J-S57038-13

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
DOMENIQUE THOMAS WILSON, a/k/a DONMONIC THOMAS WILSON,	:	
	:	
Appellant	:	No. 257 MDA 2013

Appeal from the Order entered on January 10, 2013
in the Court of Common Pleas of Clinton County,
Criminal Division, No. CP-18-CR-0000148-2009

BEFORE: PANELLA, MUNDY and MUSMANNO, JJ.

MEMORANDUM BY MUSMANNO, J.: **FILED NOVEMBER 26, 2013**

Domenique Thomas Wilson, a/k/a Donmonic Thomas Wilson ("Wilson"), appeals from the Order denying his Petition for relief pursuant to the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§ 9541-9546. We affirm.

The pertinent facts and procedural history of this case are as follows:

> On March 3, 2010, [] Wilson was convicted by a jury of his peers on every count contained in a thirty-seven (37) count information, which included multiple counts of, *inter alia*, rape, involuntary deviate sexual assault, criminal trespass, robbery, burglary, and unlawful restraint. The jury determined that [] Wilson was the perpetrator who, on February 1, 2009, broke into a house shared by three female college students who were, at the time, attending Lock Haven University, subduing them, as well as raping and otherwise sexually violating two of them over a period lasting between approximately five (5) and six (6) hours, before absconding with their cash, credit cards, debit cards, and cellular phones.

> Following … review of [Wilson's] Pre-Sentence Investigation (PSI) report, after hearing remarks by the district attorney and counsel for [] Wilson, after all eligible offenses were merged and taking into consideration applicable deadly weapon aggravators, th[e trial c]ourt sentenced [] Wilson to various terms of imprisonment, aggregating to between eight hundred and forty (840) to two thousand, three hundred and fifty-two (2,352) months[fn], which sentence commenced on June 7, 2010. [Wilson's] trial counsel, Todd Fiore, Esq. ["Fiore"], filed a motion to withdraw as counsel, which was granted on the same date as [Wilson's] sentencing hearing — that is, June 7, 2010. Th[e trial c]ourt then appointed David Isaac Lindsay, Esq. ["Lindsay"], Public Defender, to represent [Wilson]. Attorney Lindsay filed post[-]sentence motions on June 18, 2010. In lieu of an appeal, Attorney Lindsay filed an ***Anders*** **[*v. California***, 386 U.S. 738 (1967)] brief, stating that all bases of appeal available to [Wilson] were frivolous. Subsequent thereto, the Superior Court remanded, directing Attorney Lindsay to follow the ***Anders*** procedure set forth by the Pennsylvania Supreme Court in ***Commonwealth v. Santiago***, 602 Pa. 159, 978 A.2d 349 (2009). Attorney Lindsay subsequently followed that procedure and the Superior Court both permitted his withdrawal as counsel and affirmed [Wilson's] sentence in an unreported memorandum Opinion, dated December 13, 2011. Despite Mr. Lindsay's assessment of frivolity, [Wilson] persisted in appealing the discretionary aspects of his sentence. [Wilson] contended that the sentence this Court imposed was excessive because, in [Wilson's] estimation, it failed to give due weight to his rehabilitative needs. The Superior Court, noting that [Wilson's] sentence for each conviction was within the standard sentencing range, found that [Wilson's] argument did not raise a substantial question as to whether the sentence [] imposed was not appropriate. That court also expressly stated that it found no abuse of discretion. ***See Commonwealth v. Wilson***, 1116 MDA 2010 (Pa. Super. 2011), at page 6.
>
> [fn] This sentence translates to between seventy (70) and one hundred and ninety-six (196) years of imprisonment.

Beginning in November of 2011, [Wilson] filed, *pro se*, a [P]etition for postconviction collateral relief. On November 29,

> 2011, th[e PCRA c]ourt appointed John P. Boileau, Esq. ["Boileau"], to represent [Wilson] in his efforts to obtain post-conviction collateral relief. Due to an apparent conflict of interest with Mr. Boileau's office, th[e PCRA c]ourt removed [] Boileau and appointed Frederick Lingle, Esq. ["Lingle"], to represent [Wilson] on December 2, 2011. On March 29, 2012, in accordance with the schedule set forth by th[e PCRA c]ourt, [] Lingle filed, on behalf of [Wilson], an "Amended Motion for Post Conviction Collateral Relief," setting forth thirteen (13) assertions of ineffective assistance of counsel[fn], which also contained a vague reference to "[a] violation of the Constitution of the Commonwealth or the laws of the United States which, in the circumstances of the particular case, so undermine the truth-determining process that no reliable adjudication of guilt or innocence could have taken place[fn]". We view this document as a petition fitting within the ambit of [the PCRA]…. On April 17, 2012, [Wilson] moved to add an additional assertion of ineffectiveness to his Petition, as paragraph 5.A.14. Th[e PCRA c]ourt permitted the addendum by an Order dated April 17, 2012.
>
> [fn] The only assertion which appears to relate to Attorney Lindsay's post-sentence representation of [Wilson] is set forth at Paragraph 5.A.13 of [Wilson's] Amended PCRA Petition, which cites a failure to file post-trial motions.
>
> [fn] ***See generally*** Defendant's Amended Motion for Postconviction Collateral Relief, filed March 29, 2012, at ¶ 5.

PCRA Court Opinion, 1/11/13, at 1-3 (footnotes in original).

After a hearing, the PCRA court denied Wilson's PCRA Petition. Wilson filed a timely appeal of the PCRA court's Order denying his PCRA Petition. The PCRA court ordered Wilson to file a Pa.R.A.P. 1925(b) concise statement, and Wilson complied with that Order.

Wilson raises the following issues on appeal:

> 1. Did trial counsel provide [Wilson] with ineffective assistance of counsel such that he should be granted a new trial?
>
> 2. Was [Wilson] provided his constitutional right to a fair trial?
>
> 3. Did post-trial appointed counsel provide [Wilson] with ineffective assistance of counsel?

Brief for Appellant at 3.

Wilson first contends that his trial counsel, Fiore and Alan Sagot, Esq. ("Sagot"), provided ineffective assistance of counsel requiring the granting of a new trial. Specifically, Wilson argues that his trial counsel were ineffective for failing to file a motion to suppress statements he made to the police after the police had given him ***Miranda***[1] warnings. Wilson alleges that the statements were made after he told the police that he wished to obtain an attorney. Wilson also argues that trial counsel was ineffective for failing to object to the prosecutor's reference to these statements in closing argument.

"When reviewing an order of a PCRA court, our standard of review is whether the determination of the PCRA court is supported by the evidence of record and is free of legal error." ***Commonwealth v. Hill***, 42 A.3d 1085, 1089 (Pa. Super. 2012).

> In order to establish a claim of ineffective assistance of counsel under the PCRA, an appellant must show that: (1) the claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or

[1] ***Miranda v. Arizona***, 384 U.S. 436 (1966).

> inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different.

Commonwealth v. Moore, 805 A.2d 1212, 1215 (Pa. 2002) (citation omitted). "A PCRA court passes on witness credibility at PCRA hearings, and its credibility determinations should be provided great deference by reviewing courts." ***Commonwealth v. Johnson***, 966 A.2d 523, 539 (Pa. 2009).

In the instant case, we have thoroughly reviewed the record in connection with Wilson's claim of ineffective assistance of counsel. Based on our review, we conclude that there is no arguable merit to Wilson's claim. The PCRA court has accurately addressed this issue. ***See*** PCRA Court Opinion, 1/11/13, at 30-34. We adopt the PCRA court's Opinion and affirm on that basis with regard to this issue. ***See id.***

Wilson further contends that his trial counsel was ineffective for failing to file a motion requesting the trial court to pay for independent DNA testing. Wilson asserts that trial counsel was ineffective for failing to file a motion in *limine* with regard to DNA evidence from three open cases in Philadelphia County, which matched the DNA evidence in the present case. In addition, Wilson argues that trial counsel was ineffective for failing to discredit the evidence presented by the Commonwealth's DNA expert.

We have thoroughly reviewed the record with regard to these contentions. Based on our review, we conclude that Wilson is not entitled to

relief on these claims. The PCRA court has accurately addressed these issues. ***See*** PCRA Court Opinion, 1/11/13, at 42-46. We adopt the PCRA court's Opinion and affirm on that basis with regard to these issues. ***See id.***

Wilson next contends that his trial counsel was ineffective for failing to attempt to suppress the voice identification evidence. At trial, two of the three victims identified Wilson's voice from an audio recording of Wilson talking to another person.

We have thoroughly reviewed the record with regard to this contention. Based on our review, we conclude that Wilson is not entitled to relief on this claim. The PCRA court has accurately addressed this issue in its Opinion. ***See*** PCRA Court Opinion, 1/11/13, at 11-30. We adopt the PCRA court's Opinion and affirm on that basis with regard to this issue. ***See id.***

Wilson next contends that his trial counsel was ineffective for failing to object to remarks made by the district attorney in his opening statement, during trial, and during closing argument. Specifically, Wilson objects to the district attorney's use of the word "defendant" instead of the word "perpetrator" when questioning witnesses. Wilson also alleges that, during his opening statement, the prosecutor stated that the person responsible for the crimes was the "defendant." In addition, Wilson claims that, during closing remarks, the prosecutor gave his opinion that Wilson was the perpetrator of the crime by using the word "defendant."

After thoroughly reviewing the record with regard to these claims, we conclude that Wilson is not entitled to relief. The PCRA court has accurately addressed these issues in its Opinion. ***See*** PCRA Court Opinion, 1/11/13, at 36-39, 40-42. We adopt the PCRA court's Opinion and affirm on that basis with regard to these issues. ***See id.***

Wilson next contends that his constitutional right to a fair trial was violated by the prosecutor telling the jury, in his opening statement, that the "defendant" was the perpetrator of the crimes, and by referring to "the defendant" as the perpetrator of the crimes during questioning of the victims.

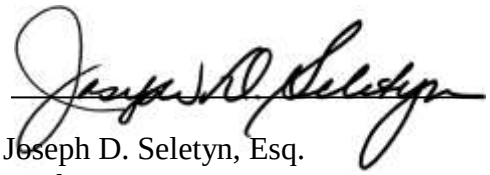
Any issue not raised in a Rule 1925(b) concise statement is considered waived on appeal. Pa.R.A.P. 1925(b)(4)(vii); ***Commonwealth v. Dowling***, 778 A.2d 683, 686 (Pa. Super. 2001). Here, Wilson failed to raise the above-stated issue in his Rule 1925(b) Concise Statement. Therefore, we deem the issue waived for the purpose of this appeal.

Finally, Wilson contends that his post-trial counsel was ineffective for filing an untimely Motion to modify sentence.

After reviewing the record, we conclude that this claim lacks merit. The PCRA court has accurately addressed this issue in its Opinion. ***See*** PCRA Court Opinion, 1/11/13, at 50-51. We adopt the PCRA court's Opinion and affirm on that basis with regard to this issue. ***See id.***

Order affirmed.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 11/26/2013

557038-13

IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA :
:
v. : NO. 148-2009 CR
:
DOMENIQUE THOMAS WILSON, :
Defendant :

FILED
CLINTON COUNTY, PA
2013 JAN 11 AM 8 58
MARIE J. VILELLO
PROTHONOTARY & CLERK

OPINION

Procedural History

On March 3, 2010, Defendant Domenique Thomas Wilson was convicted by a jury of his peers on every count contained in a thirty-seven (37) count information, which included multiple counts of, *inter alia*, rape, involuntary deviate sexual assault, criminal trespass, robbery, burglary, and unlawful restraint. The jury determined that Defendant Wilson was the perpetrator who, on February 1, 2009, broke into a house shared by three female college students who were, at the time, attending Lock Haven University, subduing them, as well as raping and otherwise sexually violating two of them over a period lasting between approximately five (5) and six (6) hours, before absconding with their cash, credit cards, debit cards, and cellular phones.

Following our review of Defendant's Pre-Sentence Investigation (PSI) report, after hearing remarks by the district attorney and counsel for Defendant Wilson, after all eligible offenses were merged and taking into consideration applicable deadly weapon aggravators, this Court sentenced Defendant Wilson to various terms of imprisonment, aggregating to between eight hundred and forty (840) to two thousand, three hundred and fifty-two (2,352)

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months[1], which sentence commenced on June 7, 2010. Defendant's trial counsel, Todd Fiore, Esq., filed a motion to withdraw as counsel, which was granted on the same date as Defendant's sentencing hearing – that is, June 7, 2010. This Court then appointed David Isaac Lindsay, Esq., Public Defender, to represent Defendant. Attorney Lindsay filed post-sentence motions on June 18, 2010. In lieu of an appeal, Attorney Lindsay filed an *Anders*[2] brief, stating that all bases of appeal available to Defendant were frivolous. Subsequent thereto, the Superior Court remanded, directing Attorney Lindsay to follow the *Anders* procedure set forth by the Pennsylvania Supreme Court in *Commonwealth v. Santiago*, 602 Pa. 159, 978 A.2d 349 (2009). Attorney Lindsay subsequently followed that procedure and the Superior Court both permitted his withdrawal as counsel and affirmed Defendant's sentence in an unreported memorandum Opinion, dated December 13, 2011. Despite Mr. Lindsay's assessment of frivolity, Defendant persisted in appealing the discretionary aspects of his sentence. Defendant contended that the sentence this Court imposed was excessive because, in Defendant's estimation, it failed to give due weight to his rehabilitative needs. The Superior Court, noting that Defendant's sentence for each conviction was within the standard sentencing range, found that Defendant's argument did not raise a substantial question as to whether the sentence we imposed was not appropriate. That court also expressly stated that it found no abuse of discretion. *See Commonwealth v. Wilson*, 1116 MDA 2010 (Pa.Super.2011), at page 6.

Beginning in November of 2011, Defendant filed, *pro se*, a petition for post-conviction collateral relief. On November 29, 2011, this Court appointed John P. Boileau, Esq., to represent Defendant-Petitioner in his efforts to obtain post-conviction collateral

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[1] This sentence translates to between seventy (70) and one hundred and ninety-six (196) years of imprisonment.
[2] *See Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396 (1967).

relief. Due to an apparent conflict of interest with Mr. Boileau's office, this Court removed Mr. Boileau and appointed Frederick Lingle, Esq. to represent Defendant-Petitioner on December 2, 2011. On March 29, 2012, in accordance with the schedule set forth by this Court, Mr. Lingle filed, on behalf of Defendant-Petitioner, an "Amended Motion for Post Conviction Collateral Relief," setting forth thirteen (13) assertions of ineffective assistance of counsel[3], which also contained a vague reference to "[a] violation of the Constitution of the Commonwealth or the laws of the United States which, in the circumstances of the particular case, so undermine the truth-determining process that no reliable adjudication of guilt or innocence could have taken place[4].". We view this document as a petition fitting within the ambit of Pennsylvania's Post Conviction Relief Act (PCRA), 42 Pa.C.S. §§ 9541–9546. On April 17, 2012, Defendant moved to add an additional assertion of ineffectiveness to his Petition, as paragraph 5.A.14. This Court permitted the addendum by an Order dated April 17, 2012. Including that addendum, the fourteen (14) bases of ineffective assistance of counsel presently articulated by Defendant's PCRA Petition, as amended, are paraphrased below:

1. Defendant-Petitioner's trial counsel failed to file a suppression motion suppressing what Defendant-Petitioner characterizes as an "illegal voice identification" of Defendant-Petitioner by two of the victim-witnesses[5].

2. Defendant-Petitioner's trial counsel never filed a Motion to suppress evidence obtained as a result of police questioning of Defendant on February 13, 2009, at 9:41 p.m., at which point Defendant claims he indicated to police that he wanted an attorney to represent

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[3] The only assertion which appears to relate to Attorney Lindsay's post-sentence representation of Defendant is set forth at Paragraph 5.A.13. of Defendant's Amended PCRA Petition, which cites a failure to file post-trial motions.
[4] *See generally* Defendant's Amended Motion for Postconviction Collateral Relief, filed March 29, 2012, at ¶ 5.
[5] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶ 5.A.1.

him. As a related matter, Defendant also asserts that his trial counsel never objected when the prosecutor referred to the "subsequent questions and answers about subsequent questioning throughout the trial including in his Closing Argument[6]."

3. Defendant-Petitioner's trial counsel failed to subpoena and call as witnesses specific persons – to wit, Tiffany Dorman, Marjorie Mincer, Marissa Wright and Marissa Shady, who, according to Defendant-Petitioner, "could have rebutted evidence presented by the Commonwealth identifying the Defendant as a Perpetrator of" the crimes for which Defendant-Petitioner was convicted[7].

4. Defendant-Petitioner's trial counsel did not object when the District Attorney stated that Defendant-Petitioner was the person inside the apartment of the three victims, was confronted by the victims, and engaged in various acts forming the *res gestae* of these offenses. Defendant-Petitioner characterizes this as the district attorney improperly injecting his opinion into the Opening Statement[8].

5. Defendant-Petitioner's trial counsel did not move for a mistrial when the District Attorney referred to Defendant-Petitioner as the perpetrator at least thirty-nine (39) times during his examination of the victims[9].

6. Defendant-Petitioner's trial counsel did not object to, and in fact consented to, the entry into evidence of various "improper" exhibits to which a jury could give undue weight[10].

7. Defendant-Petitioner's trial counsel introduced as an exhibit at trial, the Affidavit of Probable Cause for the search warrants issued on February 13, 2009[11].

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[6] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶ 5.A.2.
[7] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.3.
[8] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.4.
[9] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.5.
[10] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶ 5.A.6 (citing Exhibits ## 35-39, 45-60, 73-87).
[11] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.7.

8. Defendant-Petitioner's trial counsel did not object to the admission of what Defendant-Petitioner regards as "improper parts of the Closing Argument of the Prosecutor" nor did he move for a mistrial on the basis of such admission. Particularly, Defendant-Petitioner takes issue with the chosen language "There is no doubt... that this is the person that committed all of these offenses[12]."

9. Defendant-Petitioner's trial counsel did not object to the testimony and conclusions drawn by the Commonwealth's expert witness, regarding DNA evidence which placed Defendant-Petitioner as the probable[13] contributor of semen samples found in the rape victims[14].

10. Defendant-Petitioner's trial counsel did not challenge the DNA results or present any expert testimony to challenge the testimony of the Commonwealth's expert witnesses as being "unreliable and inadmissible[15]."

11. Defendant-Petitioner's trial counsel did not cross-examine the Commonwealth witnesses or offer evidence that the search and seizure of cellular phones found with Defendant were not the cellular phones taken from the victims nor used by the perpetrator at the scene of the crime[16].

[12] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.8.
[13] As the Commonwealth points out in its Brief, the testimony of Frank Kist, a forensic scientist with the Pennsylvania State Police DNA Lab, was that based on analysis of DNA in the semen obtained from sexual assault evidence collection kits performed on the victims, utilizing known samples of DNA from each victim and Defendant-Petitioner, the probability that some randomly selected individual, other than Defendant-Petitioner, contributed the semen was one in 360 quintillion for the African American population. *See* Trial Transcript, March 2, 2010, at page 134. We take notice that one quintillion represents ten to the eighteenth power, or 10^{18}, for which the long form expression is 1,000,000,000,000,000,000. A quintillion is equivalent to one billion billions.
[14] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.9
[15] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.10.
[16] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.11.

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12. Defendant-Petitioner's trial counsel did not object and move for a mistrial when the district attorney stated that Defendant-Petitioner's trial counsel had every opportunity to have his client take the stand and testify[17].

13. Following the withdrawal of Defendant-Petitioner's trial counsel, Defendant-Petitioner's court-appointed Public Defender did not file timely post-sentence motions, thus resulting in their dismissal by the court[18].

14. Defendant-Petitioner's trial counsel, when questioning victim Andrea Strough, referred to Defendant-Petitioner as having done acts to her as if Defendant-Petitioner was, in fact, the perpetrator of the crime in question[19].

Post Conviction Relief Act & Applicable Standards

The PCRA "provides for an action by which persons convicted of crimes they did not commit and persons serving illegal sentences may obtain collateral relief." *See* 42 Pa.C.S. § 9542. Section 9542 also makes clear that the PCRA is "the sole means of obtaining collateral relief" which "encompasses all other common law and statutory remedies for the same purpose." *See id.* To be eligible for relief under the PCRA, under the circumstances of the instant case, Defendant-Petitioner must both plead and prove, by a preponderance of the evidence, that (1) he has been convicted of a crime under the laws of the Commonwealth of Pennsylvania and is at the time relief is requested currently serving a sentence of imprisonment, probation or parole for that crime; (2) That the conviction or sentence resulted from one or more of the following: (i) a violation of the Pennsylvania Constitution or the United States Constitution or the laws of the United States which, under the circumstances of

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[17] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.12.
[18] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.13.
[19] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.14.

this case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place; (ii) ineffective assistance of counsel which, under the circumstances of this case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place …; or (vii) the imposition by the trial court of a sentence greater than the lawful maximum; (3) that the allegation of error has not been previously litigated or waived; and (4) that any failure to litigate an issue prior to or during trial or on direct appeal could not have been the result of any rational, strategic or tactical decision by counsel. *See* 42 Pa.C.S. § 9543. An issue has been previously litigated, for the purposes of the PCRA, where "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue" or where "it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." *See* 42 Pa.C.S. § 9544(a)(2)-(3). An issue has been waived, for the purposes of the PCRA, "if the petitioner could have raised it but failed to do so before trial, at trial, […] on appeal or in a prior state post-conviction proceeding." *See* 42 Pa.C.S. § 9544(b). We note that, with the exception of assertion number 13, set forth above, Defendant is barred from directly raising constitutional or statutory violations *directly*, as those claims were waived for failure to raise them before the trial court or on direct appeal. Instead, Defendant-Petitioner seeks to ascribe ineffectiveness to his counsel for their perceived failures.

Defendant-Petitioner clearly meets the first criterion for relief, as he has been convicted of numerous offenses under Pennsylvania's Crimes Code and is currently serving a sentence of imprisonment, which was imposed following those convictions. When sitting as a PCRA Court, we must begin our analysis of claimed ineffectiveness of assistance of counsel with the strong presumption that counsel was effective and make every effort to

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eliminate the distorting effects of hindsight from our analysis of the reasonableness of counsel's strategic decisions. *See Commonwealth v. Spotz*, *supra*, 610 Pa. 17, 44, 18 A.3d 244, 259-60 (2011) (citing *Commonwealth v. Rios*, 591 Pa. 583, 609, 920 A.2d 790, 805 (2007)); *Commonwealth v. Hanible*, 30 A.3d 426, 439 (Pa.2011) (citing *Commonwealth v. Cooper*, 596 Pa. 119, 941 A.2d 655, 664 (2007)); *see also Commonwealth v. Miller*, 494 Pa. 229, 233, 431 A.2d 233, 235 (1981) (iterating, under older Post Conviction Hearing Act (PCHA), that counsel's alleged ineffectiveness must be viewed in the light of the strategic alternatives available to counsel, contemporaneous to counsel's representation); *Strickland*, *supra*, 466 U.S. at 688-89, 104 S.Ct. at 2065 ("[j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable [....] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'") (internal citations omitted); *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 602, 235 A.2d at 351 (on review of a petition for habeas corpus predating the PCRA, the Pennsylvania Supreme Court recognized "(T)he concept of 'effective representation' must be strictly construed and no deprivation found to result unless

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appellant's representation was so lacking in competence as to make a mockery of justice.' [...] However, whatever the applicable characterization, a court is compelled to test, at least in some minimal way, the effectiveness of counsel's efforts. We approach such a task always mindful of the presumption that counsel is competent [....]" (internal citations omitted). When determining whether counsel's actions or omissions were reasonable, "we do not question whether there were other more logical courses of action which counsel could have pursued: rather, we must examine whether counsel's decisions had *any* reasonable basis." *See Commonwealth v. Rios*, 591 Pa. 583, 920 A.2d 790, 799 (2007) (emphasis added). "'A chosen strategy will not be found to have lacked a reasonable basis unless it is proven 'that an alternative not chosen offered a potential for success substantially greater than the course actually pursued.'" *See Commonwealth v. Collins*, 598 Pa. 397, 409, 957 A.2d 237, 244 (2008) (quoting *Commonwealth v. Williams*, 587 Pa. 304, 899 A.2d 1060, 1064 (2006), in turn quoting *Commonwealth v. Howard*, 553 Pa. 266, 719 A.2d 233, 237 (1998)).

Ever realizing that a petitioner has the burden of proof in a PCRA proceeding, in order to evaluate whether Defendant-Petitioner has rebutted the strong presumption that his counsel was effective, we must adhere to the three-prong test applied by our Supreme Court, utilizing the same standard applied by the United States Supreme Court:

> To establish counsel's ineffectiveness, a PCRA petitioner must demonstrate: (1) the underlying claim has arguable merit; (2) counsel had no reasonable basis for the course of action chosen; and (3) counsel's action or inaction prejudiced the petitioner.

Commonwealth v. Abraham, 2012 WL 6097088 (Pa. 2012), at page 2, n. 5 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Commonwealth v. Pierce*, 515 Pa. 153, 527 A.2d 973, 975 (1987) (recognizing complete harmony between *Strickland* standard for Sixth Amendment ineffectiveness of counsel and the standard set forth by Pennsylvania Supreme Court in *Commonwealth ex rel. Washington v. Maroney, supra*); *See also Commonwealth v. Spotz*, 18 A.3d 244, 260 (Pa. 2011) (citing *Commonwealth v. Steele*, 599 Pa. 341, 961 A.2d 786, 796 (2008)).

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In the interest of judicial economy, we may dispose of any issue raised in a PCRA petition by reference to *any* of the above prongs, without regard to order, and having so disposed of it, we need not pursue further analysis of the remaining prongs. *See Commonwealth v. Travaglia*, 541 Pa. 108, 122, 661 A.2d 352, 359 (1998) (citing *Strickland, supra*). A failure to satisfy *any one of the three prongs* of the test for ineffectiveness requires rejection of the claim. *See Collins*, 598 Pa., at 409, 957 A.2d, at 244 (emphasis added). In order to demonstrate prejudice, a PCRA petitioner must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See, e.g., Commonwealth v. Kimball*, 555 Pa. 299, 724 A.2d 326 (1999); *Commonwealth v. Pierce, supra,* 515 Pa. 153, 527 A.2d 973 (1987); *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). A reasonable probability is a probability that is sufficient to undermine confidence in the outcome of the proceeding. *See Collins, supra*; *Strickland, supra.* The Pennsylvania Supreme Court in *Kimball* stated:

> *Strickland*'s admonition that "[i]n every case the court should be concerned with whether … the result of the particular proceeding is unreliable because of a breakdown in the adversarial process," *Strickland*, 466 U.S. at 696, 104 S.Ct. 2052, finds its echo in the following language of the PCRA:
>
> > (2) [t]hat the conviction or sentence resulted from one or more of the following:
> >
> > …
> >
> > > (ii) ineffective assistance of counsel which, in the circumstances of the particular case, *so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.*
>
> 42 Pa.C.S. §9543 (emphasis added).

See Kimball, 555 Pa., at 310-11, 724 A.2d, at 332.

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The *Kimball* Court held:

> [W]here the petitioner has demonstrated that counsel's ineffectiveness has created a reasonable probability that the outcome of the proceedings would have been different, then no *reliable* adjudication of guilt or innocence could have taken place. Reliability of the adjudication of guilt or innocence and the probability that counsel's ineffectiveness caused a different outcome of the proceedings are concepts so closely intertwined and commonly-rooted in *Strickland* that we refuse to separate them.

See Kimball, 555 Pa., at 312-13, 724 A.2d, at 333 (emphasis in original).

No number of failed PCRA claims may collectively warrant relief if such claims fail to do so individually. *See Commonwealth v. Sherwood*, 603 Pa. 92, 982 A.2d 483 (2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 56 (2008); *Commonwealth v. Washington*, 592 Pa. 698, 927 A.2d 586, 617 (2007).

On September 11, 2012, we afforded Defendant-Petitioner Wilson, aided by Mr. Lingle, a hearing at which he could vet his PCRA claims. After hearing the testimony, we now address the assertions set forth under Defendant-Petitioner's petition *ad seriatim*, in order to determine whether Defendant-Petitioner has proven, by preponderance of the evidence, that his convictions or sentences, in any instance, resulted from the ineffective assistance of his legal counsel.

I. Failure of Trial Counsel to File a Motion to Suppress Defendant's Voice Identification

In the case *sub judice*, all three of the victim-witnesses were asked by police investigators to listen to an audio-recorded conversation and to tell the investigators whether they recognized either of the voices on it. The voice sample provided to the victim-witnesses

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for review was an audio recording of Defendant-Petitioner[20]. While the first victim-witness to testify at trial did not recognize the voice, the other two victim-witnesses recognized it as that of the perpetrator's and, therefore, identified Defendant-Petitioner as the perpetrator. Defendant-Petitioner now attacks the voice-identification procedure utilized by the police, asserting that it was impermissibly suggestive.

It is settled law in Pennsylvania that a witness may testify to a person's identity from his voice alone. *Commonwealth v. Jones*, 954 A.2d 1194, 1197 (Pa.Super. 2008); *Commonwealth v. Fromal*, 392 Pa.Super. 100, 109, 572 A.2d 711, 716 (1990) (citing *Commonwealth v. Woodbury*, 329 Pa.Super. 34, 40, 477 A.2d 890, 893 (1984), in turn citing *Commonwealth v. Reid*, 448 Pa. 288, 292 A.2d 297 (1972)). Moreover, evidence of identification need not be positive and certain to sustain a conviction. *See Fromal*, 392 Pa.Super., at 109, 572 A.2d, at 716 (citing *Woodbury*, *supra*, 329 Pa.Super at 40, 477 A.2d at 893, in turn quoting *Commonwealth v. Hickman*, 453 Pa. 427, 309 A.2d 564 (1973)). The weight to be accorded voice identification testimony is a question for the trier of fact. *See id.*

In *Biggers v. State of Tennessee*, 390 U.S. 404, 88 S.Ct. 979 (1968), the Supreme Court of the United States considered a criminal defendant's due process right, attendant to a single police "showup" where a rape victim made both a visual and voice identification of a single rape suspect, who was sixteen years of age at the time of the offense. The facts of the "showup," were recited by the Supreme Court in a *per curiam* Opinion in *Biggers*, *supra*, on discretionary direct review:

> On August 17, 1965, petitioner, still only 16 years old, was arrested for the rape of another woman. On the same day the police brought [victim] to the police station to 'look at a suspect.' They brought petitioner to the doorway

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[20] *See* Trial Transcript, March 1, 2010, at page 137; Trial Transcript, March 2, 2010, at pages 62-63 (Corporal Kibler of the Lock Haven Police confirmed that two of the three victim-witnesses identified Defendant-Petitioner's voice from the audio recording).

> of the room where she sat. She asked the police to have him speak and they told him to repeat the words spoken by the rapist, 'Shut up, or I'll kill you.' Only after he had spoken did [victim] identify petitioner as the man who had raped her; she testified [at trial] that it was petitioner's voice that 'was the first thing that made [her] think it was the boy.'

See Biggers v. State of Tennessee, 390 U.S., at 405, 88 S.Ct., at 980 (1968).

Also on direct review, the Court noted that "[t]he only evidence connecting [the defendant-petitioner] with the rape was [victim]'s station-house identification. She did not identify him in the courtroom. She testified that she had identified him by his size, his voice, his smooth skin, and his bushy hair." *See Biggers*, 390 U.S., at 405-06, 88 S.Ct., at 980. The *Biggers* Court reasoned that its earlier decisions made clear that "'a procedure of identification may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' that due process of law is denied when evidence of the identification is used at trial." *See* 390 U.S., at 406, 88 S.Ct., at 980. (citing *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967); *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968)). The *Biggers* Court stated that the claim that the rape victim's identification of defendant-petitioner fell within the rule calling for the exclusion from admission of such evidence "'must be evaluated in light of the totality of the circumstances' with the view of determining if the procedure in petitioner's case 'was so unduly prejudicial as fatally to taint his conviction.'" *See id* (quoting *Simmons, supra*). Because the *Biggers* identification occurred as a one-on-one "showup" arranged by the police, absent any issue of compelling urgency, some seven months following the rape, and where the police officers referred to defendant-petitioner as a suspect, the Court stated there that, under the totality of the circumstances, it appeared the "police maximized the suggestion that petitioner committed the crime." *See Biggers*, 390 U.S., at 408, 88 S.Ct., at 981. The Court's further statements, however, tempered its holding:

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> *Of course, due process is not always violated when the police fail to assemble a lineup but conduct a one-man showup.* Plainly here, however, the highly suggestive atmosphere that had been generated by the manner in which this showup was arranged and conducted could not have failed to affect [victim]'s judgment; when she was presented with no alternative choices, 'there (was) then a strong predisposition to overcome doubts and to fasten guilt upon the lone suspect.' Palmer v. Peyton, [359 F.2d,] at 201. The conclusion is inescapable that the entire atmosphere created by the police surrounding Mrs. Beamer's identification was so suggestive that use at trial of her station-house identification constituted a violation of due process.

See Biggers, 390 U.S., at 408-09, 88 S.Ct., at 981 (emphasis added).

The *Biggers* Court on direct review made a point to specify that voice identification is potentially prejudicial and hinted they may constitute an imprecise form of identification:

> [U]nlike the Simmons case, identification here rested largely on voice. The fact that petitioner had 'the voice of an immature youth,' to use [the rape victim]'s words, merely put him in a large class and did not relate him to speech peculiar to him. Voice identifications involve 'grave danger of prejudice to the suspect,' as the Court of Appeals for the Fourth Circuit said in Palmer v. Peyton, 359 F.2d 199, 201. No one else identified petitioner.

See Biggers, 390 U.S., at 408, 88 S.Ct., at 981.

The Court was evenly split, however, and therefore affirmed the Tennessee Supreme Court's affirmance of defendant-petitioner's conviction. Defendant-petitioner later filed a petition for collateral federal habeas corpus relief, raising several claims, including whether due process was violated by the visual and voice identification. After a federal district court held that the station-house "showup" identification procedure was so suggestive as to violate due process and the Sixth Circuit Court of Appeals affirmed, the Supreme Court granted certiorari and addressed defendant-petitioner's claims in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375 (1972). The *Neil* Court noted that the primary evil to be avoided is a very substantial likelihood of misidentification. *See Neil*, 409 U.S., at 198, 93 S.Ct., at 381. The Court further stated, "[i]t is the likelihood of misidentification which violates a defendant's

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right to due process [....] Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as Stovall [v. Denno, 388 U.S. 293, 87 S.Ct. 1967 (1967)] makes clear, *the admission of evidence of a showup without more does not violate due process.*" *See Neil*, 409 U.S., at 198, 93 S.Ct., at 382 (emphasis added). With reference to the particular facts of the rape case precipitating its review of the collateral relief granted by the district court, the Court stated:

> What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness alone requires the exclusion of evidence. While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent, *we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process.*

See Neil, 409 U.S., at 199, 93 S.Ct., at 382 (citing *Clemons v. United States*, 133 U.S.App.D.C. 27, 48, 408 F.2d 1230, 1251 (1968) (Leventhal, J., Concurring).

When the *Neil* Court turned to the "central question of whether, under the 'totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive," it set forth five (5) factors to be considered in determining the likelihood of misidentification: (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5) the length of time between the crime and the confrontation. *See Neil*, 409 U.S., at 199-200, 93 S.Ct., at 382. Applying these five factors, the Court reversed the district court's grant of habeas corpus relief to the defendant-petitioner, stating:

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> We find that the District Court's conclusions on the critical facts are unsupported by the record and clearly erroneous. *The victim spent a considerable period of time with her assailant, up to half an hour.* She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. *She was no casual observer, but rather the victim of one of the most humiliating of all crimes. Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice [...] was more than ordinarily thorough.* She had 'no doubt' that respondent was the person who raped her. *In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited opportunity of observation.* The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face 'I don't think I could ever forget.' App. 127.
>
> There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the [several preceding] showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury.

See Neil, 409 U.S., at 200, 93 S.Ct., at 382-83 (emphasis added).

In *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243 (1977), the Supreme Court again emphasized that a suggestive identification alone does not, in itself, intrude upon a constitutionally protected interest, but, rather, the *reliability* of the identification is the lynchpin in determining its admissibility at trial against a criminal defendant, upon a consideration of the five (5) totality of the circumstances factors enunciated in *Neil, supra. See Manson*, 432 U.S., at 114, 97 S.Ct., at 2253. The object of the inquiry, upon a review of these five factors, continues to be whether there exists a very substantial likelihood of irreparable misidentification. *See Manson*, 432 U.S., at 116, 97 S.Ct., at 2254. The *Manson* Court ultimately held, in a post-conviction collateral relief setting, that an undercover police officer's identification of a narcotics suspect from a single photograph, viewed two days after

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interacting with the identified individual for a matter of minutes, was sufficiently reliable to admit the evidence at trial, despite that the procedure was suggestive and was not warranted by any exigency. The *Manson* Court expressly resolved a circuit split amongst the Courts of Appeals by adopting the *Neil* totality of the circumstances approach[21] which "serves to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact[,]" *See Manson*, 432 U.S., at 110-11, 97 S.Ct., at 2251, rather than a "*per se*" exclusion of testimony regarding identifications obtained by suggestive means. The Court noted that the totality of the circumstances approach correctly balances the interests at stake in identification cases, especially with regard to considerations of the administration of justice, contrasting with it the shortcomings of the *per se* approach:

> Here the per se approach suffers serious drawbacks. Since it denies the trier reliable evidence, it may result, on occasion, in the guilty going free. Also, because of its rigidity, the per se approach may make error by the trial judge more likely than the totality approach. And in those cases in which the identification is reliable despite an unnecessarily suggestive identification procedure reversal is a Draconian sanction.

See Manson, 432 U.S., at 112-13, 97 S.Ct., at 2252.

In *Commonwealth v. Vanderlin*, 398 Pa.Super. 21, 580 A.2d 820 (1990), our Superior Court addressed, on direct appeal, the Centre County Court of Common Pleas' refusal to suppress a voice identification of a single audio-recorded voice sample. In *Vanderlin*, a woman was sexually assaulted when she was walking home from work. The defendant partially undressed the victim, fondled her, digitally violated her, forced her to fondle him, and stated that he was going to either rape her or kill her, but instead fled the scene. During the attack, the woman "only glanced at her attacker's face because he covered her eyes with

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[21] The question in *Mansion* was, essentially, whether the *Neil* approach applied following *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967 (1967), because the procedure challenged in *Neil* occurred prior to the Court's holding in *Stovall* and certain language in *Neil* suggested that the approach enunciated in *Neil* may have been limited to pre-*Stovall* occurrences. *Mansion* dispelled that notion.

her work apron." *See Vanderlin*, 398 Pa.Super., at 24, 580 A.2d, at 821. However, at trial, the victim-witness "repeatedly testified that she remembered her assailant's voice. She said that he spoke to her in a 'scratchy whisper' throughout the twenty minute assault." *See Vanderlin*, 398 Pa.Super., at 24, 580 A.2d at 822. Following the attack, the defendant-appellant placed a call to 911 dispatch, which was both traced to his apartment complex and automatically recorded:

> At approximately 7:00 p.m. on November 27, 1988, the appellant, James Vanderlin, dialed "911" and reached the Centre County Emergency Communications Center. The dispatcher traced Vanderlin's call to an apartment complex located in proximity to the crime scene. *Id.* at 55-56. The call was automatically recorded. *Id.* at 49-50. During his conversation with the dispatcher, Vanderlin asked whether an attempted rape had occurred near the high school track. When the dispatcher replied that he had not yet received such a report, Vanderlin confessed to the commission of the crime [....]
>
> [A police investigator] obtained a copy of the tape recording and played it to [victim-witness] two times [....] [Victim-witness] identified the voice as that of her attacker [....] Thereafter, [the investigator] played the tape over the radio and television. Several persons contacted [the investigator] and identified the caller's voice as Vanderlin's [....]

See Vanderlin, 398 Pa.Super., at 24-25, 580 A.2d, at 823 (interal citations to trial record omitted).

Defendant-appellant Vanderlin's first issue on appeal was whether the trial court erred in failing to suppress the "one-on-one identification" of the attacker's voice from the tape-recorded confession. The Superior Court cited to, *inter alia*, *Manson*, *supra*, and *Commonwealth v. Thompkins*, 311 Pa.Super. 357, 457 A.2d 925 (1983), noting that the five factors set forth in both cases constitute the appropriate criteria to determine, under the totality of the circumstances, the reliability of a voice identification, and that such voice identification should only be excluded if it could be shown that the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable

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misidentification. *See Vanderlin*, 398 Pa.Super., at 27-29, 580 A.2d, at 824. The trial court had applied the factors set forth in *Neil* and *Manson* and adopted in *Thompkins* to the voice identification at issue in *Vanderlin*:

> Defendant urges that the first identification of the voice on tape on December 8, 1988, was impermissibly suggestive because the tape contained only one voice. Defendant contends the identification is therefore akin to a photographic lineup with only one photograph. Defendant further maintains that because every subsequent identification of the voice by the victim was tainted by this first impermissibly suggestive identification, all such subsequent identifications must be suppressed. This would also render inadmissible any potential identification at trial of the voice on the tape.
>
> While Defendant's analogy to a photographic lineup with only one photograph is well taken, we nevertheless do not believe it requires suppression of the tape or the identification. In *Commonwealth v. Thompkins*, 311 Pa.Super. 357, 457 A.2d 925 (1983), the Pennsylvania Superior Court discussed the factors to be considered in making such a determination. Noting that "(t)he essential criteria in determining whether or not evidence of pre-trial identification is admissible is its reliability under all of the circumstances," the Court wrote: 'The question for the suppression court is whether the challenged identification has sufficient indicia of reliability to warrant its admission even though the confrontation procedure may have been suggestive.' 311 Pa.Super. at 362-363, 457 A.2d at 928 (emphasis in original) [sic] (footnote and citation omitted).
>
> The Court in *Thompkins* then enumerated certain factors which should be considered in deciding whether or not to suppress evidence of pre-trial identifications. They are: '... the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.' Id. (Citing *Manson v. Brathwaite*, 432 U.S. 98, 114 [97 S.Ct. 2243, 2253, 53 L.Ed.2d 140] (1977).) In *Commonwealth v. Spiegel*, 311 Pa.Super. 135, 145, 457 A.2d 531, 536 (1983), the Superior Court went one step further, holding that the opportunity of the witness to view the actor at the time of the crime is the key factor in the totality of the circumstances analysis (citation omitted).
>
> *In [Vanderlin], the Court has before it an audio pre-trial identification, rather than the usual identification of an eyewitness or visual nature.* Nevertheless, the Superior Court's opinions in *Thompkins* and *Spiegel*, above, are relevant and instructive inasmuch as the same principles must be applied. The *victim in*

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the instant case had ample opportunity to listen to her assailant at the time of the alleged crime. She testified that the attack lasted approximately twenty minutes. Additionally, she testified the assailant spoke to her continuously throughout the attack, directing her to do certain things. The evidence clearly established not only that she had ample opportunity to listen to the sound of his voice, but also that her attention was focused on what the assailant was saying to her throughout the attack.

Another factor to be considered, according to *Thompkins*, is the level of certainty which the victim demonstrated when confronted with the tape recording. We note again the victim's testimony that she "froze" when she first heard the recording, and after asking [the investigator] to play it once again "so she could be sure," the victim stated unequivocally that it was the voice of her attacker.

We must also consider the amount of time which elapsed between the crime and the confrontation. The attack allegedly took place on November 27, 1988. The victim first identified the voice on the tape on December 8, 1988, eleven days later. It is difficult to know just how long is "too long" between a crime and an identification. Nonetheless, this Court does not believe eleven days to be too long a lapse between the alleged attack and the victim's identification of the attacker's voice.

The remaining factor to be considered, under *Thompkins*, is the accuracy of the victim's prior description of the criminal. It is not clear from the record whether the victim ever gave the police a description of her attacker's voice prior to the identification on December 8, 1988. Nevertheless, in view of the application of all the other *Thompkins* factors to the instant case, we believe the victim's identification has "sufficient indicia of reliability to warrant its admission even though the confrontation procedure may have been suggestive." *Thompkins*, 311 Pa.Super. at 363, 457 A.2d at 928 (footnote and citation omitted). We also subscribe to the Superior Court's assertion in *Commonwealth v. Spiegel*, *supra*, that the opportunity of the witness to view, or in this case *hear*, the actor at the time of the crime is the key factor in the "totality of the circumstances" analysis.

Against all of the above factors, this Court must now weight the "corrupting effect of the suggestive identification itself." *Thompkins*, *supra*. We do not find the corrupting effect of admitting the voice identification is of such weight as to render it inadmissible. The challenged evidence merely connects an anonymous caller with the crime. Alone, it does not connect Defendant with the crime. That fact, coupled with what we believe are sufficient indicia of reliability surrounding the voice identification, leads us to enter the following ... [Order denying Vanderlin's motion to suppress identification testimony was entered on April 21, 1989].

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See Vanderlin, 398 Pa.Super., at 30-32, 580 A.2d, at 825-26 (emphasis added).

The Superior Court affirmed the trial court's analogous reasoning in *Vanderlin*, also affirming defendant-appellant's conviction there. Five years later, the Third Circuit Court of Appeals took a similar perspective on voice identifications. *See Government of Virgin Islands v. Sanes*, 57 F.3d 338 (3d Cir. 1995) (applying the *Neil* and *Manson* factors, as adapted to voice identification of defendant in home invasion rape and robbery case, affirming the federal district court's refusal to suppress the voice identification and affirming defendant-appellant's conviction).

In the case *sub judice*, it appears from the trial testimony that the victim-witnesses were provided with a voice sample of Defendant-Petitioner's voice in conversation with his father, rather than an array of different voices[22], the procedure utilized was, therefore, arguably unnecessarily suggestive. However, this does not end our analysis of whether the underlying claim had arguable merit for a multitude of reasons. First, the decisions of the Supreme Court of the United States, the Third Circuit Court of Appeals and our Superior Court in the cases cited above hold that the *reliability* of a pretrial identification[23], rather than its simple suggestiveness, is the lynchpin for determining its potential admissibility and that such reliability must be ascertained by reference to the totality of the circumstances surrounding the unique set of facts. Because of the apparent suggestiveness of the voice identification procedure utilized here, we apply the *Neil* and *Manson* elements to the facts of record.

(1) **The opportunity of the witness to view/hear the criminal at the time of the crime:** The sum of the victim-witnesses' trial testimony was that the perpetrator made

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[22] *See* Trial Transcript, March 1, 2010, at pages 155-156.
[23] Including those of a strictly auditory nature.

several verbal statements[24] either directly to, or in the presence of each of the victim-witnesses, over the extended duration of approximately five (5) to six (6) hours, with at least one of the rape episodes lasting at least an hour[25], according to one of the victim-witnesses[26] who was raped. During that time, the perpetrator gave the victims commands[27], threatened to slit one victim-witness's throat[28], told the same victim-witness that he "could just stab [her] in the liver or the kidney, and [she would] die[29]," and either conversed with or pretended to converse with a third party on a cellular telephone[30]. According to our Superior Court's previous articulations in *Spiegel* and *Vanderlin*, both cited *supra*, this is the key factor in analyzing whether the identification is reliable. This factor militates in favor of admission.

(2) **The witness' degree of attention**: As the Supreme Court acknowledged in *Neil*, a rape victim is no casual observer but is, rather, "a victim of one of the most humiliating of all crimes." In the case, *sub judice*, the perpetrator invaded the victim-witnesses' college residence, threatened them with violence, at knife-point, restrained all of them, and raped and otherwise sexually assaulted two of them multiple times over a period of between five (5) and six (6) hours. One of the rape victims identified Defendant-Petitioner's voice. These victim-witnesses were surely not casual observers. The only victim-witness who was not sexually assaulted testified that Defendant-Petitioner asker her why he shouldn't slit her throat and let her bleed out, after she struck him with a mirror[31]. We believe that the trial testimony reflects that their degree of attention was elevated well beyond that of an ordinary

[24] *See, e.g.*, Trial Transcript, March 1, 2010, at pages 131-132.
[25] We note that the *Neil* Court found a period of half an hour to be a significant period of time for the purpose of evaluating the reliability of a rape victim's identification of the defendant as the perpetrator and the *Vanderlin* court held twenty minutes to be significant.
[26] *See* Trial Transcript, March 1, 2010, at pages 203-204.
[27] *See, e.g.*, Trial Transcript, March 1, 2010, at pages 46, 64, 66, 123.
[28] *See, e.g.*, Trial Transcript, March 1, 2010, at page 52.
[29] *See*, Trial Transcript, March 1, 2010, at page 124.
[30] *See, e.g.*, Trial Transcript, March 1, 2010, at page 134.
[31] *See* Trial Transcript, March 1, 2010, at page 129.

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witness to a crime. This element militates in favor of the admission of testimony concerning the voice identification.

(3) **the accuracy of the witnesses' prior description of the criminal**: As in *Vanderlin*, it is not clear from the record that the victim-witnesses ever gave the police a description of the perpetrator's voice prior to the voice identifications conducted by police. This element is neutral; it does not militate for or against the admissibility of the identification testimony.

(4) **The level of victim-witnesses' certainty regarding the identifications**: Only two (2) of the three (3) victim-witnesses positively identified Defendant-Petitioner's voice from the audio-recorded conversation. The victim-witness who did not identify Defendant-Petitioner testified, on cross-examination at Defendant-Petitioner's trial, that she could not be one hundred percent certain if any voice on the tape matched the perpetrator's voice, however, she explained her inability, stating, "[h]e was talking to his father on the tape, not telling his father that he was going to slit his throat[32]." Both of the other victim-witnesses positively identified Defendant-Petitioner's voice. The second victim-witness to testify[33] at trial testified that she was "absolutely sure" that the voice on the tape, *i.e.*, Defendant-Petitioner's voice, was that of the perpetrator. When she was asked how she came to that conclusion, she testified, "When you listen to someone threaten your life for hours and pretty much mentally torture you, you never forget that. You could play that voice for me in 20 years, and I would still tell you[34]." The final victim-witness to testify, one of the sexual assault victims, testified that she recognized Defendant-Petitioner's voice as soon as she heard it and that she was absolutely sure the voices were the same. When asked how she

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[32] *See* Trial Transcript, March 1, 2010, at page 96.
[33] This was the only victim-witness who was not sexually assaulted.
[34] *See* Trial Transcript, March 1, 2010, at page 137.

knew this, she testified, "[b]ecause I heard it for, like, six hours straight. And since I couldn't see him; and your senses perk up. So you hear it[35]." This element strongly militates in favor of admission.

(5) **The time between the crime and the voice identifications**: The offense occurred on February 1, 2009. The second victim-witness who testified at trial testified that she listened to the audio recording sometime after Valentine's Day[36], February 14, 2009. The *Neil* Court affirmed a rape conviction which was based on an identification encompassing both visual and auditory observation by the victim in low light, and which occurred after a period of seven (7) months. The *Vanderlin* court permitted admission of an identification made after eleven (11) days. Given the impression this ordeal certainly left on these young women, we believe that a duration in the neighborhood of two (2) weeks does not represent such a long period of time that their memory would be clouded against accurate identification of a suspect's voice. This element militates in favor of admission.

Against the above factors we weigh the corrupting effect of the suggestive identification itself. One of the victim-witnesses[37] who identified Defendant-Petitioner as the perpetrator in the case *sub judice* testified that she was asked to come in to the police station to "review some items for the case"; she "wasn't told what it was. [She] was told that we have some things that we need you to look over[38]." When it became apparent that the police were going to play the tape for her, they asked her to identify any voices she recognized on the tape[39]. This scenario is far less suggestive than the single-suspect in-person police station "showup" identification from *Neil*. Therefore, it appears that the voice identification

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[35] *See* Trial Transcript, March 1, 2010, at page 214.
[36] *See* Trial Transcript, March 1, 2010, at pages 155-156.
[37] This victim-witness was not sexually assaulted.
[38] *See* Trial Transcript, March 1, 2010, at pages 155-156.
[39] *See* Trial Transcript, March 1, 2010, at page 156.

procedure utilized bore sufficient indicia of reliability to warrant admission and that had Defendant-Petitioner's trial counsel filed a suppression motion, it would have failed the *Neil/Manson* totality of the circumstances reliability test, resulting in denial. The voice identification was competent evidence subject to weighing by the jury.

To the extent this claim bears arguable merit, we note that to obtain PCRA relief, Defendant-Petitioner bears the burden to also prove, by preponderance of the evidence, *both* that his attorney lacked any reasonable basis for failing to move to suppress *and* that he suffered prejudice as a result of the voice identification. At the PCRA hearing, Defendant-Petitioner's pre-trial counsel, Allan Sagot, Esq., testified that he did not believe the voice identification was suppressible as a matter of law. *See* transcript, September 11, 2012 PCRA Hearing, filed October 18, 2012, at page 35 (hereinafter "PCRA transcript"). When asked to explain his belief in this regard, Mr. Sagot testified "[b]ecause, quite simply, the identification issues were not issues. The DNA was more than sufficient to establish a firm identification. To say that they were wrong in their identification despite a DNA match, I think would take any credibility away from any lawyer who represented him in the case. I wasn't going to go there." *See id.* Mr. Sagot further testified that he "really didn't look at anything in the discovery with an idea of attempting to suppress it[40]."

Even if we assume that this was *not* among the reasonable alternatives available to counsel[41], we unequivocally find that Defendant-Petitioner has *not* suffered prejudice as a

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[40] *See* PCRA Transcript, at page 35.

[41] This point is debatable; according to Mr. Sagot's and Mr. Fiore's testimony at the PCRA hearing, Defendant-Petitioner's theory of the case was that, while the rapes may have actually occurred, he was not the perpetrator. *See* PCRA Transcript, at pages 5, 41. Defendant-Petitioner's theory also apparently included that his DNA had been planted by a drug dealer who was trying to frame him. *See* PCRA Transcript, at page 35 (Mr. Sagot testified, "the only issue that was ever raised as to how the DNA got there was what the mother had suggested, as well as the Defendant suggesting it, that I believe a marijuana dealer [...] had removed a condom from his trash can; and that he had DNA on it that he spread amongst the victims who were coconspirators with him. I must suggest to you sir, I found that to be ludicrous at best."); page 53 (Mr. Fiore testified, "[t]he only defense

result of the admission of the voice identifications, given the other overwhelming evidence offered against Defendant-Petitioner at trial. While Defendant-Petitioner targets the voice identifications of Defendant-Petitioner by two of the victim-witnesses, the ultimate issue of prejudice, under the PCRA, is whether the outcome of Defendant-Petitioner's trial would have been different but for counsel's actions or omissions. We believe no prejudice occurred, first, because as the foregoing analysis suggests, the motion, if filed, would have been denied and second, because when viewed in light of all the other evidence presented by the Commonwealth, we believe voice misidentification would not, by itself, have changed the outcome of Defendant-Petitioner's trial.

While the perpetrator wore a mask, the victim-witnesses testified that they saw the perpetrator and were able to visually perceive the perpetrator's other physical characteristics, which, like Defendant-Petitioner's own characteristics, included that perpetrator was a tall[42] African-American[43] man, with a lean build[44] and black dots[45] and a scar on his leg[46]. This

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that he had was that this guy -- I forget his nickname -- from Williamsport had this stripper named Nasty come and have sex with him. And they must have taken the condom out of the garbage and planted the evidence. That was the defense." When presented with such a theory, it seems defense counsel would have been constrained to attack the voice identification as well, consistent with the theory that while there may have been a home invasion and sexual assaults, Defendant-Petitioner was not the perpetrator. This, of course would not withstand counsel's ethical duty against proffering false testimony, if, in fact Mr. Sagot or Mr Fiore knew their client was lying. There has been no testimony suggesting that this was the case. Therefore, while maintaining trial counsel's credibility with the trier of fact is ordinarily a reasonable trial strategy, it is difficult to see how it could have been reasonable for counsel to entirely avoid any attempt at impugning the voice identification, where such an attempt would have fit with the version of facts and theory that Defendant-Petitioner was not the perpetrator, which he had apparently peddled to both his pretrial and trial counsel. *If successful*, this *may* have undercut in some small way Defendant-Petitioner's identification as the perpetrator of these crimes. Counsel's choice appears the equivalent of running up the white flag, as far as identification. However, we ultimately agree with Mr. Sagot's assessment that the voice identification under the facts of this case was not suppressible as a matter of law. It is clear that Defendant-Petitioner's chosen trial strategy would not have offered prospects of success substantially better than those which were actually achieved both because, even had Mr. Sagot filed his motion, it would have been denied and because of the independent mountain of evidence of Defendant-Petitioner's guilt proffered by the Commonwealth.

[42] *See, e.g.*, Trial Transcript, March 1, 2010, at pages 35, 78, 168.

[43] *See, e.g.*, Trial Transcript, March 1, 2010, at pages 78, 168.

[44] *See, e.g.*, Trial Transcript, March 1, 2010, at pages 78, 171.

[45] *See* Trial Transcript, March 2, 2010, at page 63 (Andrea Strough identified markings in picture of Defendant-Petitioner's leg as belonging the perpetrator who had attacked her.)

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latter specific characteristic was corroborated by Corporal Winters, who testified that when he summoned Defendant-Petitioner from his lodgings at the Fallon Hotel, he was wearing shorts and Corporal Winters observed his bare legs, noting, "[o]n his right leg below the knee, he had some spots and some scarring in that area[47]" and Corporal Kibler, who likewise testified to seeing a scar and "small circular black dots" on Defendant-Petitioner's leg[48]. In addition, one of the victim-witnesses testified that she struck the perpetrator in the forehead with a mirror in a failed attempt to escape[49]. Corporal Winters testified that Defendant-Petitioner had what appeared to be a freshly healed over abrasion on his forehead, near his scalp[50]. All three of the victim-witnesses testified that the perpetrator had been wearing a dark colored zip-up hooded sweatshirt at the time of the commission of the crimes[51]. Corporal Winters and Corporal Kibler both testified that Defendant-Petitioner had a black zip-up hooded sweatshirt on February 13, 2009[52]. One of the victim-witnesses testified that the perpetrator bore the unsavory scent of body odor[53]. Corporal Kibler testified that on February 13, 2009, he noted Defendant-Petitioner "didn't appear to bathe on a regular basis or even wash his clothes on a regular basis" and that he had "moderate to strong body odor[54]." The victim-witnesses testified that the perpetrator used duct tape[55] and wore gloves[56]. Corporal Kibler testified that when asked whether the police would find anything in his room at the Fallon Hotel, Defendant-Petitioner indicated that he had a roll of duct tape

[46] *See, e.g.,* Trial Transcript, March 1, 2010, at page 75.
[47] *See* Trial Transcript, March 2, 2010, at page 5.
[48] *See* Trial Transcript, March 2, 2010, at page 32.
[49] *See* Trial Transcript, March 1, 2010, at page 118.
[50] *See* Trial Transcript, March 2, 2010, at page 7.
[51] *See* Trial Transcript, March 1, 2010, at pages 37, 109-110, .
[52] *See* Trial Transcript, March 2, 2010, at pages 5, 33.
[53] *See, e.g.,* Trial Transcript, March 1, 2010, at page 78.
[54] *See* Trial Transcript, March 2, 2010, at page 33.
[55] *See, e.g.,* Trial Transcript, March 1, 2010, at pages 46, 111.
[56] *See, e.g.,* Trial Transcript, March 1, 2010, at pages 37, 49, 145.

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and a pair of black gloves[57]. The Commonwealth presented this other identification testimony[58], which Defendant-Petitioner does not dispute, as well as expert testimony that Defendant-Petitioner's DNA matches that left by the perpetrator, within a probability of one (1) in three hundred and sixty quintillion (360,000,000,000,000,000,000), within the African American population. Corporal Winters testified that Defendant-Petitioner was brought in on February 13, 2009 for questioning regarding "assaults" and Defendant-Petitioner spontaneously referred to "rapes" three times during those interviews[59]. Corporal Kibler also testified that near the conclusion of an interview conducted on February 17, 2009, Defendant-Petitioner admitted to being the perpetrator of these crimes[60]. Additionally, from

[57] *See* Trial Transcript, March 2, 2010, at page 50.

[58] We do not purport this to be an exhaustive list of the individual items of evidence which aggregate to form the strong nexus between Defendant-Petitioner and the Perpetrator, but believed that particular reference to the record might be helpful, should the Order following this Opinion be appealed. Added to this mix were also the fact that the Fallon Hotel is only approximately two blocks away from the residence the victims shared, the comparable length of Defendant-Petitioner's pubic hairs to those of the perpetrator, which were described to police by the victims, as well as other inconsistent and inculpatory remarks Defendant-Petitioner made to police and the fact that the bank ATM security frames displayed a person attempting to use the victims' bank cards, wearing what appeared to be the same hooded sweatshirt that was retrieved from Defendant-Petitioner's room at the Fallon Hotel.

[59] *See* Trial Transcript, March 2, 2010, at page 8.

[60] *See* Trial Transcript, March 2, 2010, at page 51 (Corporal Kibler testified, "At one point, he indicated, okay, I did it" although Defendant-Petitioner apparently later characterized this as sarcasm); *see also id.*, at pages 55-56 (Corporal Kibler testified, "[Defendant-Petitioner] again asked how long it would take to get results. And I again advised him that I couldn't give him a definite answer on how long it would take. He indicated that the results would be positive, that it is still too tough to talk about, and that he would tell me everything whenever we got the results back. I asked him why this had even occurred. He responded, money."); *id.*, at page 56 (Corporal Kibler testified, "He said that when it occurred, he was drinking and not in his right mind. He said that he felt that he was already guilty in my eyes and in his eyes. And he said that it was so hard to talk about that he felt like throwing up. After that, I asked him how long he had been in the apartment before anybody returned home. He said about five minutes. I asked where he was at in the apartment whenever anybody came in. He said that he was upstairs and that he walked down the steps when they were in the apartment. Then he said that, I can't even look you in the face. Every time I do, I think you got me. He then asked about leaving the room, and I indicated he could leave whenever he wanted to. And then he said that, I fucked up. I can't even look at you. Every time I look at you, I think you got me, again."); *id.*, at page 57 (Corporal Kibler testified, "And I asked him how many came into the apartment first. He said that two came in first, and the other come in about an hour later. Then I asked him what -- what he had gotten from the apartment, if he took any money. And his response was liquor. I asked if he remembered what kind it was or how much he had drank, and he said no. I asked him if he had used any drugs that day, and he said no. I asked if he got drunk, decided he wanted sex, and told the girls what he wanted them to do; and he responded, that's your answer. There you go. And then he said, I can't look you in the face because I'm ashamed. I asked him how many of the girls he had had sex with. And he said that, you already know, Kibler. You got everything you need. It

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our review of the trial record in the context of this PCRA petition, we observed and noted an interesting piece of testimony by Defendant-Petitioner at trial, which may have gone overlooked before. When Defendant-Petitioner was asked whether he made certain statements to the police, the following exchange took place:

District Attorney: So when you're saying that you didn't make these statements to the police –

Defendant: I said certain statements that I didn't make.

District Attorney: All right [sic]. So certain ones you did, and other ones you didn't?

Defendant: Yes. *Just like other statements the girls in the apartment stated I said, I didn't state.*[61]

While it is not entirely clear from this testimony whether Defendant-Petitioner was referring to persons in his own apartment[62] or the apartment where the victim-witnesses were assaulted, it would have been reasonable for the jury to infer that he was referring to the latter and that he had slipped up during his trial testimony, given that his entire defense was that he wasn't there and had nothing to do with the home invasion, rapes, and other related crimes and that he had never met the victims[63].

We feel confident that any potential influence on Defendant-Petitioner's trial outcome caused by the suggestiveness of the voice identification procedure, if there was any at all, was exponentially marginal, in light of the other overwhelming evidence of his guilt. *See,*

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says everything in those papers, referring to the search warrant. And then he said again that it's hard because he's embarrassed and ashamed. And then he asked me -- he said, how are the girls? Okay?"

[61] *See* Trial Transcript, March 2, 2010, at page 202 (emphasis added).

[62] This seems unlikely, however, because the persons to whom Defendant-Petitioner would have been referring in this scenario were never located by police and it is therefore curious how they could have implicated Defendant-Petitioner as making such statements.

[63] *See* Trial Transcript, March 2, 2010, at page 171.

e.g., Commonwealth v. Travaglia, 541 Pa., at 122, 661 A.2d, at 358-59 (In context of post-conviction relief, Pennsylvania Supreme Court analyzed Sixth Amendment *Bruton* violation by reference to harmless error standard enunciated in *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056 (1972), and finding any prejudice arising from potential error at trial to be "insignificant when compared to the overwhelming evidence of guilt.") Therefore, post-conviction relief on this basis shall be DENIED.

II. Failure of Trial Counsel to Move to Suppress Statements Made by Defendant While In Custody Following Request for Attorney but Before Waiver of Rights

Defendant-Petitioner asserts that his pretrial counsel, Mr. Sagot, was ineffective because he never filed a motion to suppress evidence obtained as a result of police questioning of Defendant on February 13, 2009, at 9:41 p.m., at which point Defendant-Petitioner asserts he demanded counsel. As a related matter, Defendant also asserts that his trial counsel never objected when District Attorney Salisbury referred to the "subsequent questions and answers about subsequent questioning throughout the trial including in his Closing Argument[64]."

In *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), the United States Supreme Court held:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory[65], stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to

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[64] *See* Defendant-Petitioner's PCRA Petition, at ¶5.A.2.

[65] Defendant-Petitioner correctly points out in his brief that the Pennsylvania appellate courts have reiterated the rule set forth in *Miranda* that even exculpatory remarks are subject to exclusion for a *Miranda* violation. *See, e.g., Commonwealth v. Umstead*, 916 A.2d 1146, 1149 (Pa.Super.2007).

> assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.

See Miranda, 384 U.S., at 444, 86 S.Ct., at 1612.

The *Miranda* Court further articulated that in order to protect a criminal suspect's Fifth Amendment privilege against self-incrimination from compelling pressures inherent to the atmosphere of custodial interrogation, "[i]f an individual states that he wants an attorney, the interrogation must cease until an attorney is present." *See Miranda*, 384 U.S., at 474, 86 S.Ct., at 1628.

However, Defendant-Petitioner's assertion of ineffectiveness on this basis cannot reasonably be sustained, given his testimony at the PCRA hearing. Defendant-Petitioner testified that during the police interview on February 13, 2009, Officer Kibler of the Lock Haven Police Mirandized him and he demanded counsel[66]. Defendant-Petitioner further testified, on cross-examination, that he later waived his *Miranda* rights, in writing[67]. During the interim between his demand and *Miranda* waiver, Defendant-Petitioner testified that he began speaking *to himself* in a manner which was likely audible to the police officers present[68], not in response to police questioning[69], but, rather, as a result of his own

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[66] *See* PCRA Transcript, at pages 20-21.
[67] *See* PCRA Transcript, at pages 73-74.
[68] At the PCRA hearing, Defendant-Petitioner testified that he was talking out loud to himself. *See* PCRA Transcript, at page 74. District Attorney Salisbury asked Defendant-Petitioner whether he was talking to himself with other people around him, to which Defendant-Petitioner testified, "The whole thing is, like, with these two detectives right there and these other people surrounding me; and I'm, then and there at the time, frustrated and kind of upset. I'm allowed to talk to myself and say things to myself. That doesn't mean I'm saying this to this officer so he can write these things down and say I said what I said to him." *See* PCRA Transcript, at page 76. Contrary to Defendant-Petitioner's conception of the law, his unsolicited utterances may be used against him.

verbalization of his internal feelings. As to self-initiated confessions, the *Miranda* Court, itself, specifically stated:

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[69] To be sure, Defendant-Petitioner did contend at the PCRA hearing that the police officers continued asking him questions between the time he demanded counsel and the time he signed the first *Miranda* waiver on the evening of February 13, 2009. *See* PCRA Transcript, at pages 74, 77-78. Defendant-Petitioner further argues in his brief, "[t]hat Defendant was questioned after he told Officer Kibler that he wanted an Attorney was not contested by the Commonwealth." *See* Brief of Defendant, filed November 1, 2010, tenth page. This testimony must be considered in light of the trial testimony given by both Defendant-Petitioner and the police investigators. Corporal Winters testified that Defendant-Petitioner was Mirandized on February 13, 2009, prior to any questions being asked. *See* Trial Transcript, March 2, 2010, at page 6. Corporal Kibler testified that Defendant-Petitioner was advised of his rights as soon as they arrived at the police station, stating, "Immediately when we arrived there, Officer Winters advised him verbally of Miranda Warnings. And then after I took the photographs, I sat down and got a Lock Haven Police Department Right Sheet out and again read him his rights and the waiver portion, which he signed both the rights and the waiver portion." *See* Trial Transcript, March 2, 2010, at page 36. Corporal Kibler testified that Defendant-Petitioner never suggested that he did not understand his rights and that Defendant-Petitioner spoke with Corporal Kibler voluntarily during that interview. *See* Trial Transcript, March 2, 2010, at pages 36-37. Corporal Kibler testified that after obtaining and executing a search warrant for hair and blood specimens from Defendant-Petitioner, Defendant-Petitioner "was making comments that he felt like he was being set up. How did we know he's not being set up by people he dealt with in Williamsport?" *See* Trial Transcript, March 2, 2010, at page 47. Corporal Kibler testified that after certain evidence had been collected from Defendant-Petitioner and from his lodgings at the Fallon Hotel, he again interviewed Defendant-Petitioner, this time with Corporal Bramhall from the Pennsylvania State Police, that Defendant-Petitioner was again advised of his rights and that the investigators again obtained a written waiver of his rights. *See* Trial Transcript, March 2, 2010, at page 49. Corporal Bramhall testified that that on February 13, 2009, he and Corporal Kibler began interviewing Defendant-Petitioner at around 9:41 p.m. He further testified that he advised Defendant-Petitioner of his rights and obtained his written waiver of rights signed by Defendant-Petitioner. When asked how this was done, he stated "That was done on a Lock Haven City Police Department Miranda Rights Warning and Waiver Form, which had initially been started when we first encountered the Defendant by Corporal Kibler and then was, ultimately, read to him and completed by me." *See* Trial Transcript, March 2, 2010, at pages 157-158. Defendant-Petitioner now latches onto the language that Defendant-Petitioner asked to speak to Corporal Bramhall privately at 11:10 p.m. The order in which the questions were posed and testimony was given renders it unclear whether there was a gap of roughly one hour between the start of the interview and Defendant-Petitioner's signing the waiver of rights. However, Defendant-Petitioner had every opportunity to express that he asked for an attorney at that time during his original trial. At no time until on PCRA review did Defendant-Petitioner state that he had requested an attorney at the outset of that interview. Moreover Defendant-Petitioner has failed to show us, by even a preponderance of the evidence, that he made Mr. Sagot aware of this fact. Defendant-Petitioner requested another interview with police on February 15, 2009, at which he was again Mirandized and again signed a written waiver. *See* Trial Transcript, March 2, 2010, at page 51. The record reflects that Defendant-Petitioner was again advised of his rights and again signed a waiver on February 16, 2009 and two more times on February 17, 2009. *See* Trial Transcript, March 2, 2010, at pages 54-55, 58. Mr. Fiore cross-examined Corporal Kibler, and asked whether any of the interviews were recorded, to which Corporal Kibler responded that he "asked several times about recording them, and [Defendant-Petitioner] did not wish to have it recorded." *See* Trial Transcript, March 2, 2010, at page 82. On cross-examination, Defendant-Petitioner testified that he was provided his *Miranda* rights each time he was interviewed, that he understood those rights, and that he knowingly signed waivers on each occasion. *See* Trial Transcript, March 2, 2010, at pages 186-187. When viewed in light of the testimony at the time of trial, the fact that the Officers repeatedly obtained waivers at each encounter with Defendant-Petitioner, the fact that Defendant-Petitioner, himself, declined to have the interviews recorded, the late hour at which Defendant-Petitioner first raises this issue and his failure to establish that he made his pretrial counsel aware of any such facts, we simply do not credit Defendant-Petitioner's retroactive self-serving statements at the PCRA hearing, which indicate that he was questioned for a little over an hour, after requesting an attorney, before signing a waiver of rights.

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> In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. *The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated.* There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. *Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today.*

See Miranda, 384 U.S., at 478, 86 S.Ct., at 1630 (emphasis added).

Fourteen years later, in *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980), The Court acknowledged that the *Miranda* rule applies to interrogation tactics beyond direct questioning of a suspect, but again asserted that the procedural safeguards outlined in *Miranda* only come into play upon police questioning or "its functional equivalent,":

> It is clear therefore that the special procedural safeguards outlined in *Miranda* are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. "Interrogation" as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.
>
> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

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See Innis, 446 U.S., at 300-02, 100 S.Ct., at 1689-90 (emphasis in original).

In *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880 (1981), the Court held that once a suspect in custody asserts his or her Fifth Amendment right to counsel, police interrogation must cease until either counsel has been provided to him *or the suspect, himself, initiates further communication. See Edwards*, 451 U.S., at 484-85, 101 S.Ct., at 1885 (emphasis added).

The Pennsylvania Supreme Court has consistently held that a gratuitous utterance, unsolicited by a government actor, is admissible, and that *Miranda* warnings are unnecessary under such circumstances. *See Commonwealth v. Fisher,* 564 Pa. 505, 520, 769 A.2d 1116, 1125 (2001); *Commonwealth v. King*, 554 Pa. 331, 721 A.2d 763 (2001) (citing *Commonwealth v. Abdul-Salaam*, 544 Pa. 514, 533, 678 A.2d 342, 351 (1996), *cert. denied*, 520 U.S. 1157, 117 S.Ct. 1337, 137 L.Ed.2d 496 (1997)).

Defendant-Petitioner bears the burden of proof in a PCRA proceeding. Defendant-Petitioner has failed to meet his burden of proving, by preponderance of the evidence, that the challenged statements were made in response to police interrogation or its functional equivalent. Instead, Defendant-Petitioner's PCRA testimony strongly suggests that he unilaterally and spontaneously uttered the challenged statements. Because these statements were not subject to suppression, the claim underlying this assertion of trial counsel ineffectiveness has no arguable merit. Counsel cannot be deemed ineffective for failing to file a frivolous motion. Moreover, Defendant-Petitioner cannot have been prejudiced by counsel's failure or refusal to file such a motion. Post-conviction relief on this basis is therefore DENIED.

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III. Failure of Trial Counsel to Subpoena and Call as Witnesses Particular Persons – to wit, Tiffany Dorman, Marjorie Mincer, Marissa Wright and Marissa Shady

It was established at the PCRA hearing that Defendant-Petitioner's trial counsel, Mr. Fiore, did not recall, with any accuracy, any of these potential witnesses[70]. The Pennsylvania Supreme Court recently addressed the standard, by reference to *Strickland, supra*, that a PCRA petitioner must meet in a collateral claim based on trial counsel's failure to call a witness:

> When raising a claim of ineffectiveness for the failure to call a potential witness, a petitioner satisfies the performance and prejudice requirements of the Strickland test by establishing that: (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew of, or should have known of, the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a fair trial.

See Commonwealth v. Sneed, 45 A.3d 1096, 1108-09 (2012) (citing *Commonwealth v. Johnson*, 600 Pa. 329, 966 A.2d 523, 536 (2009); *Commonwealth v. Clark*, 599 Pa. 204, 961 A.2d 80, 90 (2008)).

"To demonstrate *Strickland* prejudice, a petitioner 'must show how the uncalled witnesses' testimony would have been beneficial under the circumstances of the case.'" *See Sneed*, 45 A.3d, at 1109 (citing *Commonwealth v. Gibson*, 597 Pa. 402, 951 A.2d 1110, 1134 (2008)). Defendant-Petitioner failed to call any of these witnesses at the PCRA hearing. Defendant-Petitioner likewise failed to establish, by any other means, including the testimony of any other witness, whether these potential witnesses were available or willing to testify for the defense, or *what* they would have said had they been called to testify at the original criminal trial[71]. We are, therefore, left with scant grounds upon which to speculate

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[70] *See* PCRA Transcript, at pages 45-46.

[71] At the PCRA hearing, Defendant-Petitioner testified that one of these women was his baby's mother and the others he knew "just out there on the streets." *See* PCRA Transcript, at page 60. After a somewhat awkward series of questions on direct, of questionable relevance, which segued from this testimony, Defendant-Petitioner

as to whether the testimony any of these possible witnesses *might* have benefitted Defendant-Petitioner's case and no basis to find that counsel knew of or reasonably should have known of the existence of the witness at the time of trial. Moreover, to the extent these may have been character witnesses, we note that there is a stipulation of record clearly specifying Defendant-Petitioner's trial counsel's trial strategy to not introduce character witnesses so as to avoid introducing testimony concerning collateral matters pending in other jurisdictions[72]. Pretrial counsel, Mr. Sagot, likewise testified at the PCRA hearing that he did not recall being asked to call witnesses in the pretrial stages[73]. Defendant-Petitioner has thus failed, in this assertion, to demonstrate a colorable issue of ineffectiveness, which might afford him relief under the PCRA. Relief on this basis shall be DENIED.

IV. Failure of Trial Counsel to Object to District Attorney's Remarks in Opening Statement

Defendant-Petitioner asserts that it constituted ineffectiveness when Mr. Fiore did not object to and did not move for a mistrial when District Attorney Salisbury "stated that the 'Defendant' was the one inside the apartment of the three victims, that the victims confronted the 'Defendant,' that the 'Defendant' comes out with Tiffany and was on top of Tiffany, one of the victims," isolating portions of the District Attorney's opening statement[74]. We find no arguable merit to this underlying claim. To be sure, a prosecutor is prohibited from offering

testified that the size of his penis is "about normal" size in comparison to those of other men. While Defendant-Petitioner *may* have been driving at the notion that these women could identify his penis as somehow different than the descriptions given by the victim-witnesses, however the trial record does not reflect that Defendant-Petitioner's penis size was a significant factor in his identification. This negates the prejudice requirement under the PCRA.

[72] *See* Trial Transcript, March 2, 2010, at pages 137-139 (Mr. Fiore specifically noted that he believed the introduction of such matters would be detrimental to and prejudice his client, that he discussed this strategy with his client, and his client was in agreement with this strategy. At this point Defendant was sworn in and stated on the record that he was satisfied with Mr. Fiore's representation to that point and that he did not disagree with the stated trial strategy).

[73] *See* PCRA Transcript, at page 36.

[74] *See* Defendant-Petitioner's Amended PCRA Petition, at ¶5.A.4; Trial Transcript, March 1, 2010, at pages 14-16.

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his personal opinions concerning a case to the jury. *See, e.g, Commonwealth v. Rollins*, 558 Pa. 532, 738 A.2d 435 (1999). However, "[t]he purpose of an opening statement is to apprise the jury how the case will develop, its background and what will be attempted to be proved; but it is not evidence." *See Commonwealth v. Parker*, 591 Pa. 526, 537, 919 A.2d 943, 950 (2007) (citing *Commonwealth v. Montgomery,* 533 Pa. 491, 498, 626 A.2d 109, 113 (1993). During his opening statement, a prosecutor is permitted to refer to facts he reasonably anticipates the evidence will prove at trial. *See Parker*, 591 Pa., at 537, 919 A.2d, at 950 (citing *Commonwealth v. Begley*, 566 Pa. 239, 274, 780 A.2d 605, 626 (2001)).

Upon our review of District Attorney Salisbury's opening statement, we find no arguable merit to the claim underlying Defendant-Petitioner's undeveloped assertion of trial counsel ineffectiveness. Stating that a criminal defendant was the perpetrator of the *res gestae* forming an act prohibited by the Crimes Code, for which he or she is on trial, is the most obvious factual assertion every district attorney is expected to make in any criminal trial. This is especially true in light of the recognized latitude afforded parties in presenting their opening statements. *See generally*, *Parker*, *supra*. Even *Commonwealth v. Jones*, 530 Pa. 591, 610 A.2d 931 (1992), cited here by Defendant-Petitioner in his brief, supports this paradigm. In *Jones*, the Pennsylvania Supreme Court stated, "[a]s long as there is a good faith and reasonable basis to believe that a certain fact will be established, reference may properly be made to it during the opening argument." *See Jones*, 530 Pa., at 607, 610 A.2d, at 938. The *Jones* Court continued, "[e]ven if an opening argument is improper, relief will be granted only where the unavoidable effect is to so prejudice the finders of fact as to render them incapable of objective judgment." *See id.*

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Defendant-Petitioner has not articulated or explained how these statements constituted Mr. Salisbury's personal opinion rather than a preliminary statement of the facts of the Commonwealth's case, consistent with the evidence to be presented, and which, in the case *sub judice*, was in fact presented, at trial. Petitioner bears the burden of proof in this regard and has failed to meet that burden. There appears to be no arguable merit to this claim. Trial counsel cannot be deemed ineffective for failing to file a frivolous motion. Therefore, PCRA relief on this basis shall be DENIED.

V. Failure of Trial Counsel to Move for Mistrial Because District Attorney Referred to Defendant as Perpetrator during Direct Examination

Defendant-Petitioner asserts that it was ineffectiveness for his trial counsel to fail to move for a mistrial when the District Attorney repeatedly referred to the perpetrator of these crimes by reference to Defendant during his direct examinations of the victim-witnesses.

Defendant-Petitioner's assertion in this regard appears to target the fact that Defendant-Petitioner was not identified by the victim-witnesses *at the outset* of their testimony, or at least not before Mr. Salisbury, in each instance, referred to the perpetrator as "the defendant." In light of the overwhelming corpus of identification testimony set forth above, it is apparent that, at worst, the disputed statements regarded facts, which were admissible upon the proper laying of a foundation adequate to support the nexus between the acts committed by the perpetrator and Defendant-Petitioner's identity as that perpetrator. To put it another way, if we cognize Defendant-Petitioner and the perpetrator as two separate entities, their identities converged upon the presentation of otherwise admissible identification testimony of the victim-witnesses. To the extent Mr. Salisbury may have jumped the gun in referring to the perpetrator as "the defendant" in the course of his direct

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examination, we do not believe the evidence is rendered somehow inadmissible on this basis. Counsel for the Commonwealth, no less than counsel for the defense must be afforded latitude in marshalling and organizing the facts of his case. *See, e.g., Commonwealth v. Fromal*, 392 Pa.Super. 100, 116, 572 A.2d 711, 719 (1990) (citing *Commonwealth v. D'Amato*, 514 Pa. 471, 489, 526 A.2d 300, 309 (1987); *Commonwealth v. Smith,* 490 Pa. 380, 387, 416 A.2d 986, 989 (1980)). Moreover, counsel's remarks to the jury may include fair deductions and legitimate inferences from the evidence presented. *See id.* (citing *D'Amato, supra*, 514 Pa. at 489, 526 A.2d at 309; *Commonwealth v. Stevens*, 276 Pa.Super. 428, 419 A.2d 533 (1980)). We find no arguable merit in claim underlying this assertion of ineffectiveness. Furthermore, we agree with the Commonwealth that these comments, when viewed in the context in which they were presented and in light of the overwhelming evidence of Defendant-Petitioner's guilt which was presented, would not have changed the outcome of Defendant-Petitioner's trial and, therefore, did not inflict prejudice upon him. Therefore, PCRA relief on this basis shall be DENIED.

VI. Trial Counsel's Failure to Object to Admission of Exhibits ## 35-39, 45-60, 73-87.

Defendant-Petitioner's PCRA Petition sets forth, as an assertion of trial counsel ineffectiveness, that trial counsel did not object, but, rather, consented to the admission at trial of the above-numbered exhibits. Insofar as Defendant-Petitioner has the burden of proof and this assertion was not supported or developed, either at the PCRA hearing or in Defendant-Petitioner's brief, we find that Defendant-Petitioner has provided us no basis for finding arguable merit in the underlying claims. Moreover, Defendant-Petitioner's lack of

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development leaves us merely guessing at what prejudice he believes infects the admitted exhibits. Therefore, PCRA relief on this basis shall be DENIED.

VII. Trial Counsel's Submission for Admission of the Affidavit of Probable Cause for Search Warrants

Defendant-Petitioner asserts that his trial counsel was ineffective for admitting the affidavit of probable cause for search warrants. Defendant-Petitioner has, however, made no effort to develop this claim by specifying the prejudice he fears from this admission. Defendant-Petitioner has therefore failed to meet his burden of showing prejudice as a prerequisite to obtaining PCRA relief.

Moreover, at the PCRA hearing, when cross-examined by District Attorney Salisbury, Mr. Fiore confirmed that the admission of these documents constituted trial strategy, testifying, "Well, my strategy, Mr. Salisbury, at trial in terms of my client's statement was -- is you guys didn't introduce any of his statements that referred to the individual from Williamsport that may have set him up. I wanted to bring that in to make it look like you guys were hiding something from the jury. That would have been my only shot at winning this case[75]." Eliminating hindsight from our analysis, and viewing this assertion in light of the entire record, we find this to be an entirely reasonable trial strategy. For these reasons, PCRA relief on this basis shall be DENIED.

VIII. Trial Counsel's Failure to Object or Move for Mistrial When District Attorney Stated in Closing that There was "No Doubt" Defendant Committed Crimes

Defendant-Petitioner asserts that his trial counsel was ineffective for failing to object to District Attorney Salisbury's isolated remark in his closing statement that there was "no

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[75] *See* PCRA Transcript, at page 55.

doubt" Defendant-Petitioner was the perpetrator of these crimes and for failing to move for a mistrial on that basis.

Our Supreme Court has explained that, "[i]n general, closing remarks are evaluated within the context in which they were made, and a prosecutor's argument will not warrant relief 'unless the unavoidable effect of such comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict.' *See Commonwealth v. Ligons*, 565 Pa. 417, 430, 773 A.2d 1231, 1238 (2001) (citing *Commonwealth v. Morales*, 549 Pa. 400, 423, 701 A.2d 516, 527-28 (1997)). Moreover, while a closing argument must be based upon evidence in the record or reasonable inferences therefrom, a prosecutor is permitted to respond to defense evidence and engage in oratorical flair. *See id.* (citing *Commonwealth v. Basemore*, 525 Pa. 512, 528-29, 582 A.2d 861, 869 (1990); *Commonwealth v. Colson*, 507 Pa. 440, 466, 490 A.2d 811, 824 (1985)).

In the context of the Commonwealth's closing argument at Defendant-Petitioner's trial, Mr. Salisbury's expression that there was "no doubt" of Defendant-Petitioner's guilt appears to be based on the overwhelming evidence of guilt proffered by the prosecution during its case-in-chief, including the DNA evidence matching Defendant's DNA with that retrieved from semen taken from the rape victims during sexual assault evidence collection kits immediately following this incident, within a probability of one (1) in 360 quintillion (360,000,000,000,000,000,000) within the African American population. It was a stipulated fact at trial that this exceeded, by exponential order, the number of persons who have ever been born in the history of the world[76]. In addition, there was also a confluence of other

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[76] *See* Trial Transcript, March 2, 2010, at page 117 ("The United States Census Bureau, U.S. and world population clocks put the total population of the U.S. at 308,665,037 as of February 11th, 2010. The same data

identifying testimony by the victim-witnesses and Defendant-Petitioner's own inculpatory remarks to police. We believe Mr. Salisbury's comment, while possibly improper due to its absolute nature, likely flowed as an inference from this extremely compelling collection of evidence of Defendant-Petitioner's guilt.

To the extent Mr. Salisbury's comment went beyond oratorical flair, if at all, we very seriously doubt that the unavoidable effect of the statement was to "prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict." We believe the jury weighed the overwhelming evidence against Defendant-Petitioner and fairly rendered a verdict, irrespective of this comment. We do not believe the omission of this statement would have altered the outcome of Defendant-Petitioner's trial in any significant way. Defendant-Petitioner has failed to show prejudice. For this reason, PCRA relief on this basis shall be DENIED.

IX. Trial Counsel's Failure to Object to Testimony or Conclusions of Commonwealth's DNA Expert

Defendant-Petitioner asserts that his trial counsel, Mr. Fiore, was ineffective because he didn't object to the conclusions offered at trial by the Commonwealth's DNA expert, Mr. Kist.

At the PCRA hearing, however, Mr. Fiore testified that he had no basis to challenge the conclusions of the Commonwealth's DNA expert[77]. Additionally, Defendant-Petitioner's theory of the case, as both pretrial and trial counsel testified at the PCRA hearing, was that

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calculates the world population at 6,802,160,439 as of February 11, 2010[....] The Population Reference Bureau calculates the total number of people who have ever been born as 106,456,367,669.")

[77] *See* PCRA Transcript, at page 55 (Mr. Fiore additionally testified, "We were provided with all -- you know, all the information on how everything was conducted. And that is part of the training that I've had, to know what to look for.")

his actual DNA was planted by a third party[78]. In fact, Defendant-Petitioner testified at the PCRA hearing that his concern regarding the DNA evidence was that *his* DNA was found somewhere where he had not been[79]. Being that Defendant-Petitioner apparently conceded, both to his counsel and to this Court, that his actual DNA was found at the crime scene, there appears to have been no basis to attack the Commonwealth's DNA expert's conclusions. With regard to *how* Defendant-Petitioner's DNA arrived in places which inculpated him in these crimes, it is clear to us that the trier of fact assessed the presentation of evidence and concluded that it arrived there because he was the perpetrator; the home invader; the robber; the rapist.

We must consider, eliminating hindsight, whether Defendant-Petitioner's trial counsel had the benefit of some knowledge supporting that the conclusions of the Commonwealth's DNA expert were in error. Defendant-Petitioner, having the burden of proof, has not demonstrated one iota of reason for us to now undermine the jury's deliberative conclusions. Therefore, PCRA relief on this basis shall be DENIED.

X. Trial Counsel's Failure to Offer Competing Expert Testimony on DNA Evidence

Defendant-Petitioner asserts that it constituted ineffectiveness when his trial counsel did not offer expert testimony on DNA evidence, independent from that provided by the Pennsylvania State Police lab in order "to challenge the testimony of the Commonwealth's expert witnesses as being unreliable and inadmissible."[80]. This was a major thrust of the testimony presented at the PCRA hearing. Defendant-Petitioner's mother testified that she had provided various sums of money to Mr. Sagot for his representation of Defendant-

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[78] *See* PCRA Transcript, at pages 35, 53.
[79] *See* PCRA Transcript, at page 71.
[80] *See* Defendant-Petitioner's PCRA Petition, at ¶5.A.10.

Petitioner[81]. She further testified that she had asked him to obtain a second independent DNA test on behalf of Defendant-Petitioner and Mr. Sagot had declined to do so[82].

We find no arguable merit to the underlying claim, no unreasonableness in pretrial or trial counsel's actions, and no prejudice to Defendant-Petitioner related to this assertion for a number of reasons:

First, as stated above, because Defendant-Petitioner's theory was that he was framed by the planting of his actual DNA, it is not apparent how a second independent DNA test would have benefitted him[83]. Defendant-Petitioner bears the burden of proof and has failed to articulate, in any minimal degree, *what* about the Commonwealth's expert's testimony was unreliable or why the DNA evidence was, in his estimation, inadmissible. Defendant-Petitioner testified at the PCRA hearing that he wanted something tested but that he was not sure specifically what purpose having such a test performed would serve[84]. Where a PCRA petitioner fails to prove by the preponderance standard that counsel lacked a strategic basis for choosing not to call an expert witness, PCRA relief shall be denied. *See, e.g.*, *Commonwealth v. Collins*, 598 Pa. 397, 957 A.2d 237 (2008) (finding defendant failed to show that trial counsel lacked a reasonable basis for not calling a ballistics expert, where course of questioning at trial, on alternative theory, was reasonably engineered to serve defendant's interests)

Second, Mr. Sagot, as Defendant-Petitioner's pretrial counsel, testified at the PCRA hearing that he had been made aware of three (3) other open rape cases pending against

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[81] *See* PCRA Transcript, at pages 9-12.
[82] *See* PCRA Transcript, at pages 15-16.
[83] This was apparently corroborated by conversations between Defendant-Petitioner's mother and Mr. Sagot. *See* PCRA Transcript, at page 24 (Mr. Sagot testified, "[t]he mother suggested to me that the DNA was planted. She never suggested the DNA was wrong.")
[84] *See* PCRA Transcript, at page 72.

Defendant-Petitioner in Philadelphia and that DNA recovered from those cases matched the DNA from the case *sub judice*. Mr. Sagot further testified that District Attorney Salisbury had advised him that if he sought to challenge the DNA evidence, he would bring in the DNA from Philadelphia against Defendant-Petitioner under the other bad acts exception to the prohibition against propensity evidence. Mr. Sagot testified that he believed that this would "in effect -- effectively bury [Defendant-Petitioner][85]." This appears to be an extremely reasonable trial strategy, taken to avoid the piling on of DNA identification of Defendant-Petitioner and association of him in the minds of the jurors with other similar offenses where there was little, if any, offsetting benefit to be derived from seeking independent DNA testing, given Defendant-Petitioner's theory regarding his semen being planted. Defendant-Petitioner is apparently under the impression that he must first be convicted of other bad acts for them to be admissible against him. This is not, however, the state of the law in Pennsylvania. *See* Pa.R.E. 404(b)(2); *Commonwealth v. Young*, 989 A.2d 920, 926 (Pa.Super.2010) (citing *Commonwealth v. Ardinger*, 839 A.2d 1143 (Pa.Super.2003) ("Rule 404(b) is not limited to evidence of crimes that have been proven beyond a reasonable doubt in court.")) In *Commonwealth v. Weakley*, 972 A.2d 1182, 1187-88 (Pa.Super.2009), *appeal denied*, 604 Pa. 696 (2009), the Superior Court stated that, "[i]dentity as to the charged crime may be proven with evidence of another crime where the separate crimes share a method so distinctive and circumstances so nearly identical as to constitute the virtual signature of the defendant." *See Weakley*, 972 A.2d, at 1189 (citing *Commonwealth v. Novasak*, 414 Pa.Super. 21, 606 A.2d 477, 484 n. 7 (1992); McCormick, Evidence § 190 at 801–803 (4th ed. 1992)). We believe high probability DNA matches from multiple rapes or alleged rapes fit within this paradigm of admissibility. To be sure, Rule

[85] *See* PCRA Transcript, at pages 26-27.

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404(b)(3) of the Pennsylvania Rules of Evidence expressly makes the admissibility of such evidence in each case contingent upon a weighing of the potential prejudice it involves against the probative value it holds. However, contrary to Defendant-Petitioner's apparent position, counsel's strategic decision, where he has a good faith basis to believe that evidence which might "bury" his client *may* be admitted does not become unreasonable by virtue of the fact that admissibility ultimately hinges on an exercise of trial court discretion. Defendant-Petitioner's argument relies on hindsight second-guessing, which we refuse to do.

Third, as a corollary, there is no standalone due process right to an acquisition of DNA evidence by one seeking to prove his own innocence. *See District Attorney's Office for Third Judicial Dist. V. Osborne*, 557 U.S 52, 129 S.Ct. 2308 (2009).

For all of the above reasons, PCRA relief on this basis shall be DENIED.

XI. Trial Counsel's Failure to Cross-Examine Regarding Cellular Phones in Defendant's Possession

Defendant-Petitioner asserts that his trial counsel was ineffective for not cross-examining the Commonwealth's witnesses and offering evidence that the search and seizure of cellular phones possessed by Defendant-Petitioner were not the same cellular phones taken from the victim-witnesses, nor were they used by the perpetrator at the scene.

While such evidence may have had some marginal degree of relevance insofar as one who steals cellular phones *might* be expected to maintain possession of them[86] for some period of time, the fact that Defendant-Petitioner had multiple cellular phones, completely unconnected in any way to the offenses here concerned, lying around his apartment is subject to an entire universe of plausible explanations. Subject to an equally infinite list of plausible

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[86] However, the contrary point is arguably also true, since cellular phones are typically equipped with gps technology, a criminal who steals such a phone for the purpose of depriving his victim the means to communicate may have an incentive to dispose of the device as quickly as possible.

explanations is what happened to the cellular phones which were stolen from the victim-witnesses. We need not exhaust the possibilities on either account, because we do not believe any reasonable jury would alter its verdict based upon such marginal evidence.

Corporal Kibler of the Lock Haven Police testified on cross examination at Defendant-Petitioner's trial that the victim-witnesses' cellular phones were not recovered[87]. Therefore, the jury was directly informed that Defendant-Petitioner was *not* in possession of cellular phones which might have linked him to the crime. In light of the otherwise overwhelming evidence of his guilt, we do not believe that Defendant-Petitioner's chances of success would have been substantially greater had the jury also been informed that he was in possession of cellular phones which were not the ones stolen from the victims. Therefore, we believe that Defendant-Petitioner has failed to prove, beyond a preponderance of the evidence, that he was prejudiced by counsel's failure to ask these questions. PCRA relief on this basis shall be DENIED.

XII. Trial Counsel's Failure to Object to Prosecutorial Comment on Opportunity to Testify

Defendant-Petitioner asserts that his trial counsel was ineffective when Mr. Fiore did not object and move for a mistrial when the District Attorney Salisbury "stated in front of the jury that [Defendant-Petitioner]'s attorney has every opportunity to have his client take the stand and testify[88]."

In *Commonwealth v. Davis*, 452 Pa. 171, 305 A.2d 715 (1973), relying on *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965), the Pennsylvania Supreme Court held that where a defendant did not testify and offered no other witnesses or evidence at trial, a

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[87] *See* Trial Transcript, March 2, 2010, at page 98 (Corporal Kibler testified "The victims' phones and cards were not recovered.")
[88] *See* Defendant-Petitioner's PCRA Petition, at ¶5.A.12.

prosecutor's persistent references in his closing argument, over objection, to evidence against the defendant being "uncontroverted" violated the Fifth Amendment prohibition against self-incrimination, as incorporated upon the States by the Fourteenth Amendment. Were the facts in the case *sub judice* as they were in *Davis*, we would be required to conclude that the properly admitted evidence was so overwhelming and the prejudicial effect of the improper comment was so insignificant by comparison that it is clear beyond a reasonable doubt that the error was harmless before we could disregard the comment.

However, the facts are not as they were in *Davis* and challenged prosecutorial comments must be viewed in context in which they were made. *See Commonwealth v. King*, 554 Pa., at 372, 721 A.2d, at, 783 (citing *Commonwealth v. Morales*, 549 Pa. 400, 424, 701 A.2d 516, 528 (1997)). A review of the trial record reveals not only that Defendant-Petitioner did testify, but also that Mr. Salisbury's isolated statement was made in the context of an objection to defense counsel's apparent attempt, on cross-examination, to import statements previously made by Defendant-Petitioner via the hearsay testimony from Corporal Kibler. Mr. Fiore had asked "at some point did [Defendant-Petitioner] explain how he thought he was set up?[89]" to which Corporal Kibler began responding, when Mr. Salisbury objected, stating, "Your Honor, I'm going to object to this on the grounds of hearsay. I believe that this is being offered for the truth of the matters asserted. He has every opportunity to have his client take the stand and testify[90]." This resulted in a sidebar exchange where Mr. Fiore explained that his aim in this questioning was to obtain greater specificity regarding matters Corporal Kibler had already testified to, and he also stated "[t]he other thing is, my client is going to testify. But if he wasn't, the statement that Mr.

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[89] *See* Trial Transcript, March 2, 2010, at page 86.
[90] *See* Trial Transcript, March 2, 2010, at page 87.

Salisbury just said could be interpreted -- and my client has the absolute right not to testify[91]." The Court then instructed Mr. Fiore that it would administer appropriate instructions at the conclusion of the trial. At the PCRA Hearing, Mr. Fiore recalled Mr. Salisbury's comment and his reaction, stating, "I think I may have. I think we went to sidebar on that. And I mentioned something about I could ask for a mistrial, but since the Defendant is going to testify -- in his pretrial remarks, I believe the Judge also stated that you can't hold it against the Defendant if he doesn't testify. I felt that it wasn't necessary to ask for a mistrial at that point considering that the Defendant was going to testify[92]."

We believe, as Mr. Fiore apparently did, that any risk of prejudice, if there was any at all, was sufficiently quelled by Court's pretrial and post-trial limiting instructions. At the outset of trial, the Court instructed the jury that "[t]he Defendant has a right to remain silent and present no evidence. You must not hold it against the Defendant if he happens to choose not to testify in this trial[93]." The Court similarly instructed the jury again at the close of evidence. Additionally, Mr. Fiore testified at the PCRA hearing that it was part of trial strategy to have Defendant-Petitioner testify, stating "I was sure. The only possible way that anything could have -- any defense that could have been postured for him would have been for him to have to testify. The evidence was so overwhelming in this case, the only way to raise any kind of doubt was if the jury believed him when he got up on the witness stand and told them that he didn't do it[94]."

Even if we adhered to the *Davis* "harmless beyond a reasonable doubt" standard, we feel confident that this comment was, in fact, harmless. However, the standard is much

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[91] *See* Trial Transcript, March 2, 2010, at page 88.
[92] *See* PCRA Transcript, at page 51.
[93] *See* Trial Transcript, March 1, 2010, at page 8.
[94] *See* PCRA Transcript, at page 52.

looser on PCRA review. As we have stated numerous times throughout this Opinion, Defendant-Petitioner has the burden to prove each prong of each assertion of ineffectiveness by a preponderance of the evidence. Clearly, when viewed under that standard, this evidence was harmless and raises no prejudice concerns in light of the other overwhelming evidence of Defendant-Petitioner's guilt. We believe the impact this comment could potentially have had was either zero or close to zero and the omission of this comment from the trial certainly would not have substantially altered the likelihood of Defendant-Petitioner's success. Therefore, PCRA relief on this basis shall be DENIED.

XIII. Appointed Public Defender's Failure to Timely File Post-Trial Motions

Defendant-Petitioner asserts that it constituted ineffectiveness when Public Defender David Lindsay, appointed following sentencing, "failed to file timely Post-Sentence motions[95]."

As the Commonwealth points out, however, this Court's Order, dated June 22, 2010, simply denied the post-sentence motions filed by Mr. Lindsay on behalf of Defendant-Petitioner. Nothing on the face of that Order indicates that it was premised on a timeliness failure. However, even if this were the case, we note that the motion focused solely on sentencing issues, the merits of which were addressed and disposed of in the Superior Court's Memorandum Opinion, dated December 13, 2011. We note that, pursuant to the plain language of the PCRA, the Act does not afford relief for issues which have been previously litigated. *See* 42 Pa.C.S. § 9543. An issue has been previously litigated where "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." *See* 42 Pa.C.S. § 9544. In this case, that would be the

CRAIG P. MILLER
PRESIDENT JUDGE
COURT OF COMMON PLEAS
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[95] *See* Defendant-Petitioner's PCRA Petition, at ¶5.A.13.

Superior Court. We refer Defendant-Petitioner to *Commonwealth v. Liston*, 602 Pa. 10, 977 A.2d 1089 (2009), where the Pennsylvania Supreme Court remarked "[p]resumably, since post-sentence motions are optional, *see* Pa.R.Crim.P. 720(B), rarely will counsel be deemed to have been ineffective for failing to file them except, for example, when the claim involves the discretionary aspects of sentence or a challenge to a verdict on weight of the evidence grounds, *claims which must be raised in the trial court to be preserved for purposes of appellate review*." *Liston*, 602 Pa., at 19, n.9, 977 A.2d, at 1094, n.9 (emphasis added). *Liston* encourages us in our belief that the Superior Court did not construe our Order denying Defendant-Petitioner's post-trial motions as being related to timeliness. Moreover, because the sole purpose of reinstating post-trial motion rights *nunc pro tunc* is to preserve appeal rights, Defendant-Petitioner is absolutely incapable of demonstrating prejudice on this assertion. Therefore, PCRA Relief on this basis shall be DENIED.

XIV. Trial Counsel's References to Defendant as Perpetrator

Defendant-Petitioner asserts that it constituted ineffectiveness when Mr. Fiore referred to the perpetrator as "defendant" during his cross-examination[96] of the first victim-witness to testify.

We do not tarry long with this assertion. Mr. Fiore testified at the PCRA hearing that "if [he] did that, that was a mistake[97]." Defendant-Petitioner's PCRA counsel then asked Mr. Fiore, "Do you think the jury maybe got the impression that the Defendant was the one there, too?" To this, Mr. Fiore responded, "I think that 318 quintillion, the DNA, maybe gave them the indication that he was the one that did it[98]." Sarcastic as it may have been, we agree with

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[96] *See* Defendant-Petitioner's PCRA Petition, at ¶5.A.14 (incorporated from motion for addendum),
[97] *See* PCRA Transcript, at page 49.
[98] *See id.*

this assessment. Mr. Fiore's quoted number actually afforded Defendant-Petitioner a statistical advantage that he didn't deserve, based on the trial testimony of Mr. Kist.

In view of all of the overwhelming evidence of Defendant-Petitioner's guilt presented at trial, recorded in transcripts exceeding five hundred (500) pages in length, we find that no prejudice could have befallen Defendant-Petitioner from four (4) isolated slips of the tongue, even if made by Defendant-Petitioner's trial counsel. Therefore, PCRA relief on this basis shall be DENIED.

Conclusion

After reviewing the trial record and the testimony at the PCRA hearing, we believe that Defendant-Petitioner was afforded a fair trial, with effective counsel, and was found guilty upon competent evidence. We are reminded that the purpose of the PCRA is not to provide convicted criminals with the means to escape well-deserved sanctions, but to provide a reasonable opportunity for those who have been wrongly convicted to demonstrate the injustice of their conviction. *See Commonwealth v. Sam*, 597 Pa. 523, 543, 952 A.2d 565, 577 (2008); *Commonwealth v. Peterkin*, 554 Pa. 547, 557-58, 722 A.2d 638, 643 (1998). By its own express terms, the Act "provides for an action by which persons convicted of crimes *they did not commit* and persons serving illegal sentences." *See* 42 Pa.C.S. § 9542 (emphasis added). We find no basis to afford Defendant-Petitioner PCRA relief on any of his assertions of ineffectiveness of counsel.

An Order consistent with this Opinion shall be entered this date.

CRAIG P. MILLER
PRESIDENT JUDGE

COURT OF COMMON PLEAS
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COURTHOUSE
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IN THE COURT OF COMMON PLEAS OF CLINTON COUNTY, PENNSYLVANIA
CRIMINAL

FILED
CLINTON COUNTY, PA
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MARIE J. VILELLO
PROTHONOTARY & CLERK

COMMONWEALTH OF PENNSYLVANIA :
:
v. : NO. 148-2009 CR
:
DOMENIQUE THOMAS WILSON, :
Defendant :

ORDER

AND NOW this 10th day of January, 2013, IT IS HEREBY ORDERED that Defendant-Petitioner Domenique Wilson's Petition for Post-conviction Collateral Relief and Amended Petition for Post-conviction Collateral Relief are hereby DENIED, for the reasons stated in the above Opinion.

IT IS FURTHER ORDERED that Defendant is advised that Defendant has the absolute right to appeal this Order to the Superior Court of Pennsylvania. Said appeal must be in writing and filed within thirty (30) days of today's date. Said appeal must be in writing and filed in the Office of the Clerk of Courts of the Court of Common Pleas of Clinton County, which is located on the first floor of the Clinton County Courthouse, 230 East Water Street, Lock Haven, Pennsylvania 17745. Frederick D. Lingle. Esquire shall remain available to Defendant to represent and assist Defendant in any appeal that Defendant may wish to pursue or to answer any questions or issues that Defendant may have.

The Clerk of Courts is directed to forward this Opinion and Order to Defendant by regular and certified mail at the State Correctional Institution at Cresson.

BY THE COURT:

Craig P. Miller, President Judge

CRAIG P. MILLER
PRESIDENT JUDGE
COURT OF COMMON PLEAS
25TH JUDICIAL DISTRICT
OF PENNSYLVANIA
COURTHOUSE
LOCK HAVEN, PA 17745

cc: Office of District Attorney
Frederick D. Lingle, Esquire
David I. Lindsay, Esquire
Domenique Thomas Wilson, Defendant
President Judge Craig P. Miller
Senior Judge J. Michael Williamson
Lock Haven Express
Court Administrator

CRAIG P. MILLER
PRESIDENT JUDGE
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