[J-171-2002]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 332 CAP
	:	
Appellee	:	
	:	Appeal from the Order of the Court of
	:	Common Pleas of Philadelphia County
v.	:	entered on 2/14/01 dismissing PCRA
	:	petition at Nos. 1994-1997 December
	:	Term 1981
JOSEPH D'AMATO,	:	
	:	
Appellant	:	SUBMITTED: August 21, 2002

CONCURRING OPINION

MR. JUSTICE EAKIN **DECIDED: September 2, 2004**

I join the majority opinion with respect to the resolution of all issues. Recognizing the precedent of employing the after-discovered evidence test to analyze recantation testimony, I write separately only to suggest that test is not really designed to assess post-verdict recantation, and ought to be reconsidered. Recantation at this stage may "fall under the heading" of after-discovered evidence, but this is only because it is "discovered after" trial. True "after-discovered evidence" is evidence that was existent but undiscovered at the time of trial as opposed to recantation evidence which did not exist at trial.

Analysis under the after-discovered evidence exception requires examination of whether a petitioner has shown the evidence:

> 1) has been discovered after the trial and could not have been obtained at or 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) is of such nature and character that a different verdict will likely result if a new trial is granted.

Commonwealth v. McCracken, 659 A.2d 541, 545 (Pa. 1995) (citation omitted).

As the test clearly assumes, after-discovered evidence existed at the time of trial, it was just not discovered until later. Recantation is new evidence, withdrawing, or repudiating that which went before; by definition, this "new" evidence was nonexistent at the time of trial. Thus, as applied to recantation, the first prong is never determinative; it is definitionally redundant and meaningless.

Likewise, the value (or lack thereof) of recantation evidence is not measured by the second prong, which considers whether it is merely corroborative or cumulative. It is inherently non-corroborative and non-cumulative of the testimony recanted; while the substance of it may, in the end, corroborate or be cumulative of other evidence, this has little to do with whether it should be the basis of relief. The very act of recanting gives the resultant version a different reputation and pedigree than other consistent-from-the-first testimony. When can recanted trial testimony be termed "merely cumulative," such as to make this prong analytically valuable?

The third prong is likewise not designed to measure recantation evidence, which will not be used solely to impeach. Recantation is new and different testimony. It certainly may involve credibility issues for the recanting witness, but the testimony must have some relevance beyond impeachment or it is not admissible in the first place. If the original testimony was used to impeach, the recanted testimony would tend to un-

impeach, not impeach; conversely if it was not originally impeachment testimony, it will not be solely impeachment testimony in the recanted form.

The last prong certainly applies, but the first three do not. The fourth prong is, in my judgment, sufficient to test recantation evidence, understanding that such is always of questionable credibility. However, in trying to fit the shoe of the after-discovered evidence test on the foot of recantation evidence, we end up simply with a test that is not a good fit. Thus, I offer this concurrence, suggesting the applicable rule be recobbled.