluctant witness does not constitute police coercion. As stated by Dillard in an interview with an OAG agent, the affidavit attached to Johnson's pleadings **was prepared by Johnson's counsel and "how it is interpreted (by Johnson's counsel) is not exactly how [I] meant it."** *See* copy of OAG agent report attached as Exhibit R (emphasis added). According to Dillard, "as a cop, there are facts that you know that the person you are interviewing would only know if they were there. A cop can tell when someone is lying. That is what [I] meant by the statement 'we worked on them [sic] until we knew they [sic] were telling the truth'" (Exhibit R). Also according to Dillard, he thought Brown was taken down to the station on the night of murder, but **it happened so long ago that it could have been another night.** *Id.* Moreover, contrary to Johnson's pleading, nowhere in Dillard's affidavit attached to the pleadings does it say that Brown was taken to the station **from the scene.**

Beyond being untimely and misconstruing the meaning of Dillard's words, claim 10 advances the false notion that the Commonwealth hid the fact that police spoke to Brown on several occasions prior to trial. On the contrary, the police report produced before trial disclosed the March 27, 1996 interview of Brown conducted by Duffin and attached the statement she gave which indicated that she had initially rebuffed efforts by the police to talk with her. At Johnson's preliminary hearing,

Brown testified that: (1) she did not talk with police until Officers Curtis and Kohr came and got her sometime after the murder; (2) at that time she did not cooperate with them; and (3) on March 27, 1996, Duffin came with Dillard and found her at her friend Roz's house, after which she told Duffin what she knew. *See* Exhibit D. The preliminary hearing testimony, of which Johnson was obviously well aware, made very clear that Brown first encountered Officers Curtis and Kohr and told them that she knew nothing, and later gave a statement to Duffin in which she revealed what she actually knew about the murder.

The claim fails prongs 1, 3, and 4 of the *Pagan* test. In light of the foregoing, the Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 11

In claim 11, Johnson avers that William Davenport came out of the house "a very short time after hearing the gun shot" just down the street, at which time he observed Brown, Ramsey, and others and also observed the police take Brown and Ramsey away from the scene. Johnson argues that this previously-unavailable information undercuts Brown's trial testimony that she ran away from the scene and did not immediately talk with the police.

The ADE exception is not applicable to this untimely claim because Johnson has failed to plead and prove that he could not have obtained this information previously through the exercise of due diligence and that he filed the claim within 60 days of when it first could have been presented. In addition, as noted below,

Johnson knew Davenport "from the streets" at the time of the murder, which means that Davenport and any personal knowledge he had in connection with the murder was fully available to Johnson at that time.

The averments in support of this claim are not supported by an affidavit signed by Davenport. Instead, Johnson relies on inadmissible hearsay in the form of investigator Shara Davis' representation of what Davenport purportedly told her. During the course of its investigation of the pending PCRA claims, the Commonwealth discovered why Johnson chose to utilize the Shara Davis affidavit rather than one signed by Davenport: **Davenport told an OAG agent that the assertions made in the Davis affidavit are patently false and contain numerous outright fabrications.** *See* copy of OAG agent report attached as Exhibit S.

More specifically, Davenport told OAG that all of the following averments contained in the Shara Davis affidavit are inaccurate: (1) that Davenport went outside shortly after hearing the blast (he waited 30 minutes before going outside); (2) that Carla Brown was the first person he observed when he got outside (she was not; there was a crowd of people there); (3) that Davenport believed Brown and the victim were engaged in a romantic relationship (this is not true; Davenport never said or implied this); (4) that Davenport and Brown went to high school together (this is false; Brown is older than Davenport); (5) that Davenport knew Mike Johnson (he did not and does not); (6) that Davenport told the investigator that Johnson lived at Park and 16th Streets in Harrisburg (Davenport told the investigator that Johnson lived at Regina and 18th Streets); (7) that Davenport knew Johnson and

Walker (Davenport does not know Walker; he knew Johnson from the streets); (8) that Johnson and Walker lived right next door to Davenport (they did not); (9) that Davenport knew that Johnson and Walker had been charged with Taraja Williams' murder (he was not aware of that fact); (10) that Officer Curtis only asked Davenport if he saw anything (Officer Curtis asked Davenport questions in addition to whether or not he saw anything); (11) that Brown was always getting high (it was solely Davenport's opinion that this was so); and (12) that when he went outside, he saw both Brown and Ramsey (he only saw Ramsey when he walked down to the bar). *See* Exhibit S.

Not only does claim 11 fail prongs 1, 3, and 4 of the *Pagan* test, but **it is based on affidavit authored by Shara Davis that is at least partially false and fraudulent.** For all of the foregoing reasons, the Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.[26]

Claim 12

In claim 12, Johnson avers that on the night in question, he was in New York with Suquan Ripply ("Ripply") and that when Ripply was interviewed by Duffin

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[26] If Davenport's representations to OAG Agent Timothy Shaffer are true, this Court is faced with a serious question about the perpetration of fraud upon the Court. In addition, the credibility of the entirety of Johnson's third set of PCRA claims is thrown into the gravest of doubt. The Commonwealth respectfully suggests that the Court conduct an evidentiary hearing on the veracity of the Shara Davis affidavit as it applies to Davenport, and if it finds that knowing misrepresentations were advanced in these judicial proceedings, it could deny all claims supported in any way by the Davis affidavit as well as take any other action deemed to be appropriate.

during the criminal investigation: (1) Ripply gave a statement to Duffin indicating that Johnson had an alibi for the night in question; and (2) Duffin coerced Ripply into changing his statement by making both threats and promises that were conditioned on Ripply being vague about when he was in New York with Johnson.

The claim is untimely and the ADE exception does not apply because **Ripply testified at trial as a witness for Johnson.** Under these circumstances, it is ludicrous for Johnson to be advancing the argument that he could not have discovered this information at or prior to the time of trial through reasonable diligence and that he has advanced this "new" claim within 60 days of the date it first could have been presented.

What is worse, the claim is bogus and attempts to exploit Ripply's confusing trial testimony. Specifically, at trial Ripply testified on direct examination that he and Johnson were in New York on the night of the murder, that he had given a statement to that effect to the police several days before the trial, and that Duffin had told him he was lying and made him feel that he had to give a second statement indicating that the first statement was inaccurate. **In other words, at trial under oath, Ripply testified in support of the alibi defense presented by Johnson and told the jury that Duffin had pressured him.** However, during the direct examination **he alternately indicated that the night he and Johnson were in New York was December 15, 1995 and December 16, 1995** (3/13-17/97 NT at 257-264).

On cross-examination, Ripply testified that the first statement he had given Duffin was true, but when confronted with the fact that the first statement

definitively indicated that he and Johnson were in New York on December 16, 1995, Ripply said that **he had confused the dates.** When asked whether he stood by his first statement to Duffin, Ripply said yes but that the date was wrong. He also acknowledged that he, Johnson, and others had traveled to New York multiple times for drugs (3/13-17/97 NT at 264-270). On redirect examination, Ripply repeated that he and Johnson were arrested on the day following the murder and that the date of that event was December 16, 1995 (3/13-17/97 NT at 270-272).

For patently obvious reasons, claim 12 fails prongs 1 and 4 of the *Pagan* test. **The information proffered by Johnson cannot be after-discovered evidence because it was already presented to the jury and the jury convicted Johnson anyway.** Johnson had ample opportunity to address this subject with Ripply during the trial. Indeed, what Johnson is actually seeking is a "redo." He wants a chance to allow Ripply to "correct" his trial testimony, to add new details that accentuate the portion of the testimony relating to coercive tactics employed by Duffin. Johnson, however, is not entitled to a "redo." This attempt to dupe the Court into believing that Ripply's information is newly discovered and previously unavailable in order to get a retrial is highly improper.

For all of the foregoing reasons, the Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.[27]

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[27] The Commonwealth acknowledges that when an OAG agent contacted Ripply in the course of its recent investigation, Ripply indicated that the PCRA affidavit he signed is accurate. *See* copy of OAG agent report attached as Exhibit W.

Claim 13

In claim 13, Johnson avers that on the night in question, he was with Victoria Doubs in New York and that Duffin used threats and promises to coerce her into testifying at trial that she could not recall the exact date that the two of them were in New York. Omitted from the pleading is any acknowledgement of the fact that: (1) Doubs is deceased (she died in 2003) and therefore unavailable to address this claim; and (2) Doubs testified at trial that although she was in New York with Johnson and told police that, she could not be certain as to the date of that trip. **Also omitted from the pleading is the fact that Doubs told the jury that after the murder, a friend of Johnson's and Walker's named Larry offered to provide money to bail Doubs out of jail for unrelated charges in exchange for her telling the police that Johnson was in New York with her on the night in question** (3/13-17/97 NT at 225-230).

The claim is untimely and the ADE exception does not apply because Doubs testified at trial and was subjected to cross-examination by Johnson's trial counsel. The subject of Doubs' discussions with police came up (3/13-17/97 NT at 225). Obviously Johnson cannot legitimately argue that the proffered information was unavailable to him and could not have been discovered through the exercise of reasonable diligence at or before the time of trial. Doubs was on the witness stand in court under oath required to answer truthfully any and all relevant questions posed to her by the parties' counsel.

In truth, Johnson lacks any factual support for this claim that Detective Duffin coerced her into defeating Johnson's alibi. There is no affidavit signed by Doubs to this effect and Doubs is deceased. It is a matter of record that **it was Detective Laudermilch -- not Detective Duffin -- who spoke with Doubs in July 1996 about her trip to New York with Johnson** (3/13-17/97 NT at 225-227). Claim 13 is unsubstantiated unadulterated pablum designed to give Johnson a chance to undo his jury's verdict, retry the case, and reach a different result.

For these reasons, the Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 14

In claim 14, Johnson avers that on the night in question, Johnson was in New York with Lillian Alexander ("LA"), that she never revealed her knowledge to anyone out of fear, and that this information has only recently been discovered.

The claim is untimely and Johnson's attempt to fit it into the after-discovered evidence exception to the time-bar is unavailing and frivolous. Obviously, **if Johnson was in New York with LA at the time of the murder, he himself was fully aware of her identity and the fact that she could support his alibi and he cannot claim that the proffered information could not have been discovered through reasonable diligence prior to trial and that he raised it within 60 days of discovering it. He had the right to subpoena LA as a witness for trial in his defense but did not do so.** To suggest that Johnson was unable to bring this

information to the Court's attention prior to 2013 begs credulity and again raises an issue of bad faith.

With regard to the merits, Johnson does not present the Court with an affidavit signed by LA supporting the claim, but instead relies on the inadmissible hearsay of the Shara Davis affidavit purporting to tell the Court what LA told her. As discussed *supra*, the Davis affidavit is of questionable credibility. Along the same lines, an OAG agent made eight separate attempts to talk with LA but was unsuccessful; she did not return his calls or respond to his messages. *See* copy of OAG agent report, attached as Exhibit T. Does Johnson really expect the Court to trust Shara Davis' representation as to what LA would say, especially in light of the fact that LA has persistently refused to confirm Davis' representation to Commonwealth investigators?

For these reasons, claim 14 fails prongs 1, 2, and 4 of the *Pagan* test. Specifically with regard to the second prong, the proffered evidence is merely corroborative of Suquan Rippy's trial testimony that Johnson was in New York at the time of the murder. The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 15

In claim 15, Johnson avers that his girlfriend at the time of the murder, Theresa Thomas ("Thomas"), "has also revealed" that: (1) she knew Johnson was in New York at the time of the murder; (2) she told Duffin that Johnson repeatedly called her from New York and that her phone records would bear that out; (3)

Duffin told her that if she lied she could be charged with perjury and that her children would be taken away from her if that happened; and (4) she hid her knowledge in this regard from everyone and refused to come forward out of fear.

Essentially the same analysis that applies to claim 14 applies to this claim. It is untimely and Johnson's attempt to characterize it as subject to the after-discovered evidence exception to the time-bar is unavailing and frivolous. Obviously, **if Thomas was Johnson's girlfriend and had telephone records reflecting calls from him that supported his alibi defense, he himself was fully aware of this information at the time of trial. He cannot now claim that the proffered information could not have been discovered through reasonable diligence prior to trial and that he raised it within 60 days of the date it first could have been presented. Clearly, Johnson had the right and the ability to subpoena Thomas as a witness for trial and subpoena the purportedly relevant phone records but did not do so.** To suggest that Johnson was unable to bring this information to the Court's attention prior to 2013 begs credulity and again raises an issue of bad faith.

With regard to the merits, Johnson does not present the Court with an affidavit signed by Thomas supporting the claim, but instead relies on the inadmissible hearsay of the Shara Davis affidavit purporting to tell the Court what Thomas told her. As discussed *supra*, the Davis affidavit is of questionable credibility. Along the same lines, an OAG agent made two separate attempts to talk with Thomas but was unsuccessful; he was informed by the manager of the

residential complex that Thomas had moved and left no forwarding address. *See* copy of OAG agent report, attached as Exhibit U.[28]

For these reasons, claim 15 fails prongs 1, 2, and 4 of the *Pagan* test. Specifically with regard to the second prong, the proffered evidence is merely corroborative of Suquan Rippy's trial testimony that Johnson was in New York at the time of the murder. The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 16

With claim 16, Johnson advances his first of numerous allegations of a *Brady* violation, this one claiming that the Commonwealth withheld exculpatory evidence relating to Doubs' expectation of leniency in her own criminal case in exchange for her testimony at Johnson's trial. Although the pleading acknowledges that this Court, the Superior Court, and the United States District Court for the Middle District of Pennsylvania have all determined that there was no violation of *Brady* in this instance, Johnson argues that: (1) the District Court found that the Commonwealth suppressed favorable information relating to Doubs' criminal proceedings (but that the suppression did not prejudice Johnson); and (2) this Court is required to consider this suppression cumulatively with the other suppressions articulated in the third set of PCRA claims.

[28] During the course of the investigation, OAG agents relied in part on information supplied by counsel for Johnson regarding the current whereabouts of the individuals referenced in the third set of PCRA claims.

The Commonwealth agrees that the District Court ruled that a suppression occurred with regard to information arguably relevant to Doub's subjective hope of leniency in her own case but that the suppression was not prejudicial ("the Doubs suppression"). *See supra* at 4 n.4. The Commonwealth also concurs that the governing law requires a court to consider the materiality of a *Brady*-related suppression cumulatively with any other such suppressions that occurred as well as individually.

Beyond that, the parties part company on this claim. The Commonwealth disputes all other allegations of *Brady* violations set forth in the third set of PCRA claims. Simply put, the Commonwealth disputes the averment that there are any other "suppressions" to weigh cumulatively with the Doubs suppression. For that matter, the Commonwealth respectfully asserts that: (1) there was no suppression in connection with Doubs' trial testimony;[29] and (2) this Court is not bound by the factual determinations of the District Court in connection with this case. *See Commonwealth v. Travaglia*, 661 A.2d 352, 363 (Pa. 1995); *Commonwealth v. Lambert*, 765 A.2d 306, 323 (Pa. Super. 2000).

For these reasons, the Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

[29] The Commonwealth respectfully disagrees with the District Court on that point.

Claim 17

In claim 17, Johnson avers that the Commonwealth violated *Brady* and *Napue v. Illinois*, 360 U.S. 264, 269 (1959) because the prosecutor at trial failed to correct testimony elicited on the stand that he knew was false.

The claim is untimely and Johnson has failed to plead with the requisite specificity how the government interfered with his ability to discover the information he relies on, what reasonable diligence he engaged in to discover this information, the date upon which he first learned of the alleged falsity of the testimony, and why he could not have raised the claim earlier. These pleading deficiencies are fatal to the claim of a GIE to the statutory time-bar.

On the merits, Johnson has failed to articulate facts that support his claim. With regard to the notion that Prosecutor Abruzzo knew that Brown lied when she testified that she had been drug-free for the nine months preceding the trial, Johnson relies on the averment in Carl Williams' PCRA affidavit stating that he sold drugs to Brown during that nine-month period. However, Johnson has failed to cite the binding legal authority that imputes to Prosecutor Abruzzo the purported knowledge of self-proclaimed drug dealer Carl Williams regarding Brown's street drug purchases. He does not because the contention is patently absurd.

With regard to the notion that Prosecutor Abruzzo knew that Brown lied when she testified that she ran away from the scene after the victim was shot, Johnson relies on the representations of investigator Shara Davis that William Davenport told her he saw Brown at the crime scene within minutes of the shooting

and observed police take her away in a patrol car. As discussed *supra*, however, Davenport told an OAG agent that these specific averments are patently false. *See* Exhibit S.[30]

For these reasons, the Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 18

In claim 18, Johnson avers that the Commonwealth violated *Brady* when it failed to disclose prior to trial the fact that Detective Duffin had used threats and promises to coerce Suquan Ripply into recanting his original statement indicating that Johnson was with him in New York at the time of the murder and into testifying vaguely at trial regarding the precise date the two were in New York.

The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing. In support of its argument, the Commonwealth incorporates by reference its response to claim 12 set forth above. In addition to the claim being untimely with no "government interference" exception applicable, Johnson simply cannot establish either that the proffered information was suppressed or was material because **Ripply testified on Johnson's behalf at trial and told the jury precisely what Johnson is now claiming that the**

[30] To the extent that Johnson relies for this claim on Detective Dillard's purported statement that Brown was taken to the police station from the scene on the night of the murder: (a) there is no support in the Dillard PCRA affidavit for the proposition that Brown was taken to the station **from the scene**; and (b) Dillard told an OAG agent that because of the amount of time that has passed since the murder, **he may have been mistaken** in saying that Brown was questioned by police on the night of the murder. *See supra*.

Commonwealth should have revealed to him. Contrary to the claim, Ripply did not testify vaguely as a result of any coercion by Duffin; he very clearly told the jury that Johnson was with him in New York, that he informed Duffin of this fact, and that Duffin coerced him into changing his statement to the police. As revealed by the trial transcript (and ignored by Johnson), however, **Ripply was genuinely confused about the date they were in New York.**

Claim 19

In claim 19, Johnson avers that the Commonwealth violated *Brady* when it failed to disclose prior to trial the fact that Detective Duffin had used threats to coerce Theresa Thomas into remaining silent about Johnson's alibi.

The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing. In support of its argument, the Commonwealth incorporates by reference its response to claim 15 set forth above. Accepting Johnson's representation that Thomas was his girlfriend and had telephone records reflecting calls from him that supported his alibi defense, he himself was fully aware of this information at the time of trial and had access to the phone records. He cannot now claim that the government prevented him from discovering or accessing the proffered information until 2013 and that he raised it within 60 days of the date it first could have been presented.

Claim 20

In claim 20, Johnson avers that the Commonwealth violated *Brady* when it failed to disclose prior to trial the fact that Towana Poteat told Officer Curtis at some

point that Walker was in the bar when they learned of the shooting and therefore could not have killed the victim.

The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing. In support of its argument, the Commonwealth incorporates by reference its response to claim 4 set forth above. The claim is untimely and the "government interference" exception is inapplicable in light of the fact that, according to Johnson's own pleading, Johnson and Poteat knew each other. The government obviously did not control Poteat's ability to share with Johnson what she shared with Officer Curtis, and Johnson does not contend that Poteat was coerced by the police into secreting the "information."

Claim 21

In claim 21, Johnson avers that after Brian Ramsey received a subpoena but prior to testifying at Johnson's trial: (1) Ramsey wrote and sent a letter to Prosecutor Abruzzo indicating that he needed help with his unrelated criminal case; and (2) although no deal was struck, someone from the Commonwealth either wrote him a letter or visited him in prison and indicated that "we'll do what we can." Johnson pleads that the Commonwealth failed to disclose this information to the defense prior to trial and that this failure constituted a *Brady* violation.

The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing. In support of its argument, the Commonwealth incorporates by reference its response to claim 6 set forth above. The claim is untimely and no statutory exception to the time-bar applies because,

among other things, Ramsey testified under oath at trial in 1997 and was subject to full cross-examination by Johnson's counsel.

During that trial testimony, Ramsey confirmed that he was currently serving a sentence in prison and stated that no promises or threats of any kind had been made by the Commonwealth in exchange for his testimony. Moreover, Ramsey's own PCRA affidavit (the most recent one) explicitly states that in 2002, he was in prison with Johnson and informed Johnson at that time that he had lied at the trial. Johnson has failed to plead specifically how, in light of these facts, the government prevented him from discovering the proffered information and why the claim could not, with the exercise of reasonable diligence, have been formulated and raised prior to 2013. Any such pleading would be disingenuous. Johnson had Ramsey on the witness stand under oath in 1997 and has been **working in concert with** Ramsey since 2002 in an effort to obtain a new trial.

On the merits of the *Brady* claim, the Commonwealth does not dispute the averment that Ramsey sent such a letter to Attorney Abruzzo seeking consideration in his own case. It does, however, dispute the suggestion that any representative of law enforcement responded to the letter in any way, including by making any promise to Ramsey whatsoever. Ramsey's testimony at trial blew that allegation out of the water. The remark in Ramsey's PCRA affidavit regarding a response to the letter is so vague that it is meaningless.

In light of the fact that Ramsey sent a letter to the prosecutor on September 25, 1996 expressing a desire for a *quid pro quo*, combined with Ramsey's unequivocal

trial testimony communicating that the Commonwealth rejected his request, a reasonable and logical inference arises that at the time of trial, the Commonwealth's refusal to "play ball" would have frustrated Ramsey and **given him a motive to thwart rather than assist the Commonwealth** in its case. This contextual information rendered Ramsey's trial testimony more, rather than less, credible in the eyes of Johnson's jury.

In the Commonwealth's review of its files for this case, it has not, to date, located any evidence indicating that the letter in question was turned over the defense prior to trial.[31] However, it is the Commonwealth's contention that this letter was not material to the outcome of the trial because Ramsey told the jury that he had his own set of criminal charges, had been sentenced prior to Johnson's trial, was currently residing in prison, and had not received any consideration whatsoever from the Commonwealth in exchange for his testimony at Johnson's trial (3/13 - 17/97 NT at 164-197).

Claim 22

In claim 22, Johnson avers that the Commonwealth violated *Brady* by failing to disclose to the defense prior to trial the fact that witness Gary Miller, Jr. "had been implicated in a police killing when his car was used to rob the store where the officer was shot, and ammunition had been found in the car."

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[31] During an OAG agent's interview with Attorney Abruzzo, the agent neglected to ask Abruzzo what he recalls about the letter in question. The Commonwealth respectfully seeks leave of the Court to file a supplement to this response addressing Abruzzo's recollections on the subject after it has done a follow-up interview. *See* copy of OAG agent report attached as Exhibit X.

The averment is bald, conclusory, and undeveloped. There are no specific allegations that, if true, would satisfy a statutory exception to the one year time-bar. There is no factual support whatsoever cited in Johnson's filings for the self-serving proposition that Miller was "implicated" in a killing of a police officer, much less support for the notion that he was criminally charged or convicted in connection with a murder. The claim is both untimely and patently frivolous and the Commonwealth requests that the Court dismiss and deny the claim on those grounds.

Claim 23

In claim 23, Johnson avers that a number of items were suppressed by the Commonwealth prior to trial and that when considered cumulatively, the materiality prong of the Brady rule is satisfied to establish a violation of Johnson's due process constitutional rights.

The claim fails to plead specific facts which, if true, would establish that any of the alleged "suppressions" qualify for the ADE or GIE to the statutory time-bar. Johnson has failed to explain to the Court why he could not have raised these claims earlier that the year 2013 through the exercise of reasonable diligence. He has failed to articulate specific dates that he first became aware of each alleged "suppression" and what his basis is for alleging that he raised these issues within 60 days of the dates he could first have presented them. Indeed, **each and every one of these alleged suppressions/*Brady* violations could have been raised during Johnson's direct appeal proceedings, first PCRA proceedings, or second PCRA proceedings.**

They are patently untimely and the Court lacks jurisdiction to consider claim 23 as a matter of law.

In reality, Johnson has strung together six miscellaneous observations/complaints/accusations regarding various perceived aspects or imperfections in the Commonwealth's handling of this case and simply attached the label "*Brady* violation" to them. The claim is incoherent and absurd. The first two items identified are questions rather than purported evidence. The third item has no support; Davenport has repudiated Johnson's allegation on this point contained in the Shara Davis affidavit. With regard to item four, Doubs, Germaine, and Ripply ALL TESTIFIED AT TRIAL and either addressed the item raised or Johnson had an opportunity at that time to address the item. Item five is neither exculpatory or material to the outcome of the case. Item six is a mischaracterization of Detective Dillard's recollection of police interaction with Brown during the criminal investigation.

The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 24

Claim 24 avers that the third set of PCRA claims proves that Johnson "is innocent of the crimes with which he was charged, and that the Commonwealth had reason to know he was innocent but prosecuted him for murder nonetheless." It is not really a separate claim, but rather an inflammatory, provocative, defamatory characterization of the Commonwealth's prosecution of this case. **The**

Commonwealth categorically rejects this patently outrageous, frivolous, conclusory, self-serving, hyperbolic, sensational rhetoric as utterly false. The "claim" should be dismissed and denied without an evidentiary hearing.

Claim 25

In claim 25, Johnson avers with hindsight analysis that his trial counsel rendered ineffective assistance of counsel because she did not do certain things that Johnson and his current counsel believe she should have done. The claim is both untimely and is waived. It is waived pursuant to 42 Pa.C.S.A. §§ 9543(a)(3), 9544(b) because the claim could have been raised on direct appeal, in the first set of PCRA claims, or in the second set of PCRA claims but was not.

The Commonwealth disputes the factual averments contained in the claim. Remarkably, Johnson argues that his trial counsel should have interviewed his purported alibi witnesses Ripply, Alexander, Doubs, Germaine, and Thomas. **This contention directly contradicts his simultaneous claims that these witnesses were unavailable at the time of trial and could not have previously been discovered through the exercise of due diligence, and that he raised his claims in connection with these witnesses within 60 days of the dates that the claims could first have been presented to the Court.**

Claim 25 argues a standard of perfection. It is based on the theory -- not recognized in the law -- that trial counsel is ineffective if the petitioner can identify anything in hindsight that could possibly have been done differently or additionally that would have improved his chances of prevailing at trial. By way of example

only, Attorney Wagner did present to the jury an alibi defense for Johnson, utilizing the testimony of both Ripply and Doubs. Johnson's complaint now is that she should have done a more effective job, i.e. one that would have gained him an acquittal.

The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 26

In claim 26, Johnson advances a boilerplate, undeveloped allegation of PCRA counsel ineffectiveness. It is untimely and Johnson has failed to plead with specificity how an exception to the time-bar is applicable. It is also waived for two reasons. First, it is waived pursuant to 42 Pa.C.S.A. §§ 9543(a)(3), 9544(b) because the claim against first PCRA counsel could have been raised in the second PCRA proceedings, and the claims against second PCRA counsel could have been raised in the appellate courts on appeal of this Court's PCRA determinations. Second, it is waived because it is completely undeveloped. *See Commonwealth v. Perez*, 93 A.3d 829 (Pa. 2014); *Commonwealth v. Akbar*, 91 A.3d 227 (Pa. Super. 2014).

Claim 27

Claim 27 is not a claim for relief, but instead an argument that Johnson is entitled to discovery from the Commonwealth. As an initial matter, the Commonwealth notes that it has provided Johnson's counsel with the first two items requested -- the first eight pages of the police report and Carla Brown's statement given in March 1996 -- in a gesture of good will notwithstanding the fact that it was

not required to under the law. With regard to the remaining five items requested in claim 27, the Commonwealth disputes Johnson's argument that he has articulated exceptional circumstances that should trigger an override of the governing standard that ordinarily, a PCRA petitioner is not entitled to discovery.[32]

The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 28

In claim 28, Johnson avers for the first time in claim 28 that Doubs and Detective Kevin Duffin had a close personal relationship, that she regarded him as a brother, that she felt beholden to him, and that this information should have been disclosed to the defense prior to trial per *Brady* because it would have tipped the scales in Johnson's favor regarding her credibility in the eyes of the jury.

As already discussed, because Doubs is deceased, the Commonwealth is severely prejudiced in its ability to rebut this allegation, which it expressly denies. *See* copy of OAG agent report attached as Exhibit Z. It would be fundamentally unfair and a denial of justice to: (1) allow Johnson to proceed with this claim making self-serving characterizations about Doubs' state of mind that arguably undermine the Commonwealth's case notwithstanding the fact that Doubs -- the only person to actually know what her state of mind was regarding her relationship

[32] Notably, Johnson's claim 27 is reminiscent of a pre-trial motion for discovery, as if Johnson is entitled to retry his case. He is putting the cart before the horse: a PCRA petition must plead and prove that he is entitled to a new trial before he is entitled to start the pre-trial process -- including a motion for pre-trial discovery -- over again.

with Detective Duffin during the relevant time period -- is unavailable to testify at a PCRA hearing to shed light on the subject; and (2) to grant Johnson a new trial, to require the Commonwealth to rely on Doubs' 1997 trial testimony which did not address her relationship with Duffin in any manner, and to permit Johnson to argue to the jury this new theory that she had a motive to lie based on her relationship with Duffin. *See id.*

The claim is untimely and Johnson has failed to plead, much less establish: (1) that the ADE exception to the time-bar is applicable; (2) that the GIE exception to the time-bar is applicable: (3) what date he first learned of this purported information; (4) why he could not have, through the exercise of reasonable diligence, learned of this at an earlier time; and (5) that he filed the claim within 60 days of the date when he first could have presented it. Johnson has failed to articulate the circumstances surrounding his discovery of the purported evidence.

On the merits, the Commonwealth disputes the contention that, to the extent there was a pre-existing relationship existing between Doubs and Duffin (prior to trial), it was material to the outcome of Johnson's trial. James Bowman -- Doubs' brother -- refused to talk with OAG investigators and did not confirm the accuracy of Johnson's allegations. *See* copy of OAG agent report, attached as Exhibit AA. Assuming, *arguendo*, that the representations contained in the Freddie Williams PCRA affidavit are accurate, the proffered information is that Detective Duffin's mother cared for Victoria Doubs for approximately four years when Doubs was in elementary school. The suggestion that the failure of the Commonwealth to disclose

this specific information to the defense prior to trial constitutes a *Brady* violation is frivolous.

It is worth noting that in this Court's opinion denying the first set of PCRA claims, it specifically highlighted the fact that Doubs' credibility at trial was profoundly reduced by defense counsel questioning during cross-examination. *See* Exhibit O. The District Court, during Johnson's federal habeas corpus proceedings, came to the same conclusion, which served as the basis for its determination that the suppressed material relating to Doubs' own criminal case was not material for purposes of the *Brady* rule.

The Commonwealth acknowledges that if the Bowman PCRA affidavit is considered along with the Williams PCRA affidavit and the OAG agent report of the interview with Detective Duffin, there is arguahly a dispute of material fact. Therefore, it is the Commonwealth's position that if and only if the following conditions are satisfied, the Court should conduct an evidentiary hearing and permit development of the record on claim 28: (1) the Court finds that it has jurisdiction to consider the claim because an exception to the time limitation has been properly pleaded via an amended pleading and proved in a hearing on the issue of timeliness; (2) the Court finds that Johnson has amended his pleadings to satisfy the statutory pleading verification requirement; (3) the Court finds that Johnson has made the required threshold showing of a miscarriage of justice; and (4) the Court finds that Johnson is not precluded from proceeding on his claims due to unwarranted delay in filing them that has severely prejudiced the Commonwealth.

Claim 29

In claim 29, Johnson avers that on June 13, 2014, the Commonwealth provided him with a copy of the first eight pages of the police report that was generated in this case. According to Johnson, the Commonwealth had never previously produced pages one through eight of the police report to Johnson and neither he nor any of his counsel past or present had ever seen them prior to June 13, 2014. Johnson filed this claim on August 7, 2014. **Notably, the claim was not accompanied by affidavits from Johnson's prior attorneys Mr. Brandenstein, Ms. Wagner, Mr. Socha, and/or Mr. Engle corroborating Mr. Wiseman's contention that Johnson's file never contained these pages. It is also remarkably and disturbingly coincidental that the first eight pages of the police report list the names, addresses, telephone numbers, and other identifying information about people interviewed by the police, some of which Johnson now claims were unavailable to him prior to and at the time of trial.**[33]

The Commonwealth agrees that on June 13, 2014, in an act of good faith and a gesture of good will by undersigned counsel, the Commonwealth provided a copy of pages one through eight of the police report to Attorney Wiseman. This act was not required by any governing legal authority, and was done because: (1) Mr. Wiseman had indicated both in the court filings and in communications with

[33] If the eight pages were in fact turned over to the defense prior to trial as averred by the Commonwealth, Johnson's new claims relating to Jesse Davis, Adrian Fluellen, Brian Ramsey, Scott Holloway, and Tina Darden cannot be timely because the identity and contact information for each of these individuals was known by the defense prior to trial.

undersigned counsel that the files he had inherited from Johnson's prior chain of attorneys were incomplete and did not contain those specific pages;[34] and (2) **these pages of the report had been produced and/or made available for inspection and copying by the Commonwealth to Johnson's counsel prior to trial.**

The latter fact is borne out by the transcript for the PCRA hearing conducted in 2001, during which Attorney Wagner testified that the prosecutor had made the Commonwealth's entire file available to her prior to trial:

> Q: Now, in that regard, is it fair to say that you were given complete discovery by Mr. Abruzzo about this case, it was an open file?
>
> A: Yes. I went to his office and he pretty much let me look at everything.

(3/7/01 NT at 39).

Because the documentation at issue was made available to Ms. Wagner prior to trial, Johnson cannot satisfy the ADE exception to the one-year time limitation and the 60-day pleading requirement. Moreover, it is illogical and defies common sense to suggest that the Commonwealth disclosed **the paginated** police report to the defense prior to trial but withheld the first eight pages, and that Johnson's trial counsel (both Attorney Brandenstein and later Attorney Wagner) failed to notice -- or simply accepted the fact -- that the critically important document they received

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[34] In Johnson's counsel's own words, "[t]he file in counsel's possession has passed through the hands of a number of attorneys, and **accordingly it is far from complete**" (Aug. 7, 2014 Second Supplement to PCRA Petition at 2 n.2) (emphasis added).

from the Commonwealth detailing the Commonwealth's criminal investigation of the murder **began on page nine.** *See* Exhibit G.

In light of the foregoing, the Court can reliably conclude that the pages of the police report in question were disclosed to Johnson prior to trial, and therefore that he has failed to satisfy ADE exception to the statutory time-bar, including the requirement that the claim be raised within 60 days of the date that it first could have been presented. The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 30

In claim 30, Johnson avers that Wendy Harris ("Harris") was in the bar on the night in question and that: (1) Johnson was not in the bar; and (2) she saw no altercation in the bar.

The claim is untimely and Johnson cannot establish that the ADE to the time bar applies. This is because, according to Johnson's own pleadings, Harris knew Johnson as well as Walker and Jackson at the time. Obviously Johnson was aware of her identity and had access to the purported information. Moreover, Johnson has utterly failed to explain to the Court via specific factual allegations why he could not have discovered this information previously through the exercise of reasonable diligence, and what specific facts he relies on to aver that he raised the claim within 60 days of the date when the claim first could have been presented.

The claim fails all four prongs of the *Pagan* standard. Beyond the issue of reasonable diligence (prong 1), the information offered is cumulative of the

testimony provided at trial by Lashawnya Jackson (prong 2). It is offered to impeach the credibility of trial witnesses Brown and Miller (prong 3). In her interview with an OAG agent, Harris indicated that she cannot say for certain whether or not Johnson was in the bar on the night in question. *See* copy of OAG agent report attached as Exhibit Y.

For these reasons, the Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 31

In claim 31, Johnson avers that David Hairston ("Hairston") was with Johnson in New York on a drug run at the time of the murder, and that he did not appear as a witness for Johnson at trial because the police had falsely told him that Johnson was a witness against him in an unrelated case.

The claim is untimely and Johnson's attempt to fit it into the after-discovered evidence exception to the time-bar is unavailing and frivolous. Obviously, **if Johnson was in New York with Hairston at the time of the murder, he himself was fully aware of Hairston's identity and the fact that he could support his alibi and Johnson cannot claim that the proffered information could not have been discovered through reasonable diligence prior to trial and that he raised it within 60 days of discovering it. Johnson had the right to subpoena Hairston as a witness for trial in his defense but did not do so.** To suggest that Johnson was unable to bring this information to the Court's attention prior to 2013 begs credulity and again raises an issue of bad faith.

Claim 31 fails prongs 1, 2, and 4 of the *Pagan* test. Specifically with regard to the second prong, the proffered evidence is merely corroborative of Suquan Rippy's trial testimony that Johnson was in New York at the time of the murder. The Commonwealth disputes this claim and requests that it be dismissed and/or denied without an evidentiary hearing.

Claim 32

In claim 32, Johnson avers that the Commonwealth violated Brady by failing until September 2014 to produce to the defense the statement given by Carla Brown to the police on March 27, 1996.

As already articulated, Johnson's representation to the Court that the Brown statement was never disclosed or made available to him prior to September 2014 is patently false. In addition to the prosecutor making his entire file available to Ms. Wagner prior to trial, *see supra*, the following facts expose the fraudulent nature of claim 32: (1) Detective Duffin's police report was provided by District Attorney Abruzzo to Attorney Brandenstein on October 7, 1996, i.e. prior to the trial that occurred between March 13, 1997 and March 17, 1997; *see* Exhibit B; (2) Detective Duffin's police report specifically states that he interviewed Carla Brown on March 27, 1996, describes the nature of the statement Brown gave to him at that time, and clearly indicates with the language "SEE ATTACHED STATEMENT" that the Brown statement is attached to his report, *see* C; (3) at Johnson's preliminary hearing, Johnson's counsel reflected a specific awareness of this March 27, 1996 interview and the nature of Brown's statement to police, an awareness that was

unambiguously revealed by his cross-examination of Carla Brown questioning her directly about her comments to the police on March 27, 1996, *see* Exhibit D; and (4) at the PCRA hearing in 2001, Attorney Wagner testified that at the time of trial, she was aware of Brown's prior inconsistent statements, including a prior statement given to Detective Duffin, *see* Exhibit E. **In light of these indisputable facts, Johnson's representation to this Court that neither he nor any of his counsel were aware of the Brown statement prior to September 12, 2014 is incredibly reckless at best and unethical at worst.**[35]

Putting the foregoing information aside, Johnson's *pro se* PCRA petition filed on December 1, 1999 recites the following:

> Detective Curtis went to interview Carla Brown. During this first interview Ms. Brown denied any knowledge of the shooting (NT, 114-114). **About one week later Detective Duffin interviewed Ms. Brown a second time, and Ms. Brown's memory seemed to become restored...**

(Dec. 1, 1999 *Pro Se* PCRA Petition at 4) (emphasis added). This pleading -- which is consistent with Brown's testimony at the preliminary hearing -- reveals that on

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[35] At the time that Johnson's counsel filed the August 5, 2013 PCRA petition, he was fully aware of Carla Brown's testimony at Johnson's preliminary hearing (which included specific references by both Brown and Attorney Russo to her statement to Detective Duffin on March 27, 1996). This fact is revealed by current counsel's own assertions to this Court. *See* August 5, 2013 PCRA Petition at 16 n. 10 (characterizing Brown's testimony at the preliminary hearing). No less significantly, Johnson's counsel's November 12, 2014 filing specifically refers to Brown's testimony at Johnson's preliminary hearing. *See* Nov. 12, 2014 Third Supplement to PCRA Petition at 4. Having read the preliminary hearing transcript, which reflects Attorney Russo's awareness of both the existence and content of the Brown statement, Johnson's current counsel's allegation that the Commonwealth hid the existence and content of the statement is inexplicable and deeply troubling.

December 1, 1999, Johnson himself was aware of the Brown statement. Yet he waited more than 14 years to file this particular (fraudulent) claim.

In light of the foregoing, this Court must conclude that Johnson has failed to satisfy the ADE exception to the statutory time-bar for this claim, including the requirement that the claim be raised within 60 days of the date that it first could have been presented. The claim is also patently without merit.

IX. CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests the Court to do the following:

(1) Dismiss the third set of PCRA claims without an evidentiary hearing on the grounds that the Court lacks jurisdiction to consider them because they are facially untimely and: (a) with the exception of claims 29 and 32, Johnson has failed to plead with the requisite specificity the grounds upon which he claims that he has satisfied an exception to the time bar for each claim (without prejudice to Johnson's right pursuant to Pa.R.Crim.P. 905(B) to amend his pleadings to cure this defect); and (b) Johnson's specifically-pleaded contentions that claims 29 and 32 satisfy 42 Pa.C.S.A. § 9545(b)(1)(ii) are meritless;

(2) Dismiss and deny the third set of PCRA claims without an evidentiary hearing on the grounds that Johnson has failed to provide the required verification that his pleadings are truthful and accurate (without prejudice to Johnson's right pursuant to Pa.R.Crim.P. 905(B) to amend his pleadings to cure this defect);

(3) Dismiss and deny the third set of PCRA claims without an evidentiary hearing on the grounds that Johnson has failed to make a strong *prima facie* showing that a miscarriage of justice may have occurred which would permit review of his third set of PCRA claims;

(4) Dismiss and deny the third set of PCRA claims without an evidentiary hearing on the grounds that Johnson's delay in filing the 32 pending claims is unwarranted and severely prejudices the Commonwealth's ability: (a) to respond to a portion of the claims; and (b) to retry Johnson in the event that a new trial would be granted;[36]

(5) If and only if the following conditions are satisfied, conduct an evidentiary hearing and permit development of the record on claim 28: (a) the Court finds that it has jurisdiction to consider the

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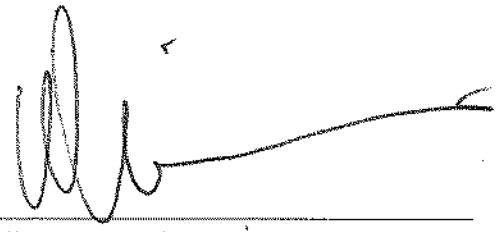
[36] As noted *infra*, prior to the Court reaching this determination, a hearing on this specific issue would have to be conducted following the filing by the Commonwealth of a motion to dismiss on this basis. *See Commonwealth v. Renchenski*, 52 A.3d 251 (Pa. 2012). The Commonwealth intends to file such a motion.

claim because an exception to the time limitation has been properly pleaded via an amended pleading and proved in a hearing on the issue of timeliness; (b) the Court finds that Johnson has amended his pleadings to satisfy the statutory pleading verification requirement; (c) the Court finds that Johnson has made the required threshold showing of a miscarriage of justice; and (d) the Court finds that Johnson is not precluded from proceeding on his claims due to unwarranted delay in filing them that has severely prejudiced the Commonwealth.

(6) Ultimately, deny all of Johnson's claims as lacking in merit.

Respectfully submitted,

KATHLEEN G. KANE
Attorney General

By: 

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Date: December 24, 2014

IN THE COURT OF COMMON PLEAS
OF DAUPHIN COUNTY, PENNSYLVANIA

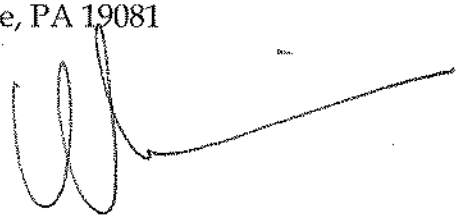
COMMONWEALTH OF PENNSYLVANIA,	:	
Respondent	:	
	:	
v.	:	**No. CP-22-CR-1544-1996**
	:	
LORENZO JOHNSON,	:	
Petitioner	:	

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving one copy of the foregoing COMMONWEALTH OF PENNSYLVANIA'S RESPONSE TO LORENZO JOHNSON'S THIRD SET OF COUNSELED PCRA CLAIMS upon the person and in the manner indicated below:

Service by UPS Ground
addressed as follows:

Michael Wiseman, Esquire
P.O.Box 120
Swarthmore, PA 19081



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