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SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA **Plaintiff-Appellee,**	)	
v.	)	**2858 EDA 2017** **CP-51-CR-0004829-2007**
JOHN IN **Petitioner-Appellant.**	)	**Non-Homicide PCRA** **PCRA Court: Sandy L. Byrd**

Petitioner-Appellant's Opening Brief

Appeal from the August 18, 2017 Order Dismissing John In's PCRA Petition Entered by the Honorable Sandy L.V. Byrd of the Philadelphia County Common Pleas Court, Criminal Division, CP-51-CR-0004768-2007

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STATEMENT OF JURISDICTION

Jurisdiction for this appeal is provided for at 42 Pa. C.S. § 742, relating to this Court's exclusive appellate jurisdiction from a Common Pleas Court's final order.

ORDER OR OTHER DETERMINATION IN QUESTION

Under appeal is the August 18, 2017 order dismissing John In's PCRA petition entered by the Honorable Sandy L.V. Byrd of the Philadelphia County Common Pleas Court, Criminal Division, CP-51-CR-0004768-2007.[1]

On September 5, 2017, Mr. In appealed.[2]

On October 2, 2017, Mr. In filed his *Concise Statement of Errors on Appeal*.[3]

On January 9, 2018, the PCRA court issued its 1925(a) opinion.[4]

PROCEDURAL HISTORY

On May 4, 2007, the Commonwealth filed an *Information* charging John In with multiple crimes in connection with the March 7, 2007 burglary and

[1] Rp. 1. Rp = Reproduced Record page number(s).
[2] Rpp. 2-3.
[3] Rpp. 4-13.
[4] Rpp. 14-25.

robbery of Vuthary Yun's home, including robbery, burglary, REAP, PIC, and false imprisonment.

Mr. In pled not guilty, but on September 16, 2008 a jury convicted him of two (2) counts of robbery, one (1) count of burglary, VUFU, Section 6105 and Section 6106, and PIC. Richard Giuliani served as trial counsel before the Honorable Sandy L.V. Byrd.

On December 19, 2008, Judge Byrd sentenced Mr. In to a term of 25 to 50 years in prison.

Mr. In appealed (1389 EDA 2009), but on July 23, 2010 this Court affirmed, and the Supreme Court denied Mr. In's *Petition for Allowance of Appeal* on January 5, 2011 (460 EAL 2010). Mr. In did not file a certiorari petition with the U.S. Supreme Court, making his conviction final on April 5, 2011.

On July 15, 2011, Mr. In filed a timely *pro se* PCRA petition, which appointed PCRA counsel, David Rudenstein, amended on October 4, 2012,[5] and July 19, 2013.[6]

On September 6, 2013, the PCRA court issued its 907 notice.[7]

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[5] Rpp. 41-47.
[6] Rpp. 48-51.
[7] Rp. 52.

On September 18, 2013, Mr. In filed his 907 objections.[8]

On October 11, 2013, the PCRA court dismissed Mr. In's petition.[9]

On November 8, 2013, Mr. In appealed (3021 EDA 2013).[10] Dissatisfied with Rudenstein's representation, Mr. In also filed a motion requesting new counsel or the right to proceed *pro se*.[11]

On December 6, 2013, this Court ordered the PCRA court to hold a *Grazier* hearing and to notify it within 60 days or by January 4, 2014.[12]

On January 14, 2014, the PCRA court issued its opinion, which this Court received on February 3, 2014, along with the trial court record. The PCRA court, however, had yet to hold a *Grazier* hearing.

On March 13, 2014, this Court again ordered the PCRA court to conduct a *Grazier* hearing within thirty days or before April 14, 2014.[13]

On April 11, 2014, the PCRA court held a *Graizer* hearing and determined Mr. In knowingly waived his right to appointed counsel.[14]

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[8] Rpp. 68-69.
[9] Rp. 53.
[10] Rp. 54.
[11] Rp. 55.
[12] Rpp. 61-63.
[13] Rpp. 61-63.
[14] Rp. 64.

On October 26, 2016, this Court remanded and ordered the PCRA court to hold a hearing on Mr. In's trial counsel ineffectiveness claims.[15]

On July 17, 2017, the PCRA court held a hearing where Mr. In's trial attorney, Richard Giuliani, testified.

On August 18, 2017, the PCRA court denied and dismissed Mr. In's petition.[16]

On September 5, 2017, Mr. In appealed.[17]

[15] Rpp. 26-35.
[16] Rp. 1.
[17] Rpp. 2-3.

ISSUE PRESENTED

Mr. In respectfully submits the following claim for this Court's consideration and adjudication:

Trial counsel made a series of objectively unreasonable decisions regarding the prosecutor's attempt to have Dyshon Marable testify against John In. Individually and cumulatively, these unreasonable decisions prejudiced Mr. In because they allowed the prosecutor to present and the jury to consider irrelevant, inadmissible, and highly prejudicial evidence regarding Mr. Marable's pre-trial statement and guilty plea without being subjected to cross-examination and without instructing the jury it could not consider Mr. Marable's guilty plea as substantive evidence of Mr. In's guilt. Had trial counsel lodged timely objections there is a reasonable probability the trial court would have prohibited the prosecutor from presenting Mr. Marable as a Commonwealth witness as well as the other evidence relating to his guilty plea and pre-trial statement. It would have also struck the prosecutor's impermissible closing arguments relating to Mr. Marable's refusal to testify, statement, and guilty plea. Trial counsel did not have a reasonable basis not to make the Individually and collectively, the introduction and consideration of this evidence undermines confidence in the jury's guilty verdicts warranting a new trial and the PCRA court erred when it refused to grant a new trial because the record supported Mr. In's right to a new trial based on trial counsel's ineffectiveness. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. 1, §§ 1, 6, 9.

STANDARD AND SCOPE OF REVIEW

In reviewing the grant or denial of PCRA relief, the Court examines whether the PCRA court's findings and conclusions are supported by the record and free of legal error. *Commonwealth v. Mitchell*, 141 A.3d 1277, 1283-1284 (Pa. 2016). The PCRA court's factual findings are entitled to deference,

but its legal conclusions are reviewed *de novo*. *Commonwealth v. Hawkins*, 894 A.2d 716, 722 (Pa. 2006).

To prevail on an ineffectiveness claim, Mr. In must demonstrate trial counsel performed deficiently and the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The deficiency prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Id*. at 687. The prejudice prong requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome," *Id*. at 694, which is "not a stringent" standard because it is "less demanding than the preponderance standard." *Hall v. Kyler*, 190 F.3d 88, 110 (3d Cir. 1999).

Under state law, Mr. In must show (1) his claim has arguable merit, (2) trial counsel's action or inaction lacked a reasonable basis, and (3) prejudice. *Commonwealth v. Pierce*, 527 A.2d 973, 975–976 (Pa. 1987). *Pierce* is identical to *Strickland*: deficient performance and prejudice. *Commonwealth v. Spotz*, 870 A.2d 822, 829 (Pa. 2005).

STATEMENT OF FACTS

A. Introduction

On March 7, 2007, around 5 a.m., three men entered 720 Mifflin Street with the intent to burglarize the house and rob its occupants. Two of the men walked up to the second floor and confronted Christina Khem at gun point,[18] while the third man took Vunthary Yun, Christina's father, to the basement at gunpoint.[19] Unbeknownst to the basement gunman, Yun's other daughter, Dina Khem, had her bedroom in the basement and overheard the gunman threatening her father, which prompted her to call 911 at 5:14 a.m.[20] Officers Thomas Nolan, Robert Robinson, and Felicia Battles arrived at the house within minutes and entered.

We know with certainty two of the perpetrators: Jerry Jean and Dyshon Marable. Detective Robert Conn found Marable hiding in a second floor bedroom closet,[21] while Officer Kevin Cannon chased down Jean at the southeast corner of Mifflin Street and 6th Street.[22] DNA evidence also linked

[18] NT, Trial, 9/10/2008, pp. 75, 76, 80, 86.
[19] NT, Trial, 9/10/2008, p. 103.
[20] NT, Officer Battles's Testimony, 9/12/2008, p. 13.
[21] NT, Trial, 9/11/2008, p. 10.
[22] NT, Trial, 9/11/2008, pp. 80-81.

Jean to latex gloves connected to the scene.[23] Jean and Marable, therefore, were the two men who accosted Christina on the second floor.

The Commonwealth believes the basement perpetrator is John In. At trial, the Commonwealth claimed that when Nolan, Robinson, and Battles entered 720 Mifflin Street chaos ensured, during which Mr. In exited the basement, ran through the kitchen and living room into the vestibule, and out the front door. Once out of the house, the Commonwealth claimed Mr. In ran to the southeast corner of Mifflin Street and 6th Street, entered Jean's Altima via the passenger's side door, moved to the driver's seat, and placed the Altima in reverse before fleeing the scene driving east bound on Mifflin Street.

While Sgt. Steve Woods detained Mr. In near the 500 block of Hoffman Street,[24] questions remain whether Mr. In was the basement gunman and Altima driver. The jury's lengthy deliberations confirm this. The jury sent nine questions and requests to the trial court regarding various witnesses and items of evidence.[25] Moreover, it deliberated for three days before returning its verdicts.[26]

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[23] NT, Trial, 9/11/2008, pp. 170, 171, 172
[24] NT, Trial, 9/11/2008, pp. 89, 97.
[25] NT, Trial, 9/12/2008, pp. 90-91; NT, Trial, 9/15/2008, pp. 1-18.
[26] NT, Trial, 9/16/2008, pp. 5-7. The jury found Mr. In guilty of conspiracy on September 15, 2008. NT, Trial, 9/15/2008, p. 23.

B. The Incident

On March 7, 2007, three men entered 720 Mifflin Street with the intent to burglarize the house and rob its occupants: Vunthary Yun, Christina Khem, Dina Khem, and Angela Khem. One man took Yun into the basement, while the two other men went to the second floor and accosted Christian.

After the incident, Yun told detectives a black man wearing a dark colored hoody approached him and placed a gun to his head. Yun said this man was skinny and "a lot taller" than him.[27] When Yun turned, he saw two other black men in the kitchen. The man with the gun to his head took him down the kitchen stairs into the basement where he tied Yun's hands behind his back with red string, placed a "cover" over his mouth, and had him sit on the basement steps.[28]

At trial, Yun said he could not identify the gunman because he purposely avoided looking at his face.[29] He said, however, the basement gunman was the tallest of the three men.[30] Yun gave the same height description at the preliminary hearing.[31]

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[27] Rpp. 79-80.
[28] Rpp. 79-80.
[29] NT, Trial, 9/10/2008, pp. 108, 111.
[30] NT, Trial, 9/10/2008, p. 112.
[31] NT, Trial, 9/10/2008, p. 117 (trial counsel reading from preliminary hearing testimony).

In her statement, Dina Khem said she was sleeping in her basement bedroom when she heard a "guy" talking to her father and demanding money and jewelry. She called 911. When she heard a "lady" yell from upstairs if someone called the police, she left her bedroom with the intent of walking upstairs to the police, but when she got to the basement steps she saw her father tied up sitting on the steps. When she called out to him, she said the gunman pointed his gun at her and told her to "shut the fuck up." She did as instructed and stayed at the foot of the stairs for two to three minutes before returning to her bedroom.[32]

After officers detained Mr. In and Jean, Dina and Christina viewed them simultaneously as they sat side-by-side in the back of a police wagon. Dina identified Mr. In as the basement gunman. Although she had yet to describe him, she said the basement gunman had a "real distinctive… sharp…. [or] pointed nose… not normal" for "a black guy[.]"[33] Dina never saw the two men who accosted Christina on the second floor.

[32] Rpp. 79-80.
[33] Rpp. 79-80.

At trial, Dina said she did not leave her bedroom until she heard the police.[34] When she left, she saw her father tied up on the top step and saw the gunman crouched beside him holding the kitchen door knob with one hand and his gun with the other.[35] The basement light was on when she encountered her father and the gunman.[36] The gunman, she said, had on a "dark" hoody.[37]

On direct-examination, Dina said she stood at the base of the stairs for two to three minutes after the gunman told her to "shut the fuck up."[38] On cross-examination, trial counsel introduced her preliminary hearing testimony where she said she "immediately" returned to her bedroom after the gunman told her to shut up. Dina could not explain the inconsistency in her testimony.[39]

In her statement, Christina Khem said she was sleeping in her second floor bedroom when two black men entered her bedroom, turned on the light, and told her to be quiet. The one man wore a green sweatshirt, the other man

[34] NT, Trial, 9/10/2008, pp. 125, 133, 134, 137.
[35] NT, Trial, 9/10/2008, pp. 126, 134.
[36] NT, Trial, 9/10/2008, pp. 126, 135.
[37] NT, Trial, 9/10/2008, pp. 134, 135.
[38] NT, Trial, 9/10/2008, pp. 127, 135, 144, 145.
[39] NT, Trial, 9/10/2008, p. 137

a Royal blue Adidas zip front sweatshirt. The man in the green sweatshirt went into her father's bedroom while the man in the blue sweatshirt stayed with her in the bedroom. The man in the blue sweatshirt then took her to her father's bedroom and talked with the man in the green sweatshirt.[40]

When the police arrived and yelled if anyone called the police, one of the men replied, "No, no one called the cops." The man in the green sweatshirt placed his hand over Christina's mouth and put his gun to her head. This man had on latex gloves, but Christina was unsure if the man in the blue sweatshirt had on latex gloves because his hands were in his jacket pockets. When the police again asked if someone called, the man in the blue sweatshirt ran to the back bedroom. The man in green sweatshirt followed and let Christina go, at which point she ran downstairs and told the officers about the two men upstairs.[41]

As the police searched for the two men, Christina said a black man ran across the living room from the kitchen. The man stopped at the vestibule, assessed the situation, and said, "Oh shit, what's happening," before running out the front door. She said the man was "tall" and had on a dark colored

[40] Rpp. 83-84.
[41] Rpp. 83-84.

sweatshirt and pants. After officers detained Mr. In and Jean, Christina and Dina viewed them simultaneously as they sat side-by-side in the back of a police wagon. Christina did not identify Mr. In as the man who ran across the living room, but identified Jean as the green sweatshirt gunman.[42]

At trial, Christina gave a consistent narrative.[43] She also said the hooded man in the "dark clothing" stopped at the vestibule momentarily and said, "Oh shit, what's happening," before running out the front door.[44] She could not identify this man because his hood covered his face,[45] but she said the man was tall.[46] Christina also said when she initially viewed Mr. In and Jean, she did not recognize either.[47] Officers then pointed to Jean and told her they had taken a green sweatshirt from him.[48] Based on this information, she identified Jean as the green sweatshirt gunman.[49]

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[42] Rpp. 83-84.
[43] NT, Trial, 9/10/2008, pp. 75-82.
[44] NT, Trial, 9/10/2008, pp. 83, 91.
[45] NT, Trial, 9/10/2008, p. 83.
[46] NT, Trial, 9/10/2008, p. 91.
[47] NT, Trial, 9/10/2008, pp. 92-93.
[48] NT, Trial, 9/10/2008, p. 94.
[49] NT, Trial, 9/10/2008, p. 94.

Officers Thomas Nolan, Robert Robinson, and Felicia Battles arrived at the house within minutes.[50] Once Christina ran down from the second floor, Nolan ran up the stairs and into the back bedroom where he saw Jean escaping through the bedroom window. Nolan grabbed Jean's leg, but could not hold on, allowing him to escape out the window and into the backyard.[51] When Nolan ran upstairs, Robinson ran through the kitchen and into the backyard. Battles followed Robinson.[52]

Once in the backyard, a black man in a green hoody with sideburns and a beard ran by Robinson and Battles, but they lost track of him because of the poor lighting in the backyard.[53] When they heard someone in the backyard shed, they ordered him to come out with his hands up. A black man exited the shed, appeared ready to give himself up, but then scaled the backyard fence, prompting Battles to fire her gun because it appeared the man had a gun.[54] The man fled through the alley behind 720 Mifflin Street.[55]

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[50] Rp. 78.
[51] NT, Trial, 9/11/2008, p. 48; Rpp. 75-76.
[52] NT, Trial, 9/11/2008, p. 31; NT, Officer Battles's Testimony, 9/12/2008, pp. 37, 39.
[53] NT, Trial, 9/11/2008, pp. 33, 35, 36; Rpp. 85-90.
[54] NT, Trial, 9/11/2008, pp. 33-35; NT, Officer Battles's Testimony, 9/12/2008, p. 21; Rpp. 85-87.
[55] NT, Trial, 9/11/2008, p. 35.

Robinson ran back through the house, exited the front door, and ran eastbound on Mifflin Street toward the 600 block.[56] He ran parallel with the back alley and caught glimpses of Jean fleeing.[57] Robinson approached the corner of Mifflin Street and 6th Street, looked into the alley, and saw that Officer Kevin Canon had subdued Jean.[58] As Robinson ran eastbound on Mifflin Street he did not see the unknown male who ran out the front door, nor did he see the Altima speed off eastbound on Mifflin Street.[59]

Cannon arrived at the corner of 7th Street and Mifflin Street, assessed the situation, and saw a black man crouched between an Altima and a gold-colored Honda at the southeast corner of 6th Street and Mifflin Street.[60] He exited his patrol car and approached the man, but as he did, the Altima reversed and sped eastbound on Mifflin Street toward the 600 block.[61] He did not see anyone running to, sitting on, or kneeling beside the Altima and he did not see the driver.[62] Cannon continued approaching Jean, who ultimately surrounded without incident. When Cannon searched the area where he

[56] NT, Trial, 9/11/2008, pp. 35, 43, 44.
[57] NT, Trial, 9/11/2008, p. 35.
[58] NT, Trial, 9/11/2008, pp. 36, 45.
[59] NT, Trial, 9/11/2008, p. 44.
[60] NT, Trial, 9/11/2008, pp. 80-81; Rpp. 73-74.
[61] NT, Trial, 9/11/2008, pp. 80-81; Rpp. 73-74.
[62] NT, Trial, 9/11/2008, p. 85.

initially saw Jean between the Altima and Honda, he found a green hoody, a white t-shirt, and latex gloves.[63]

Officer Roger Birch also responded. At trial, Birch said he approached the scene traveling southbound on 7th Street toward Mifflin Street. As he approached, he said he saw Mr. In kneeling beside the passenger's side door of an Altima parked at the southeast corner of 6th Street and Mifflin Street.[64] When trial counsel asked how it was possible to see someone kneeling beside a vehicle at the southeast corner of 6th Street and Mifflin Street as he traveled southbound on 7th Street, Birch changed his testimony and said he saw Mr. In and the Altima at the southeast corner of 7th Street and Mifflin Street.[65]

Birch said he saw Mr. In enter the Altima through the front passenger door, scoot across to the driver's side seat, place the Altima in reverse, and speed off eastbound on Mifflin Street toward the 600 block.[66] Birch said he did not exit his patrol car when he arrived at 720 Mifflin Street. Instead, once Mr. In fled in the Altima, he pursued him in his patrol car until the Altima crashed near 524 Mifflin Street. Birch said he parked his patrol car near 524

[63] NT, Trial, 9/11/2008, pp. 84-85; Rpp. 73-74.
[64] NT, Trial, 9/11/2008, pp. 96, 98, 104, 105.
[65] NT, Trial, 9/11/2008, p. 110.
[66] NT, Trial, 9/11/2008, pp. 98, 105.

Mifflin Street.[67] Once the Altima crashed, Birch said he saw Mr. In exit the Altima and run westbound toward the corner of 5th Street and Mifflin Street.[68] He pursued Mr. In on foot and Sgt. Steven Woods eventually subdued Mr. In on the 500 block of Hoffman Street.[69] When detained, Mr. In was wearing a "blue jacket with camouflage writing on it."[70]

The crime scene unit ("CSU") collected a latex glove from the vestibule of 720 Mifflin Street, from the alley where Jean fled, and from the 600 block of Mifflin Street. The CSU also recovered a gun from the backyard shed and a gun from the Altima's front seat. The male DNA identified on the latex gloves from the back alley and 600 block of Mifflin Street matched Jean's DNA.[71] DNA testing excluded Mr. In as the donor of the male DNA on all three latex gloves, including the one recovered in the vestibule.[72] DNA testing also excluded Mr. In as the contributor of the male DNA identified on the guns recovered from the backyard shed and Altima.[73]

[67] NT, Trial, 9/11/2008, pp. 96, 99.
[68] NT, Trial, 9/11/2008, pp. 96, 97.
[69] NT, Trial, 9/11/2008, pp. 89, 93, 97.
[70] NT, Trial, 9/11/2008, pp. 92, 100.
[71] NT, Trial, 9/11/2008, pp. 170, 171, 172.
[72] NT, Trial, 9/11/2008, p. 172.
[73] NT, Trial, 9/11/2008, pp. 175-176.

ARGUMENTS

1. Trial counsel made a series of objectively unreasonable decisions regarding the prosecutor's attempt to have Dyshon Marable testify against John In. Individually and cumulatively, these unreasonable decisions prejudiced Mr. In because they allowed the prosecutor to present and the jury to consider irrelevant, inadmissible, and highly prejudicial evidence regarding Marable's pre-trial statement and guilty plea without being subjected to cross-examination and without instructing the jury it could not consider Marable's guilty plea as substantive evidence of Mr. In's guilt. Had trial counsel lodged timely objections there is a reasonable probability the trial court would have prohibited the prosecutor from presenting Mr. Marable as a Commonwealth witness as well as the other evidence relating to his guilty plea and pre-trial statement. It would have also struck the prosecutor's impermissible closing arguments relating to Marable's refusal to testify, statement, and guilty plea. Trial counsel did not have a reasonable basis not to make the Individually and collectively, the introduction and consideration of this evidence undermines confidence in the jury's guilty verdicts warranting a new trial and the PCRA court erred when it refused to grant a new trial because the record supported Mr. In's right to a new trial based on trial counsel's ineffectiveness. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. 1, §§ 1, 6, 9.

A. Relevant Procedures and Facts

On the trial's second day, the trial court addressed the possibility of Dyshon Marable testifying.[74] The prosecutor informed the trial court when she and Detective Conn interviewed Marable before trial, he made it clear he would not testify. The prosecutor, though, reminded the trial court Marable did not have a Fifth Amendment right to remain silent due to his December

[74] NT, Trial, 9/11/2008, p. 6.

2007 guilty plea.[75] Based on Marable's intent to remain silent, the prosecutor anticipated the trial court may hold him in contempt.[76] The trial court informed Marable's attorney, Byron Houston,[77] if he refused to testify, he would be held in contempt and sentenced to six-months in jail.[78]

The prosecutor called Marable to the stand outside the jury's presence.[79] When the trial court asked him to state and spell his name, he remained silent. The trial court then asked, "Are you refusing to state your same, sir?" Marable replied, "Yeah."[80] Houston intervened and informed the trial court Marable would not answer questions because he had received "several threats" to his "life and health[.]"[81] The trial court instructed Houston to advise Marable he had no Fifth Amendment privilege based on his guilty plea. Houston complied.[82] The trial court then had the following colloquy with Marable:

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[75] On December 3, 2007, Marable pled guilty to robbery and burglary and sentenced to five to ten years. NT, Trial, 9/11/2008, p. 60.
[76] NT, Trial, 9/11/2008, p. 6.
[77] At the time, Houston was a public defender with the Philadelphia Defender's Association. NT, Trial, 9/11/2008, p. 59.
[78] NT, Trial, 9/11/2008, p. 7.
[79] NT, Trial, 9/11/2008, p. 58.
[80] NT, Trial, 9/11/2008, p. 58.
[81] NT, Trial, 9/11/2008, p. 59.
[82] NT, Trial, 9/11/2008, pp. 60-61.

Trial court: Mr. Marable, you have refused to give your name and be sworn in; is that correct?

Marable: Yes.

Trial Court: I want you to understand that this conduct… is impermissible; do you understand that?

Marable: Meaning what?

…

Trial Court: You don't have a right to decline to give your name and/or to testify because you have pled guilty in this case and have no Fifth Amendment privilege; do you understand?

Marable: Yes.

Trial Court: Now, the consequences of your conduct are that I can hold you in contempt of court and sentence you to a term of incarceration over and above what your serving now; do you understand that?

Marable: Yes.

Trial Court: Okay. Now, do you understand?

Marable: Yes.

Trial Court: Do you intend to continue this impermissible conduct?

Marable: Yeah, I ain't telling on nobody.

….

> Trial Court: Okay. If you continue with this impermissible conduct and I conclude you will, based on your answer, such conduct is intentional, it is willful; do you understand?
>
> Marable: Yes.[83]

The trial court then instructed the Court Crier to "swear in the witness," but Marable remained silent, which resulted in the following colloquy outside the jury's presence:

> Trial Court: You are declining to give your name?
>
> Marable: Yes.
>
> Trial Court: Do you intend to testify if questions are asked of you?
>
> Marable: No.[84]

The trial court threatened Marable with contempt and instructed him to "take a moment" and "think about what you want to do[.]"[85] Marable took a moment, but still refused to testify. The trial court held him in contempt.[86] Before sentencing him, the trial court asked, "Is there anything you wish to say before sentence is imposed?" Marable replied, "When I took the deal I told

[83] NT, Trial, 9/11/2008, pp. 61-63.
[84] NT, Trial, 9/11/2008, pp. 63-64.
[85] NT, Trial, 9/11/2008, p. 65.
[86] NT, Trial, 9/11/2008, pp. 65-66.

them I wasn't going to tell on nobody."[87] The trial court sentenced Marable to six months in jail and fined him $499.[88]

After Marable left the courtroom, the trial court asked the prosecutor and trial counsel how they wished to proceed. The prosecutor replied, "I wish to call him as my witness, have him not say whatever it is he is going to say. I am going to ask Sheriff Guess to read his wristband and ask Detective Hopkins to come in and testify."[89] Doing these things, the prosecutor argued, would allow her to introduce Marable's statement.[90]

Trial counsel objected on confrontation and 804 grounds regarding Marable's statement being introduced,[91] but he did not object to Marable taking the witness stand. The trial court then said:

> I want the record to reflect that we had a sidebar and Mr. Giuliani… did not object to [the] witness testifying, he objected to the statement coming in on the ground that–well, you state your objection.[92]

[87] NT, Trial, 9/11/2008, p. 67.
[88] NT, Trial, 9/11/2008, pp. 67-68.
[89] NT, Trial, 9/11/2008, p. 69.
[90] NT, Trial, 9/11/2008, p. 69.
[91] NT, Trial, 9/11/2008, pp. 70-72.
[92] NT, Trial, 9/11/2008, p. 71.

The prosecutor agreed with trial counsel's confrontation and 804 arguments, and withdrew her request to introduce Marable's statement, but she still wished to put Marable on the stand:

> I would still ask that Mr. Marable be brought out, he be asked his name, that Sheriff Guess identify him. I would still ask that Detective Hopkins be allowed to come in and I ask Detective Hopkins if [Marable] gave a statement, although the context of that statement would not be coming in.[93]

After hearing the prosecutor's request, trial counsel said, "I don't object to any of that, Your Honor."[94] The trial court then asked trial counsel, "And the procedure just outlined [by the prosecutor] is not objectionable to the defense?" Trial counsel replied, "It is not, Your Honor."[95] After further discussion, the trial court again asked trial counsel, "So you have a tactical reason to consenting to this process?" Trial counsel replied, "Yes."[96]

When the jury returned, the prosecutor called Marable to the stand, but he refused to state and spell his name, prompting the trial court to say, "Let the record reflect the witness refused to give his name."[97] With no objection

[93] NT, Trial, 9/11/2008, p. 73.
[94] NT, Trial, 9/11/2008, p. 73.
[95] NT, Trial, 9/11/2008, p. 73.
[96] NT, Trial, 9/11/2008, p. 74.
[97] NT, Trial, 9/11/2008, p. 75.

from trial counsel, the prosecutor had Sheriff Guess identify Marable by viewing his prison identification card and saying and spelling his name as well as reading his prison identification number.[98] Trial counsel did not request, and the trial court did not provide, a cautionary instruction informing the jury it could not use Marable's refusal to testify as substantive evidence of Mr. In's guilt.

Immediately after the sheriff escorted Marable out of the courtroom, the prosecutor told the trial court and jury her and trial counsel agreed to a stipulation regarding Marable's guilty plea. Before reading the stipulation, the trial court said the following to the jury:

> Ladies and gentlemen, in my preliminary instructions I told you that statements made by the attorneys did not constitute evidence, therefore they were not binding on you. There are exceptions to this rule and one such exception is a stipulation. When the Commonwealth and defense stipulate that, is when they agree that a certain fact or facts are true, their stipulation is evidence of that fact and you jurors should regard stipulated or agreed upon facts as proven.[99]

The prosecutor read the stipulation into the record:

[98] NT, Trial, 9/11/2008, p. 75.
[99] NT, Trial, 9/11/2008, pp. 77-78.

> There's been a stipulation by and between counsel that in the case of Commonwealth v. Dyshon Marable, Common Pleas Court No. 51-CR-0004827-2007, before the Honorable Judge Byrd, Dyshon Marable pled guilty to three counts of robbery. Victims being Vuthay Yun, Dina Khem, and Christina Khem. Pled guilty to burglary of the house at 720 Mifflin Street. Pled guilty to possession of an instrument of crime, [and] conspiracy regarding the incident that happened on March 7th, 2007.
>
> In exchange to his guilty plea… he was sentenced to a period no less than five no more than ten years incarceration.[100]

Trial counsel did not request, and the trial court did not provide, a cautionary instruction informing the jury it could not use Marable's guilty plea as substantive evidence of Mr. In's guilt.

After reading the stipulation, the prosecutor called Detective Hopkins. Hopkins said he canvassed 720 Mifflin Street and located Marable hiding in a second floor bedroom closet.[101] The prosecutor asked Hopkins whether detectives questioned Marable after his arrest:

> Prosecutor: And [Mr. Marable] was taken to South Detectives, correct?
>
> Hopkins: Yes, he was.

[100] NT, Trial, 9/11/2008, p. 78.
[101] NT, Trial, 9/11/2008, p. 160.

Prosecutor: He was *Mirandized*, correct?

Hopkins: Yes, he was.

Prosecutor: And he did give a statement?

Hopkins: Yes, he did.[102]

Trial counsel did not object to the prosecutor's questions or Hopkins's answers, nor did he cross-examine Hopkins.[103] Although he testified before Marable and Hopkins, Detective Conn also informed the jury of Marable's statement. Like here, trial counsel did not object to the prosecutor's questions and Conn's answers.[104]

During closing arguments, with no objection from trial counsel, the prosecutor argued that Marable's silence, statement, and guilty plea confirmed Mr. In's guilt:

> And you saw Dyshon Marable, he wouldn't even say his name, let alone be sworn in. Well, why? He took a plea, he's serving his time. He's not going to snitch on his buddy, no matter what the consequences to him. You saw, you saw the attitude he gave everybody including the Judge. Well, that's his boy, I brought him down here. He's not going to testify for the Commonwealth, right?[105]

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[102] NT, Trial, 9/11/2008, p. 161.
[103] NT, Trial, 9/11/2008, pp. 161, 163.
[104] NT, Trial, 9/11/2008, p. 13.
[105] NT, Trial, 9/12/2008, p. 46.

B. PCRA Hearing

In this Court's first PCRA opinion (3021 EDA 2013), it remanded back to the PCRA court instructing it to hold an evidentiary hearing where trial counsel could testify and explain his reasons for the various decisions he made at Mr. In's trial. The PCRA court held an evidentiary hearing on July 7, 2017 where Richard Giuliani testified.

Giuliani recalled that Jean and Marable pled guilty before Mr. In's trial, that Marable gave a written statement implicating himself and Mr. In, and the prosecutor telling him she intended to call Marable as a witness because of his statement. The prosecutor's position, he recalled, was Marable had no Fifth Amendment privilege because of his guilty plea.[106] He knew "exactly why" the prosecutor wanted to call Marable: "She wanted to get the statement into evidence" under B*rady*/*Lively*.[107]

Giuliani recalled objecting on confrontation and 804 grounds regarding Marable's statement and the trial court sustaining his objection and preventing the prosecutor from introducing Marable's statement if he refused to answer questions.[108]

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[106]NT, PCRA Hrg., 7/7/2017, p. 11.
[107] NT, PCRA Hrg., 7/7/2017, pp. 14-15-21.
[108] NT, PCRA Hrg., 7/7/2017, p. 15.

Giuliani recalled Marable's attorney, Bryon Houston, informing the trial court Marable had no intention of answering questions. He spoke with Houston before Marable was brought out and put on the stand and Houston told him Marable "did not intend to say a word."[109] He "suspected [Marable] was not going to testify based on" Houston's "representations."[110] He recalled the trial court threatening Marable with contempt, Marable refusing to answer any questions, and Deputy Guess reading the information from Marable's identification card.[111]

Giuliani said he had a tactical reason for allowing the prosecutor to put Marable on the stand even though Marable made it abundantly clear he had no intention of answering questions. Giuliani said Yun described the basement gunman as the tallest of the three men committed the robbery.[112] Thus, because the basement gunman's height was a critical issue, Giuliani wanted to show the jury that – among Jean, Marable, and Mr. In – Mr. In was not the tallest.[113] To advance this point, Giuliani wanted the jury to see Marable's "physical stature":

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[109] NT, PCRA Hrg., 7/7/2017, pp. 12-13.
[110] NT, PCRA Hrg., 7/7/2017, p. 14.
[111] NT, PCRA Hrg., 7/7/2017, pp. 12-13, 15.
[112] NT, PCRA Hrg., 7/7/2017, p. 40.
[113] NT, PCRA Hrg., 7/7/2017, p. 41.

> One of the parts of the description was a height, a specific height. I wanted Mr. Marable to be able to come into the courtroom so that the jury could see how he -- his particular height, Mr. Marable, and compare it to Mr. In. I mentioned it on the record, but I will defer to the record. I wanted them to see his physical stature.[114]

Before trial, Giuliani received multiple 229s in discovery, including two written by Officers Jenkins and Baldwin. The 229s listed Jean as 6'0" and Mr. In as 5'9".[115] Counsel (Cooley) asked Giuliani, in lieu of having Marable take the stand when he (Giuliani) was certain Marable would not answer questions, did he contemplate calling Jenkins and Baldwin for the sole reason of having the jury informed regarding Jean's height and Mr. In's height. Giuliani said he never contemplated calling Jenkins and Baldwin as defense witnesses to identify Jean's and Mr. In's heights, in lieu of having Marable take the stand[116] Giuliani said: "Sometimes trial is fluid and since Mr. Marable ended up testifying somewhat unexpectedly, there was no sense of me putting up another officer in the defense case."[117]

[114] NT, PCRA Hrg., 7/7/2017, p. 19.
[115] NT, PCRA Hrg, 7/7/2017, pp. 41-42.
[116] NT, PCRA Hrg., 7/7/2017, pp. 42-43.
[117] NT, PCRA Hrg, 7/7/2017, p. 43.

Giuliani never had the heights of Mr. In, Marable, and Jean presented to the jury. Nor did he mention his (Giuliani) height to the jury when he asked Marable to stand up and stood next to him.[118] Giuliani repeatedly said he wanted the jury to compare Marable's height with Mr. In's height, but when counsel (Cooley) asked, "[w]hat were they comparing," Giuliani said, "Frankly, I don't recall."[119]

Counsel then asked Giuliani these questions in an attempt to flesh out how exactly the jury was supposed to compare heights when it did not know the heights of Mr. In, Marable, and Jean and Giuliani did not have Mr. In stand next to Marable in the courtroom:

> Q. Based on your testimony, you keep referring to you wanted the jury to make this comparison. What comparison did they, in fact, make?
>
> A Because the evidence came out that Mr. Jean was six foot, he was the tallest of the three.
>
> Q Did you present any evidence regarding Marable's height?
>
> A How could I? He wouldn't answer any questions. Secondly, if I did ask him a question to which he answered now, all of a sudden, there is a potential that his statement comes into evidence.

[118] NT, PCRA Hrg. 7/7/2017, p. 43.
[119] NT, PCRA Hrg., 7/7/2017, p. 44.

I did this demonstrative exhibit where I stood next to him. That was all I could do.

The point is, the whole point of doing it was to show Mr. In was not the tallest of the three. Mr. Yun was very specific; while he could not identify Mr. In or anybody by face, he made a comparison by saying there were three; the tallest pointed a gun at him.

Q How is that jury supposed to make that deduction when you stand next to somebody, you don't give your height or the other individual's, you don't give the jury, at the time, his height?

A I assume -- I don't want to assume.

I knew either Ms. Baraldo was going to put in a height of Mr. Jean when he was arrested because had she not done it, I would have.

I tried cases against her before and I know how she tried cases and I know how this office tries cases.

If they did not put that information in, I would have. I know this office would want to preclude me from doing it, because then it looks to them like they are trying to hide the evidence of a defendant that the jury did not see.

....

Q. You believed that the jury would be able to make a height deduction even though they had no idea how tall Marable was?

A Fair to say. In theory they could look at him and say his approximate height. People do that all the time,

> make estimates of people's height. May not have been completely accurate.
>
> Q Did you ask for John In to stand next to him?
>
> A No.
>
> ...
>
> Q Did you have a tactile reason for not asking Judge Byrd to allow John In to at least stand next to Marable?
>
> A No.[120]

Counsel (Cooley) asked Giuliani whether it ever crossed his mind the jury might – or easily – infer that Marable implicated Mr. In in his statement to Hopkins based on Marable's refusal to answer questions. Giuliani initially said the "prejudice" issue "crossed [his] mind," but then said he "didn't think about it."[121]

After Detective Hopkins testified and mentioned Marable's voluntary, post-arrest statement, Giuliani said it never crossed his mind the jury could have easily inferred why the prosecutor was so "hell bent" on having Marable take the stand knowing full well he was not going to answer questions, *i.e.*, because Marable implicated Mr. In in his statement to Hopkins.[122] Also, based

[120] NT, PCRA Hrg., 7/7/2017, pp. 45-46, 47-48.
[121] NT, PCRA Hrg., 7/7/2017, pp. 20-21.
[122] NT, PCRA Hrg., 7/7/2017, pp. 21, 22.

on the prosecutor's decision to call Marable to the stand, Marable's refusal to answer questions, and Hopkins's testimony that Marable gave a voluntary statement, Giuliani did not think the jury could "reasonable" infer Marable implicated Mr. In in his statement to Hopkins.[123] Lastly, Giuliani said he was not familiar with the case law regarding those situations "where a co-defendant is put on the stand knowing full well… the co-defendant will invoke his Fifth Amendment right or he made it clear he will not testify[.]"[124]

Once Marable refused to answer questions, Giuliani conceded that Hopkins's testimony regarding Marable's "voluntary statement" had "little to no relevance" at Mr. In's trial.[125] Despite its irrelevancy, Giuliani did not object to Hopkins's testimony and could not articulate a strategic reason for not making a relevancy objection.[126]

Giuliani said he had a tactical reason for the stipulation regarding Marable's guilty plea: "The defense was that Jean and Marable were involved. The third guy, whoever he was, was not John In. Had Mr. In been the only alleged co-conspirator, that would have been a problem. We know there were

[123] NT, PCRA Hrg., 7/7/2017, p. 23.
[124] NT, PCRA Hrg., 7/7/2017, p. 25.
[125] NT, PCRA Hrg., 7/7/2017, p. 23.
[126] NT, PCRA Hrg., 7/7/2017, pp. 23-24.

at least two other people. To me it didn't prejudice Mr. In by my stipulating to that."[127] Counsel (Cooley) then asked this question regarding the jury's ability to draw an adverse inference against Mr. In:

> Again, did it ever cross your mind that the jury might interpret it in a way that, especially when they hear he pled guilty to conspiracy, that he gave a voluntary statement, that he refused to testify against John In, collectively that might work against John In?

Giuliani replied:

> No, I didn't, because the names of the alleged co-conspirators were not put on the record. Again, the evidence was very clear that Mr. Jean was there and involved and shot at by the police. For all the jury knows, Mr. Marable could have given a statement that inculpated Mr. Jean or some unknown person.[128]

Giuliani did not ask for cautionary instruction informing the jury it could not draw an adverse inference against Mr. In based on Marable's silence. Nor did he ask for a cautionary instruction informing the jury it could not use Hopkins's testimony regarding Marable's voluntary statement as substantive evidence of guilt against Mr. In. Giuliani never thought about these types of cautionary instructions.[129]

[127] NT, PCRA Hrg., 7/7/2017, p. 25.
[128] NT, PCRA Hrg., 7/7/2017, p. 27.
[129] NT, PCRA Hrg., 7/7/2017, p. 28.

In terms of the prosecutor's closing arguments, Giuliani conceded he should have objected when the prosecutor argued that Marable's guilty plea and refusal to testify proved Mr. In's guilt and he conceded he did not have a "strategic reason" for not objecting.[130]

C. Cases Where it Was Clear a Co-Defendant or Key Commonwealth Witness Linked to the Defendant Would Refuse to Testify if Called as a Commonwealth Witness

After Marable repeatedly told the trial court – outside the jury's presence – he would not answer questions, even after being held in contempt and sentenced to six (6) months in jail, it was painfully obvious he would act the same way in the jury's presence. Despite this evident reality, the prosecutor placed Marable on the stand in the jury's presence and he did as everyone expected: he refused to answer a single question, even refusing to say his name. This dog and pony show happened with no objection from trial counsel. The prosecutor's decision to put Marable on the stand prejudiced Mr. In and trial counsel should have objected.

Several cases are instructive and prove trial counsel's ineffectiveness: *Commonwealth v. Terenda*, 301 A.2d 625 (Pa. 1973); *Commonwealth v. DuVal*, 307 A.2d 229 (Pa. 1973); *Commonwealth v. Davenport*, 308 A.2d 85 (Pa. 1973);

[130] NT, PCRA Hrg., 7/7/2017, pp. 28-29, 37,

Commonwealth v. Wright, 321 A.2d 625 (Pa. 1974); *Commonwealth v. Virtu*, 432 A.2d 198 (Pa. 1981); and *Commonwealth v. Musolino*, 467 A.2d 605 (Pa. Super. 1983).

1. *Terenda*

In *Terenda*, the defendant and his two co-defendants were charged with murder and convicted of manslaughter. At trial, before the prosecutor called the first co-defendant to testify, the trial court held a sidebar where the co-defendant's attorney informed the trial court and prosecutor that the co-defendant will invoke his Fifth Amendment privilege and only state his name and address on the record. After the sidebar, the prosecutor called the first co-defendant who immediately invoked his right after stating his name on the record. Over no objection from trial counsel, the prosecutor then asked the first co-defendant his age, if he was with the defendant at the time of the killing, and if he could identify certain weapons. The co-defendant invoked his right and refused to answer these questions in the jury's presence.

The prosecutor then called the second co-defendant. Trial counsel objected, but based his objection on non-Fifth Amendment grounds. Trial counsel argued the second co-defendant was not a proper rebuttal witness and it was prejudicial to call both co-defendants as Commonwealth witnesses. The

trial court permitted the Commonwealth to call the second co-defendant, which it did. When the prosecutor asked the second co-defendant about his whereabouts at the time of the killing and if he was with the defendant and the other co-defendant at the time of the killing, the second co-defendant invoked his right and refused to answer.

On appeal, the Supreme Court reversed the defendant's manslaughter conviction. The Court said the procedure described above "unfairly prejudice[ed]" the defendant. *Commonwealth v. Terenda*, 301 A.2d at 628. It premised its prejudice finding on the fact that, before the Commonwealth called the co-defendants to testify, it introduced evidence to the jury that the co-defendants "were in" the defendant's "company… at the time of the killing." *Id*. "Under such circumstances," the Court said, "the jury could reasonably have drawn inferences adverse to [the co-defendants] and transferred these adverse inferences to the [defendant]." *Id*. Because the jury "could reasonably have drawn inferences adverse" to the defendant, the defendant "was entitled to cross-examine" his co-defendants, yet this was "impossible" because his co-defendants "invoked the Fifth Amendment." *Id*. The Court left no doubt as to how it felt about a defendant's right and *ability* to confront adverse witnesses:

> Once testimony has been presented to a jury from which adverse inferences can be drawn, the [defendant] cannot be deprived of the opportunity to challenge those inferences in the jury's mind. To so deprive the [defendant] is to effectively deprive him of his rights to confront the witnesses against him guaranteed by the Sixth Amendment which is applicable to state prosecutions.

Id. at 628.

2. *DuVal*

In *DuVal*, the defendant was charged with murder and convicted of manslaughter. Based on pre-trial statements and testimony, the defendant, the victim, and two women were in the room when the victim was shot and killed. In pre-trial hearings, the two females gave inconsistent narratives as to how the victim was killed. The two women initially said a burglar had entered the home and shot the victim. Later, though, they said the defendant had shot and killed the victim after he (the victim) struck one of the females during an argument. Fearing perjury charges for their inconsistent testimony, the women hired an attorney, who called the prosecutor three to four days before defendant's trial and informed the prosecutor his clients would invoke their Fifth Amendment privilege if called to testify against the defendant.

At trial, outside the jury's presence, the trial court concluded that the women had waived their privilege when they testified at the preliminary hearing and before the grand jury. When the jury returned, and the prosecutor called the first woman, her attorney immediately notified the trial court she would be invoking her Fifth Amendment privilege. The trial court held the woman in contempt and had her led off in custody before the jury. The same sequence of events, including the trial court's waiver and contempt finding, occurred when the prosecutor called the second woman.

On appeal, the Supreme Court reversed defendant's manslaughter conviction. It quickly articulated its holding by citing *Terenda* and saying: "[I]t is prejudicial error for a prosecutor to summon a witness to the stand in a criminal trial with foreknowledge that the witness intends to invoke a privilege against self-incrimination." *Commonwealth v. DuVal*, 307 A.2d at 231-232. The Court supported this holding by citing to the ABA Guidelines: "A prosecutor should not call a witness who he knows will claim a privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, as defined in the Code of Professional Responsibility, doing so will constitute unprofessional conduct." *Id*. at 234

(quoting ABA, Standards Relating to the Prosecution Function and the Defense Function § 5.7(c)).

The Court said the "procedure followed by the prosecutors" must "be condemned" because "it presented the jury with an *irrelevant event* (invocation of the privilege) from which the jury could make fallacious deductions prejudicial to the defendant and not subject to cross-examination." *Id*. at 233 (emphasis added). The Court focused on the irrelevancy of the witnesses' invocation and said, where invocation is "irrelevant" to the guilt-innocence issue, "it is that much more prejudicial to permit the jury to observe that the recalcitrant witness (a person likely to be associated in the jurors' minds with the defendant) elects to remain silent notwithstanding the order of the court that he testify." *Id*. at 234. Based on these facts and findings, the Court said:

> … [T]he prosecution, once informed that a witness intends to claim a privilege against self-incrimination, commits error in calling that witness to the stand before the jury where the witness is a person (co-defendant, accomplice, associate, etc.) likely to be thought by the jury to be associated with the defendant in the incident or transaction out of which the criminal charges arose.

Id. at 234.

3. *Davenport*

In *Davenport*, the defendant was charged and convicted of first-degree murder. A co-defendant confessed shortly after his arrest and implicated the defendant. At trial, the prosecutor called the co-defendant. Trial counsel immediately asked for a sidebar where the prosecutor said he called the co-defendant because he "hoped" the co-defendant would repeat his confession to the jury. The co-defendant's attorney participated in the sidebar and told both parties and the trial court the co-defendant would invoke his Fifth Amendment right. When the trial court asked the prosecutor if he still intended to call the co-defendant, the prosecutor said: "[T]here is a strong possibility, probability, that if Mr. Bartlett did take the stand he would take the Fifth Amendment. I am hoping he wouldn't. There is no way, I think, anyone can be sure until the man is put to the test." *Commonwealth v. Davenport*, 308 A.2d at 86. Over trial counsel's "strenuous objection," the prosecutor called the co-defendant who, after stating his name and address, invoked his right to all questions. *Id*. Trial counsel requested a cautionary instruction informing the jury not to draw an adverse inference from the co-defendant's refusal to testify, but it was denied.

On appeal, the Supreme Court relied on *DuVal* and *Terenda* when it reversed defendant's murder conviction in a terse opinion:

> The Commonwealth alleges that no error was committed in this case because when [the co-defendant] was called to the stand, the prosecution believed in good faith that his right to invoke the Fifth Amendment had been lost by his earlier trial and conviction. As we said in *DuVal*, however, a case where the Commonwealth asserted that by testifying on prior occasions the witnesses had waived their Fifth Amendment rights, the validity *vel non* of the claim of privilege is immaterial. It is a question which can and should be settled outside the presence of the jury. It is also clear, as in *DuVal*, that the district attorney had actual notice of [the co-defendant's] intention to take the Fifth Amendment; we therefore need not explore what steps, if any, the Commonwealth should be required to take in advance in order to ascertain the willingness of a witness to testify.

Id. at 86-87.

4. *Wright*

In *Wright*, the defendant was charged and convicted of conspiracy and robbery. At trial, the prosecutor notified the trial court and trial counsel of his intention to call a witness named Hobbs, who had participated in the robbery, but was not a co-defendant. The prosecutor wanted to call Hobbs "to confirm" his "out-of-court statement implicating [the defendant] in the

holdup." *Id*. at 626. Before Hobbs testified, the trial court excused the jury, and had a sidebar with both parties. At the sidebar's conclusion, the trial court summarized the sidebar's substance by noting the prosecutor's intention of calling Hobbs, but also noting the strong likelihood Hobbs "may deny the truthfulness of [his] prior statement." *Id*. The prosecutor replied: "The only purpose I'm calling him for is the truthfulness of the prior statement." *Id*. Trial counsel retorted: "I object to that because [the prosecutor] knows he is going to say no." *Id*. The trial court overruled the objection. When the jury returned, Hobbs took the stand, and in response to the prosecutor's questions, he said "he had made and signed a three page written statement, but that the statement was not true." *Id*.

On appeal, the Supreme Court reversed the defendant's convictions. It found "no justification" for the above procedures. Critical to the Court's finding was the fact Hobbs's statement "was inadmissible against" the defendant. Because it was inadmissible, the Court said the prosecutor had "only one legitimate purpose" for presenting and asking him about his statement: "[T]o discover whether Hobbs would stand by his prior statement, or would renounce it." *Id*. at 626. The Court said these facts were "analogous" to *DuVal* and *Terenda*, meaning "[o]nce the prosecution had foreknowledge

that Hobbs was likely to disavow the statement, any doubts on this score should have been resolved outside of the presence of the jury." *Id*. While *DuVal* and *Terenda* presented with "obvious factual differences," the Court said their "underlying rationale" controlled: "The prosecution may not suggest by indirection what it is barred by the rules of evidence or testimonial privilege from demonstrating by direct testimony." *Id*. at 627.

5. *Virtu*

In *Virtu*, the defendant was charged with arson and two counts of murder in connection with a beauty shop arson that left two people dead. The Commonwealth argued the defendant committed the arson with three other people: Romeo, Spinelli, and Sandoval. Romeo owned a pizza shop directly above the beauty shop and over the course of time Romeo and the beauty shop owner disagreed over an access point to the pizza shop culminating in the arson. After the fire, Virtu, Spinelli, and Sandoval appeared at a local hospital "badly burned[.]" *Commonwealth v. Virtu*, 432 A.2d at 199. Spinelli and Sandoval died as a result of their burns, but Virtu survived and was charged.

At a pre-trial suppression hearing, the prosecutor called Romeo, but he immediately invoked his Fifth Amendment right. The trial court forced him to give his name, current address, prior address, and state whether he knew

Virtue, Spinelli, and Sandoval. However, when the prosecutor asked Romeo if he owned the pizza shop, he invoked his privilege and refused to answer. When Romeo continually invoked his right, the trial court told the prosecutor Romeo could only testify if the Commonwealth gave him immunity. Romeo was not offered immunity.

At trial, when the prosecutor listed Romeo as a Commonwealth witness, the trial court called a side bar and asked the prosecutor if Romeo was the same person who had invoked his Fifth Amendment right at the suppression hearing. The prosecutor said Romeo was the same person, but said he had not invoked his Fifth Amendment because he testified at the suppression hearing. Moreover, before Romeo took the witness stand, his attorney had informed the prosecutor that Romeo would invoke his right and refuse to testify. "Despite this unmistakably clear warning, [the prosecutor] chose to call Romeo as a witness. After responding to questions eliciting his name, his then current address, and his address as of August, 1977, Romeo replied to a question about the period of his residence at the latter address, but when asked with whom he lived in August of 1977, he asserted his Fifth Amendment privilege and refused to answer." *Id*. at 200.

The trial court called an immediate sidebar where trial counsel requested a mistrial, arguing that the "jury… had been irreparably prejudiced against the defendant by the prosecutor's deliberate misconduct." *Id*. Trial counsel also accused the prosecutor of lying at the earlier sidebar when he had said Romeo had not invoked his right at the suppression hearing. In reply to this serious charge, the prosecutor "disingenuously stated, 'He [Romeo] did not take the Fifth [at the suppression hearing] because he responded to questions.'" *Id*.

After reading the suppression hearing transcripts, as well as *Commonwealth v. Wright*, 321 A.2d 625 (1974), the trial court found that the "jury had been incurably prejudiced" and granted a mistrial. *Id*. at 201. Before the re-trial, trial counsel filed a motion to dismiss the indictment based on the prosecutor's misconduct, arguing that a re-trial violated the defendant's double jeopardy right. A different judge held a hearing on the motion and denied it, prompting the defendant to appeal.

On appeal, this Court reversed. Key to its reversal was "the indisputable fact" that the prosecutor "had *actual knowledge*" of Romeo's "intent to exercise his Fifth Amendment privilege[.]" *Id*. at 202 (emphasis in original). As a result, the prosecutor "should have brought this information" to the trial court's

attention and "requested a hearing" outside the jury's presence "for the purpose of obtaining specific rulings on the applicability of the Fifth Amendment privilege to each of his proposed questions." *Id*. at 203. Despite this "actual knowledge," though, the prosecutor disregarded these obvious protective measures and "deliberately called" Romeo. *Id*. This Court, moreover, said the prosecutor "knew, or should have known, that under the decisions of this Court, his alleged 'good faith' belief in the invalidity of a witness' contemplated assertion of his Fifth Amendment privilege was irrelevant." *Id*. To prove this point, the Court quoted and discussed *DuVal*. *Id*. at 202-203.

The Court concluded that the "only plausible" reason the prosecutor called Romeo was because he could not "elicit[] crucial testimony" based on Romeo's "anticipated assertion" of his Fifth Amendment right. This foreseeable roadblock, the Court said, "led [the prosecutor] to attempt a maneuver designed to prejudice [defendant] by forcing [Romeo] to assert the privilege in the presence of the jury." *Id*. at 203. The Court said, "This kind of intentional prosecutorial misconduct is a threat to the very integrity of our judicial process, and must not be condoned." *Id*.

6. *Musolino*

In *Musolino,* the defendant was charged with murder and convicted of second-degree murder. Shortly after the murder, the defendant attempted suicide and was taken to the hospital. While at the hospital, defendant confessed to the murder, but before confessing he talked with his priest. At a pre-trial suppression hearing, "it was made clear [the priest], if called as a witness, would invoke the priest-penitent privilege as set forth under section 5943 of the Judicial Code." *Commonwealth v. Musolino*, 467 A.2d at 607. At the suppression hearing, the prosecutor called the priest and asked him about telephone calls the defendant made to him regarding the homicide and his suicide attempt. The priest invoked the priest-penitent privilege throughout.

At trial, when the prosecutor called the priest, trial counsel objected to having the priest questioned in the jury's presence because the prosecutor knew the priest would invoke his privilege. At a sidebar, trial counsel reminded the trial court of the priest's invocation at the suppression hearing. The trial court ruled there was no privilege because the defendant had confessed. The prosecutor then questioned the priest about the phone calls, but the priest invoked his privilege throughout the questioning.

On appeal, the Supreme Court got right to the point when it addressed this issue: "The practice of questioning a witness, knowing in advance that the witness will invoke a privilege, is disfavored by the American Bar Association's Project on Standards for Criminal Justice[.]" *Id*. at 610 (quoting ABA Standards Relating to the Prosecution and Defense Function, 3-5.7(c)). Although the priest-penitent privilege presented a "novel" issue, the Supreme Court cited *DuVal*, *Davenport*, and *Wright* and said once a prosecutor is informed that a witness will claim a privilege and not answer the prosecutor's questions, the prosecutor "commits error in calling the witness where the witness is likely to be thought by the jury to be associated with the defendant in the incident out of which the criminal charges arose." *Id*. at 610. The Supreme Court acknowledged that the facts in *Musolino* were "factually distinguishable," but said *DuVal's* and *Davenport's* "underlying rationale" controlled: "That is, '[t]he prosecution may not suggest by indirection what is barred by the rules of evidence or testimonial privilege from demonstrating by direct testimony.'" *Id*. at 611 (quoting *Commonwealth v. Wright*, 4321 A.2d at 627).

The Court said the prosecutor's "interrogation" of the priest "served no apparent purpose but to create an aura of [defendant's] guilt in his refusal to respond." *Id*. at 611. This left the jury "with the distinct impression that

[defendant's] conversation with [the priest] was confidential and that the information withheld by the priest was of a confessional nature." *Id*. Under these circumstances, the Court said the procedures used at trial violated defendant's confrontation rights because of his "inability to cross-examine" the priest. *Id*. The Court, though, found the error harmless due to the defendant's confession and the "uncontroverted" and "overwhelming" evidence presented by the Commonwealth. *Id*.

D. Application of Law to Facts

1. The Prosecutor Committed Reversible Erred When She Called Marable and Her Other Decisions Also Rendered Mr. In's Trial Fundamentally Unfair

DuVal, *Terenda*, and its progeny make clear the prosecutor committed prejudicial error when she called Marable. The prosecutor, without question, knew Marable had no intention of testifying. When he pled guilty, Marable told the Commonwealth he would not testify against Mr. In. When the prosecutor and Detective Conn interviewed him before trial, Marable said he would not testify. At trial, outside the jury's presence, Marable informed the trial court and both parties he would not testify, even after being held in contempt and sentenced to six months in jail. Despite all this, the prosecutor still called Marable and did so for obvious and prejudicial reasons.

Despite what she said during closing arguments, the prosecutor knew her case against Mr. In was not overwhelming. Yes, Dina Khem identified Mr. In and Sgt. Woods detained Mr. In after a foot chase, but the Commonwealth's case had significant weaknesses. *Infra*, pp. 64-85 (discussing weaknesses and prejudice). If the prosecutor's case was so strong, she would not have gone to such great lengths to have Marable appear before the jury, knowing full well he would remain silent. Consequently, the prosecutor presented Marable clearly knowing jurors would very likely infer his silence as his way of saying, "I'm not going to snitch on Mr. In." Indeed, the prosecutor said as much during her improper closing arguments where she urged the jury to find Mr. In guilty based on Marable's silence, statement, and guilty plea.[131]

Detectives Hopkins's and Conn's testimony regarding Marable's voluntary statement made it all the more easier for jurors to make this adverse inference. A reasonable juror would easily connect the dots in this way:

> Marable gave a voluntary statement. The prosecutor called Marable as a Commonwealth witness. Marable's statement, therefore, must have incriminated Mr. In because why else would the prosecutor call him as a Commonwealth witness. Marable, consequently, refused to testify to protect Mr. In, meaning Mr. In must be guilty.

[131] NT, Trial, 9/12/2008, p. 46.

Likewise, the stipulation regarding Marable's guilty plea, the trial court's instructions regarding conspiracy, and the lack of a cautionary instruction regarding the guilty plea made it all the more easier for jurors to make this adverse inference. Again, a reasonable juror would easily connect the dots in this way:

> The trial court instructed me that conspiracy requires a meeting of the minds between two or more people.[132] The trial court said the jury's guilt-innocence decision must be based on evidence presented.[133] The trial court's instruction regarding stipulations means I can consider his guilty plea when addressing the guilt-innocence question.[134] Marable pled guilty to conspiracy. Marable's statement incriminated Mr. In because why else would the prosecutor have called him as a Commonwealth witness. Marable and Mr. In, therefore, conspired to commit this robbery and burglary. Thus, Marable refused to testify to protect Mr. In, meaning Mr. In must be guilty.

The jury's *conspiracy* verdict hammers this point home. While the jury had no problem finding Mr. In guilty of conspiracy,[135] it took another entire day of deliberations to resolve the burglary, robbery, and firearms counts.

[132] NT, Trial, 9/12/2008, pp. 73-80.
[133] NT, Trial, 9/12/2008, p. 55.
[134] NT, Trial, 9/11/2008, pp. 77-78.
[135] NT, Trial, 9/15/2008, p. 23.

The prosecutor's calling of Marable, her stipulation regarding his guilty plea, and her questions regarding his voluntary statement, in other words, doubly benefited the Commonwealth, while creating the perfect storm of prejudice for Mr. In. It not only allowed the jury to draw adverse inferences based on Marable's silence, guilty plea, and statement, Marable's refusal to answer questions prevented trial counsel for cross-examining him and potentially undermining his statement and guilty plea.

2. Trial Counsel's Objectively Unreasonable Decisions

The following decisions by trial counsel were objectively unreasonable: (1) his decision not to object when the prosecutor made it perfectly clear she still intended to call Marable after (a) his attorney, Byron Houston, informed both parties and the trial court he would not answer questions, and (b) he refused to answer the trial court's questions outside the jury's presence even after being held in contempt; (2) his decision not to object when the prosecutor actually called Marable to the stand in the jury's presence; (3) his decision to agreed to the stipulation regarding Marable's guilty plea; (4) his decision not to object – on relevancy and 403 grounds – when the prosecutor called Detective Conn for the sole purpose of informing the jury Marable gave a voluntary statement; (5) his decision not to request cautionary instructions

regarding Marable's silence, guilty plea, and statement; and (6) his decision not to object to the prosecutor's closing arguments when she argued that Marable's silence, guilty plea, and statement proved Mr. In's guilt.

a. Not Objecting When the Prosecutor Put Marable on the Witness Stand in the Jury's Presence

Based on *Terenda*, *DuVal,* and its progeny, trial counsel should have objected when the prosecutor called Marable. At the PCRA hearing, trial counsel offered various reasons why he did not object. His reasons are unavailing and objectively unreasonable.

First, trial counsel claimed he did not object because the trial court made it perfectly clear he was going to grant the prosecutor's request to put Marable on the stand in the jury's presence. This is flat-out wrong.

When the prosecutor informed the trial court of her desire to call Marable in the jury's presence so she could introduce his statement, trial counsel objected on confrontation and 804 grounds,[136] but did not object to Marable taking the witness stand. The trial court commented on trial counsel's decision not to object to this procedure.[137] The prosecutor agreed with trial counsel's confrontation and 804 arguments, and withdrew her

[136] NT, Trial, 9/11/2008, pp. 70-72.
[137] NT, Trial, 9/11/2008, p. 71.

request to introduce Marable's statement, but still wished to put Marable on the stand.[138] After hearing the prosecutor's request, trial counsel said, "I don't object to any of that, Your Honor."[139] The trial court then asked trial counsel, "And the procedure just outlined [by the prosecutor] is not objectionable to the defense?" Trial counsel replied, "It is not, Your Honor."[140] After further discussion, the trial court again asked trial counsel, "So you have a tactical reason to consenting to this process?" Trial counsel replied, "Yes."[141]

Based on these facts, the trial court only agreed to the procedure outlined by the prosecutor once trial counsel said he had not objections to it. For all we know, had trial counsel objected, the trial court could have sustained the objection and prohibited the prosecutor from calling Marable in the jury's presence. Thus, it was trial counsel's refusal to object, not the trial court's own ruling, that allowed the prosecutor to put Marable on the stand in the jury's presence.

[138] NT, Trial, 9/11/2008, p. 73.
[139] NT, Trial, 9/11/2008, p. 73.
[140] NT, Trial, 9/11/2008, p. 73.
[141] NT, Trial, 9/11/2008, p. 74.

Second, while trial counsel's reason for allowing the prosecutor to put Marable on the stand before the jury's presence may have been "strategic" in his eyes, simply characterizing a decision as "strategic" does not immunize it from judicial scrutiny and does not prevent a reviewing court from characterizing the decision as objectively unreasonable. More specifically, while a particular purpose may be *theoretically* reasonable, if trial counsel fails to introduce the necessary evidence and facts to drive home this purpose in a *practical* sense, trial counsel's actions or inactions can transform a theoretically reasonable decision into an objectively unreasonable one. Likewise, if an alternative course of action was available to achieve trial counsel's stated purpose, and the alternative was substantially less prejudicial than the course of action trial counsel actually chose, trial counsel's decision not to pursue the alternative course will be deemed objectively unreasonable.

These two situations are present here. Trial counsel articulated a reasonable purpose for putting Marable on the stand, but he failed to provide the jury with critical facts. The missing facts prevented the jury from actually doing what trial counsel desired it to do. Likewise, there was an alternative course of action trial counsel could have taken to achieve the same purpose

that was substantially less prejudicial than the course of action he actually pursued.

Trial counsel agreed to the prosecutor's procedure because he wanted the jury to see Marable's height. This rationale sounds reasonable because, according to Yun, the basement gunman was the tallest of the three perpetrators. Thus, trial counsel wanted the jury to know that – among the three defendants – Mr. In was not the tallest. This is a reasonable purpose. The problem, though, is not the purpose; it is trial counsel's failure to provide the jury with the necessary facts so it could reasonably deduce that Mr. In was *not* the tallest perpetrator.

Trial counsel, for instance, had Marable stand in the jury's presence, but he did not introduce evidence of Marable's height, nor did he have Mr. In stand next to Marable, or simply have Mr. In stand in the jury's presence by himself. When counsel (Cooley) asked trial counsel how the jury could compare Marable's height with Mr. In's height when he did none of these things, trial counsel said: "Fair to say. In theory they could look at him and say his approximate height. People do that all the time, make estimates of people's height. May not have been completely accurate."[142]

[142] NT, PCRA Hrg., 7/7/2017, p. 48.

Trial counsel's response, though, misses the point. Yes, the jury theoretically could have guestimated Marable's height, but how could it then make a comparison to Mr. In's height if trial counsel never had Mr. In stand next to Marable or simply stand by himself? Trial counsel, in other words, failed to provide the jury with the necessary facts to draw the inference he wanted it to draw.

Next, and more importantly, trial counsel could have easily showed the jury that – of the three defendants – Mr. In was not the tallest and done so without putting Marable on the stand in the jury's presence. In the pre-trial discovery, trial counsel received the 229s from Officers Jenkins and Baldwin. The 229s listed Jean as 6'0" and Mr. In as 5'9". If trial counsel wanted to prove Mr. In was not the tallest, all he had to do was call Jenkins and Baldwin and have them identify Jean's and Mr. In's heights. That Jean is taller than Mr. In unequivocally proves Mr. In cannot be the basement gunman.

This alternative course of action was – without question – far less prejudicial than the course of action trial counsel pursued when he agreed to put Marable on the stand in the jury's presence. Put differently, this course of action offered a potential for success "substantially greater" than placing Marable on the stand knowing full well he was not going to answer questions.

Trial counsel is ineffective if he failed to pursue a course of action that "offered a potential for success substantially greater than the tactics actually utilized." *Commonwealth v. Badger*, 393 A.2d 642, 644 (Pa. 1978).

Marable's silence, statement, and guilty plea made it far too easy for jurors to infer that Marable implicated Mr. In in his statement and this was why the prosecutor put Marable on the stand and why Marable refused to answer questions. The adverse inferences draw from this course of action could have easily been eliminated had trial counsel simply put Jenkins and Baldwin on the stand and had them identify Jean's and Mr. In's height.

b. Agreeing to the Stipulation Regarding Marable's Guilty Plea and Failing to Request a Cautionary Instruction Regarding the Guilty Plea

Trial counsel's decision to agree to the prosecutor's stipulation regarding Marable's guilty plea was objectively unreasonable and further prejudiced Mr. In. This is so because "[i]t is well-settled" that a co-defendant's guilty plea "cannot be considered as evidence against" the defendant "because [t]he defendant ha[s] a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *Commonwealth v. Geho*, 302 A.2d 463, 465-466 (Pa. Super. 1973); *accord United States v. Gambino*, 926 F.2d 1355,

1363 (3d Cir. 1991); *Bisaccia v. Attorney General of New Jersey*, 623 F.2d 307, 312 (3d Cir. 1980).

Here, trial counsel knew or should have known the prosecutor's stipulation served only one purpose for the Commonwealth: to prove to the jury Marable was guilty because she knew this fact would serve as a spring board to the obvious and adverse "guilt by association" inference. This inference, though, destroyed trial counsel's misidentification defense by making it more likely than not Mr. In was the basement gunman. In other words, trial counsel should have known the prosecutor had "no valid purpose" for introducing Marable's guilty plea other than to establish Mr. In's guilt. *United States v. Gambino*, 926 F.2d at 1363 (defendant is unlikely to suffer prejudice when prosecutor introduces a co-conspirator's guilty plea for a "valid purpose" other than "establish[ing]" the defendant's guilt). Indeed, the prosecutor never explained how Marable's guilty plea was relevant to anything other than establishing Mr. In's guilt.

Furthermore, if a co-defendant's guilty plea is introduced to the jury, it is incumbent upon trial counsel to request "the trial judge to give adequate and clear cautionary instructions to the jury to avoid 'guilt by association' as to the defendant being tried." *Id*. at 466; *Bisaccia v. Attorney General of New*

Jersey, 623 F.2d at 312 ("[U]se of a co-conspirator's guilty plea as substantive proof of a defendant's complicity in a conspiracy without cautionary instruction is not admissible as evidence."). Here, trial counsel never requested a cautionary instruction informing the jury "that the guilt of any one person [is] not substantive evidence of the guilt of any other person." *United States v. Gambino*, 926 F.2d at 1363-1364. At the PCRA hearing, trial counsel could not articulate a strategic reason for not requesting a cautionary instruction.

Lastly, trial counsel's decision to stipulate to Marable's guilty plea is even more egregious because trial counsel knew he had no ability to cross-examine Marable regarding his guilty plea based on his refusal to answer questions. Thus, due to the foreseeable and significant prejudice Marable's guilty plea carried with it, trial counsel did not have a strategic reason for (a) entering into the stipulation and (b) not requesting a cautionary instruction. Stated differently, trial counsel's decision did not–in any way, shape, or form–further Mr. In's interests or misidentification defense.

c. Not Objecting to Detectives Hopkins's and Conn's Testimony Regarding Marable Voluntary Statement

Trial counsel's failure to object to Hopkins's and Conn's testimony regarding Marable's voluntary statement also aggravated the prejudice to Mr. In. A competent trial attorney would have immediately identified the prosecutor's sole purpose for informing the jury Marable gave a voluntary, post-arrest statement:

> If Marable gave a statement and the prosecutor called him to testify, Marable must have incriminated Mr. In in his statement because why else would the prosecutor call him as a Commonwealth witness.

Competent trial counsel would have also immediately realized they could not challenge or undermine this adverse inference because he had no way of cross-examining Marable based on his refusal to testify.

At the PCRA hearing, trial counsel could not articulate a strategic reason for not objecting to Hopkins's and Conn's testimony. Furthermore, trial counsel conceded that after Marable refused to testify, the fact he gave a voluntary statement was irrelevant. When counsel (Cooley) asked why he did not object on relevancy grounds, trial counsel was unable to identify a strategic reason for not doing so.

Trial counsel's failure to object to this testimony is made all the more dumbfounding because he objected – on confrontation grounds – when the prosecutor tried to introduce the substance of Marable's statement.[143] For all intents and purposes, though, trial counsel's failure to object allowed the prosecutor to get what she wanted in the first place: *Evidence before the jury allowing it to infer the substance of Marable's statement*. And this evidence, moreover, proved more impactful because it was not subjected to cross-examination.

Lastly, trial counsel did not request a cautionary instruction informing the jury it could not draw an adverse inference against Mr. In based on the fact Marable gave a voluntary statement. At the PCRA hearing, trial counsel could not explain why he did not request a cautionary instruction.

d. Not Objecting to the Prosecutor's Closing Arguments

The prosecutor's closing arguments regarding Marable's guilty plea and silence were impermissible. The prosecution cannot introduce a co-defendant's guilty plea for the sole purpose of establishing the defendant's guilty: "The defendant ha[s] a right to have his guilt or innocence determined

[143] NT, Trial, 9/11/2008, pp. 70-72.

by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else." *Bisaccia v. Attorney General of New Jersey*, 623 F.2d at 312; *accord United States v. Gambino*, 926 F.2d at 1363. If the prosecution cannot introduce a co-defendant's guilty plea for this purpose, it surely cannot argue that a co-defendant's guilty plea is evidence of the defendant's guilt. Yet, this is exactly what the prosecutor argued during closing arguments: Marable's guilty plea and silence prove Mr. In is guilty.

Trial counsel, though, failed to object and his failure aggravated the prejudice to Mr. In. It allowed the prosecutor, *immediately before jury deliberations*, to comment on Marable's silence, statement, and guilty plea–*or evidence which Mr. In had no ability to confront and undermine via cross-examination*–and argue his silence, statement, and guilty plea proved Mr. In's guilt beyond a reasonable doubt.

At the PCRA hearing, trial counsel admitted the prosecutor's comments were improper and that he should have objected to them.

3. Trial Counsel Prejudiced Mr. In

The great lengths the prosecutor went to have Marable appear before the jury, knowing full well he would not testify, and the fact she felt compelled to introduce his statement and guilty plea to the jury, represent the strongest

evidence establishing prejudice. The prosecutor's dogged determination and decision-making is clear evidence she knew her case presented with several weaknesses, and because of this, she needed a game-changer to ensure the jury convicted Mr. In. The game-changer came from Marable's silence, statement, and guilty plea.

The weaknesses in the Commonwealth's case including the following:

First, Yun never identified Mr. In as the basement gunman because, as he said at trial, he purposely avoided looking at the gunman's face.[144]

Second, Yun said the basement gunman was the tallest of the three perpetrators.[145] Mr. Jean is three inches taller than Mr. In: 6'0" vs. 5'9".[146]

Third, Yun said the basement gunman was wearing a "dark grey type of sweater with a hood[.]"[147] Likewise, after staring at the perpetrator for two minutes in the well lit basement,[148] Dina Khem only described the gunman's hoody as "dark."[149] However, when Sgt. Woods detained Mr. In, he had on a blue camouflage patterned hoody with writing on it.[150]

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[144] NT, Trial, 9/10/2008, pp. 108, 111.
[145] NT, Trial, 9/10/2008, pp. 112, 117.
[146] NT, Trial, 9/11/ 2008, pp. 134, 135.
[147] NT, Trial, 9/10/2008, p. 102.
[148] NT, Trial, 9/10/2008, pp. 144, 145.
[149] NT, Trial, 9/10/2008, pp. 130, 134, 135.
[150] NT, Trial, 9/11/2008, p. 132.

Fourth, Christina Khem said when Officers Nolan, Robinson, and Battles ran out to the backyard an unknown male dressed in dark clothing ran from the kitchen across the well lit living room and into the vestibule where he stopped and he said, "Oh shit, what's happening," before exiting through the front door.[151] As mentioned, though, Mr. In had on a blue camouflage patterned hoody with writing on it when detained.[152]

Fifth, based on the Commonwealth's theory, Mr. In was the hooded man who ran across the living room. However, the male DNA on the latex glove collected from the vestibule is not Mr. In's.[153]

Sixth, despite seeing the hooded man run across the well lit living room, when Christina viewed Mr. In, she did not identify him and told officers she had never seen him before.[154]

Seventh, based on the Commonwealth's theory, Mr. In was the man who fled in the Altima and thus the man who left the firearm on the Altima's front seat. The firearm had a DNA mixture of at least two contributors–the major

[151] NT, Trial, 9/10/2008, pp. 83, 90, 91.
[152] NT, Trial, 9/11/2008, p. 132.
[153] NT, Trial, 9/11/2008, p. 172.
[154] NT, Trial, 9/10/2008, pp. 94-95.

contributor being a male. DNA testing, however, excluded Mr. In as the major contributor.[155]

Eighth, while Dina Khem identified Mr. In as the basement gunman, her identification is suspect. To begin with, "eyewitness identifications are widely considered to be one of the least reliable forms of evidence." *Commonwealth v. Walker*, 92 A.3d 766, 779 (Pa. 2014). Police procured her identification via a show-up - "a clearly suggestive procedure" courts "deplore." *Commonwealth v. Bradford*, 451 A.2d 1035, 1036 (Pa. Super. 1982).

Mr. In was handcuffed and in the back of a police wagon when she identified him.[156] This is highly suggestive and prejudicial. Richard Gonzalez, Phoebe C. Ellsworth & Maceo Pembroke, *Response Biases in Lineups and Showups*, 64 J. PERSONALITY & SOC. PSYCHOL. 525 (1993); R.C.L. Lindsay et al., *Simultaneous Lineups, Sequential Lineups, and Showups: Eyewitness Identification Decisions of Adults and Children*, 21 LAW & HUM. BEHAV. 391 (1997).

[155] NT, Trial, 9/11/2008, p. 175.
[156] NT, Trial, 9/11/2008, pp. 131, 132, 133-135.

Dina and Christina viewed Mr. In and Jean simultaneously. This is improper because it can easily taint the identifications of both eyewitnesses. For instance, in her statement, Christina said, "The Police took us to see if we knew any of the males that they had. The guy who was wearing the green sweat shirt was sitting in the back of the Police van with another guy I never saw before. My sister knew the other guy from the basement."[157] If both told the other they recognized either Mr. In or Jean, knowledge of the other's identification could have easily impacted, and likely did impact, their respective identifications.

When Dina and Christina viewed Mr. In and Jean, officers fed them potentially incriminating facts tainting the authenticity and accuracy of their identifications. For instance, when Christina viewed Mr. In and Jean, she recognized neither,[158] prompting officers to point at Jean and tell her they took a green sweatshirt from him and placed it in the back of the police wagon.[159] Once fed this information, Christina identified Jean as the green sweatshirt perpetrator.[160]

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[157] Rpp. ___ (1st brief, Ex. 23).
[158] NT, Trial, 9/10/2008, pp. 92-93.
[159] NT, Trial, 9/10/2008, p. 94.
[160] NT, Trial, 9/10/2008, p. 94.

Ninth, the only person who claims to have seen Mr. In enter and exit the Altima is Officer Birch. Birch said he saw Mr. In enter the Altima and flee the scene eastbound on Mifflin Street where he crashed in front of 524 Mifflin Street.[161] Birch said he saw Mr. In exit the Altima and flee westbound on Mifflin Street. Birch's testimony is incredible because he gave inconsistent narratives as to what he actually saw.

In his March 7, 2007 report, which he wrote only hours after the incident,[162] Birch said he approached the scene traveling southbound on 7th Street and arrived at the corner of 7th Street and Mifflin Street.[163] When he arrived, he "observed [a] male sitting inside" a white Altima.[164] The Altima then "sped off" eastbound on Mifflin Street "towards 5th [Street]" where it "veer[ed] into a parking space in front of 524 Mifflin [Street]."[165] The driver exited the Altima and fled westbound on Mifflin Street.

During his March 20, 2007 interview with Conn, however, Birch gave a different narrative:

[161] NT, Trial, 9/11/2008, pp. 96, 97, 98, 104, 105.
[162] NT, Trial, 9/11/2008, at 103.
[163] Rp. 71.
[164] Rp. 71.
[165] Rp. 71

> I responded. I saw an *Asian guy* running Northbound on 6th St. There was a white Nissan Altima parked on the Southeast corner of 6th and Mifflin St. The *Asian male* got into the Nissan, *looked in my direction*, and took off at a high rate of speed on Mifflin Street… I activated my lights and siren and chased the vehicle into the 500 block of Mifflin… The Nissan pulled into a parking spot at about 526 Mifflin St and made contact with a house. The *Asian male* ran West on Mifflin St. I exited my vehicle and chased him on foot.[166]

At trial, Birch gave yet another narrative. In this one, he approached the scene traveling southbound on 7th Street toward Mifflin Street. As he approached the corner of 7th Street and Mifflin Street, he spotted Mr. In *kneeling beside the passenger's side door of an Altima* parked an entire block away at the southeast corner of 6th Street and Mifflin Street.[167] When trial counsel asked how it was possible to see someone kneeling beside a vehicle at the corner of 6th Street and Mifflin Street, when he was still traveling southbound on 7th Street, Birch changed his narrative once more. He now said he spotted Mr. In and the Altima at the southeast corner of 7th Street and Mifflin Street.[168]

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[166] Rp. 71.
[167] NT, Trial, 9/11/2008, pp. 96, 98, 104, 105.
[168] NT, Trial, 9/11/2008, p. 110.

Birch's claim the Altima was parked at the corner of 7th Street and Mifflin Street is destroyed by Officers Cannon's and Nolan's statements and trial testimony. Both reported and testified the Altima was parked directly behind the Honda where they observed and ultimately detained Jean. More importantly, both reported and testified the Altima and Honda were parked at the southeast corner of 6th Street and Mifflin Street.[169]

When trial counsel asked about his written report, where he wrote he saw Mr. In "sitting inside" the Altima, Birch said he simply forgot to incorporate the fact he saw Mr. In kneeling beside the Altima.[170] Likewise, when asked about his statement to Detective Conn, where he said he "saw an Asian guy running northbound" on 6th Street and Mifflin Street, Birch could not explain how this phrase ended up in his statement.[171]

At trial, Birch also said he did not exit his patrol car when he arrived at 720 Mifflin Street. Instead, once he saw Mr. In flee the scene in the Altima, he pursued him in his patrol car, ultimately parking his patrol car near the crash site at 524 Mifflin Street.[172] This part of his narrative is undermined in three

[169] NT, Trial, 9/11/2008, pp. 49, 80, 81; Rpp. 73-76.
[170] NT, Trial, 9/11/2008, p. 105.
[171] NT, Trial, 9/11/2008, p. 110.
[172] NT, Trial, 9/11/2008, pp. 96, 99.

ways. To begin with, immediately after Sgt. Woods subdued Mr. In near 5th Street and Hoffman Street, Birch had the following conversation with the radio dispatcher:

> RPC: 33
>
> Radio: 33
>
> RPC: Let me know if anybody retrieved my vehicle. It was sitting on the… 700 block of Mifflin Street. I jumped out after this male.
>
> Radio: Okay. Units check um… for 33's car [at the] 700 block of Mifflin[.][173]

Next, Officer Peter Seabron testified he was the first officer at the 524 Mifflin Street crash site and when he arrived he saw no officers, no people around, and did not see Birch's patrol car.[174] Seabron also said had Birch's patrol car been parked anywhere near the crash site, he would have seen it because once he secured the scene he narrowed traffic to one lane.[175]

Lastly, when Officer Cannon arrived at the scene, he parked his patrol car at the corner of 7th Street and Mifflin Street and scanned Mifflin Street to assess the situation. He saw Jean crouching between the Altima and a Honda,

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[173] Rp. 78.
[174] NT, Trial, 9/11/2008, pp. 117, 122, 126, 127.
[175] NT, Trial, 9/11/2008, p. 122.

prompting him to exit his patrol car and approach him. As he approached Jean, he saw the Altima reverse and speed off eastbound on Mifflin Street.[176] Here is the big problem, though: based on Birch's testimony, Cannon would have easily seen Mr. In kneeling beside or running toward the Altima. Cannon, though, never reported or testified to seeing Mr. In or anyone beside, entering, or running toward the Altima.

Based on the 911 transcripts, Seabron's testimony, and Cannon's testimony, the evidence strongly suggests this narrative:

> Birch arrived at the scene, parked his patrol car near the corner of 7th Street and Mifflin Street, just as Cannon did, and exited his vehicle to assess the situation. As Birch walked eastbound on Mifflin Street towards the intersection of 6th Street and Mifflin Street, he saw the Altima flee eastbound on Mifflin Street, prompting him to run after the Altima. The Altima crashed at 524 Mifflin Street, but because Birch pursued it on foot, he did not see the driver exit the car. While there's no doubt Sgt. Wood and Birch chased Mr. In on foot, the evidence does not conclusively establish Mr. In was the man who fled in the Altima.

[176] NT, Trial, 9/11/2008, pp. 80-81.

Tenth, the jury's questions and lengthy deliberations also prove the Commonwealth's case was not overwhelming. If the evidence against Mr. In was so overwhelming, the jury would not have asked so many questions and taken three days to reach its verdicts.

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In short, had trial counsel objected to Marable's appearance before the jury, guilty plea stipulation, and Conn's testimony regarding Marable's statement, it is reasonably probable the trial court would not have allowed any of this evidence to be presented to the jury. Had any one of these items of evidence been excluded it is reasonably probable "at least one juror would have harbored a reasonable doubt." *Buck v. Davis*, 137 S.Ct. 759, 776 (2017); *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

In terms of calling Marable to the stand, Marable's appearance before the jury served no other purpose than to allow the jury to draw the obvious "guilt by association" inference. Likewise, Marable's guilty plea served the same purpose. Likewise, Conn's testimony regarding Marable's statement served only one purpose, *i.e.*, to allow the jury to make the commonsensical inference Marable must have incriminated Mr. In.

All three purposes are impermissible and would have resulted in the exclusion of Marable's appearance before the jury, guilty plea, and statement. Thus, individually and *cumulatively* the presentation and introduction of Marable's silence, guilty plea, and statement as well as trial counsel's inability to confront Marable regarding his silence, guilty plea, and statement undermines confidence in Mr. In's convictions warranting a new trial. *Commonwealth v. Johnson*, 966 A.2d 523, 532 (Pa. 2009) (allowing cumulative harm claim where errors are "intertwined"); *see also Commonwealth v. Hutchinson*, 25 A.3d 277, 319 (Pa. 2011) (to preserve "cumulative" prejudice argument, petitioner must "set[] for a specific, reasoned, and legally and factually supported argument for the claim.").

CONCLUSION

WHEREFORE, based on the forgoing facts and authorities, Mr. In respectfully requests this Court to reverse the PCRA court's dismissal and grant him a new trial based on trial counsel's ineffectiveness.

Respectfully submitted this the 14th day of March, 2018.

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CERTIFICATE OF SERVICE

On March 14, 2018, counsel e-filed this pleading on PAC-File. By e-filing the pleading, the Philadelphia District Attorney's Office received email notification of its filing allowing it to access a PDF copy of this pleading.

CERTIFICATE OF COMPLIANCE

Counsel certifies Mr. In's brief is under 14,000 words.

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH OF PENNSYLVANIA	:	CP-51-CR-0004829-2007
	:	
v.		
	:	
JOHN IN	:	SUPERIOR COURT

OPINION

Byrd, J. January 9, 2018

John In was convicted by a jury of criminal conspiracy on September 15, 2008, and of burglary, two counts of robbery, possession of an instrument of crime (PIC), and violating Sections 6106 and 6108 of the Uniform Firearms Act (VUFA) on September 16, 2008. Thereafter, this court held a bench trial on the charge of violating Section 6105 of the Uniform Firearms Act and found him guilty.[1] On December 19, 2008, petitioner was sentenced to an aggregate term of twenty-five to fifty years imprisonment to be followed by ten years probation. Petitioner's post-sentence motion was denied on April 8, 2009. On May 8, 2009, petitioner filed a notice of appeal. The Superior Court affirmed petitioner's judgment of sentence on July 23, 2010, and the Supreme Court denied petitioner's allowance of appeal on January 5, 2011.

On July 15, 2011, petitioner filed a *pro se* Post Conviction Relief Act (PCRA) petition. David Rudenstein, Esquire, was appointed counsel on December 29, 2011 and entered his appearance on that same day. Counsel filed an amended PCRA petition on October 4, 2012, and the Commonwealth filed a motion to dismiss on January 24, 2013. Petitioner filed a supplemental

[1] Petitioner's motion to sever this charge was granted on September 10, 2008.

amended petition on July 19, 2013 and a supplemental motion to dismiss was filed by the Commonwealth on July 30, 2013. This court issued a notice of intent to dismiss the petition, pursuant to Pennsylvania Rule of Criminal Procedure 907 on September 6, 2013. On October 11, 2013, this court formally dismissed the PCRA petition. On October 28, 2013, petitioner filed a notice of appeal. Petitioner then filed a *pro se* "motion for appointment of new counsel or in the alternative waive counsel" on November 7, 2013. On January 14, 2014, this court issued an Opinion. On March 13, 2014, the Superior Court ordered this court to conduct an on-the-record determination as to whether petitioner's waiver of counsel was knowing, intelligent and voluntary pursuant to *Commonwealth v. Grazier,* 713 A.2d 81 (Pa. 1998). After a *Grazier* hearing, this court permitted petitioner to proceed *pro se*, and appointed counsel withdrew on April 11, 2014.

On April 3, 2015, Craig Cooley, Esquire, was retained to represent petitioner in this PCRA proceeding. On October 26, 2016, the Superior Court issued an Opinion directing this court to conduct an evidentiary hearing and make necessary factual findings on the issues raised by petitioner. Counsel for petitioner failed to appear for an evidentiary hearing scheduled on February 3, 2017. An evidentiary hearing was subsequently held on July 7, 2017, and this court formally dismissed the PCRA petition on August 18, 2017. Petitioner then filed a notice of appeal on September 5, 2017. Pursuant to Pennsylvania Rule of Appellate Procedure 1925(b), this court ordered petitioner to file a statement of matters complained of on appeal on September 11, 2017. On October 2, 2017, petitioner filed said statement.

STATEMENT OF FACTS

The following facts are reproduced from this court's January 14, 2014 Opinion:

> On March 7, 2007, at 5:00 a.m., Vuthary Yun (Yun) saw three men break into his row home at 720 Mifflin Street as he washed dishes in his kitchen. (N.T. 9/10/08, pp. 101-102). As Yun turned in their direction, one

man pointed a gun at his head and told him to shut up. (N.T. 9/10/08, pp. 23, 101-102). [Petitioner] pushed Yun to the bottom basement step and asked him for money and jewelry. (N.T. 9/10/08, p. 103). When Yun told [petitioner] he did not have any money, [petitioner] told him to "shut the fuck up." (N.T. 9/10/08, pp. 103-104, 124). [Petitioner] then tied Yun's hands behind his back with red string, stuffed cloth into his mouth, placed the victim's head between his legs, and took him to the top step. (N.T. 9/10/08, pp. 103-105, 108, 124-125).

Yun's oldest daughter, Dina Khem, heard [petitioner] yelling at Yun from her bedroom in the basement. (N.T. 9/10/08, pp. 124, 133; N.T. 12/19/08, p. 12). As a result, she called 911 on her cell phone. (N.T., 9/10/08, pp. 124, 133). About five (5) to seven (7) minutes later, Dina heard the police upstairs and went over toward the basement steps. (N.T. 9/10/08, p. 124). As Dina walked up the steps, she saw [petitioner] wearing a dark hoodie. (N.T. 9/10/08, pp. 124-126, 130). [Petitioner] was holding the basement doorknob in one hand and a gun in the other hand while standing behind Yun, who faced her while being tied up at the top step. (N.T. 9/10/08, pp. 124-126). Dina also saw [petitioner] pull back the basement door when Angela Khem, her fifteen-year-old sister, tried to open the door. (N.T. 9/10/08, p. 128). [Petitioner] pointed the gun at Dina and told her to "shut the fuck up" when she tried to talk to Yun in Cambodian. (N.T. 9/10/08, pp. 126-127). One to two minutes later, Dina turned and went back into her bedroom. (N.T. 9/10/08, pp. 127, 144-145). Shortly thereafter, Dina called the house phone and received confirmation from Angela that it was safe to leave the basement. (N.T. 9/10/08, pp. 78, 82, 128-129). When Dina came upstairs, she joined Yun, Angela, and her eleven-year-old brother Keith Khem, who were all with the police. (N.T. 9/10/08, pp. 127-129).

While [petitioner] held Yun at gunpoint, Christina Khem, Yun's sixteen-year-old daughter, was awakened by co-conspirators Jerry Jean (Jean) and Dyshon Marable (Marable), when they came into her middle bedroom on the second floor. (N.T. 9/10/08, pp. 75-76). Jean, wearing a green sweatshirt, ordered Christina to get up and take off her jewelry. (N.T. 9/10/08, pp. 75-78). Jean grabbed Christina's rings and charm bracelet once she took them off and placed them on a pillow next to her. (N.T. 9/10/08, pp. 76-78). Marable, wearing a blue Adidas sweat jacket, first stood over Christina and then walked with Jean into Yun's adjoining bedroom, where Keith was asleep. (N.T. 9/10/08, pp. 77-79). Christina followed them after being ordered to do so. (N.T. 9/10/08, pp. 78-79). Jean then opened the closet door and asked Christina where they kept money and jewelry. (N.T. 9/10/08, pp. 78-79). Christina denied having any money or jewelry. (N.T. 9/10/08, pp. 78-79). Jerry Jean then said: "[W]ell, you better tell me something or your dad's going to die." (N.T. 9/10/08, p. 79).

As this home invasion was in progress, Police Officers Battles, Nolan and Robinson arrived on the scene in response to a police radio call. (N.T. 9/11/08, p. 29). After knocking and receiving no response, Officer Battles

went through the slightly-opened front door and yelled: "Did anyone call the police?" (N.T. 9/11/08, p. 30). Upstairs, Jean pointed a gun at Christina, covered her mouth with his latex gloved hand, and ordered her to be silent. (N.T. 9/10/08, pp. 79-81, 80, 86, 89). Officer Robinson heard an African-American voice from upstairs yell back: "Nobody called the police," which he thought odd after observing a ten to twelve-year-old Asian male in the corner on the first floor. (N.T. 9/11/08, p. 30). Officer Battles again yelled: "Did anybody here call the police?" (N.T. 9/11/08, p. 30). The voice again denied calling the police. (N.T. 9/11/08, p. 30). After Officer Battles yelled back that police had received a call from the basement, Jean released Christina and ran toward the second floor back bedroom. (N.T. 9/10/08, p. 81). Christina immediately ran down the steps, screaming: "Help me, help me, they have guns there's somebody upstairs." (N.T. 9/11/08, pp. 31, 40).

In response, Officer Nolan ran upstairs and saw Jean sliding out of the back bedroom window. (N.T. 9/11/08, pp. 31, 47-48). Officer Nolan tried to pull Jean back into the room, but he was unable to do so. (N.T. 9/11/08, p. 48). Officers Robinson and Battles began to pursue Jean, who ran past Officer Robinson and hid inside a shed in the backyard. (N.T. 9/11/08, pp. 31-33). Officers Robinson and Battles ordered Jean to come out of the shed and to lie on the ground. (N.T. 9/11/08, pp. 32-33, 42). Refusing to comply with their orders, Jean exited the shed and climbed onto an approximately eight-foot-high fence. (N.T. 9/11/08, p. 34). Once he reached the top of the fence, Jean went inside his pocket. (N.T. 9/11/08, p. 34). Having been informed that these men had guns, Officer Battles fired a shot at Jean, who climbed over the fence. (N.T. 9/11/08, p. 34, 43).

Hearing this gunshot, Officer Nolan came back down to the first floor and ran to the backyard. (N.T. 9/11/08, pp. 31-33, 42, 48). Learning that Jean had run down the alley, Officer Nolan ran out of the front of the house toward the alley entrance. (N.T. 9/11/08, p. 48). Several other police officers responded to the scene after receiving a police radio call about gunshots being fired at this location. (N.T. 9/11/08, pp. 88, 95, 116, 128). When Officer Nolan reached the 600 block of Mifflin Street, he assisted Police Officer Cannon, one of the responding officers, in apprehending Jean, who had been hiding between two parked cars, which were near a white Nissan Altima that had its lights on. (N.T. 9/11/08, pp. 35-37, 45, 49, 80-82). Shortly thereafter, Police Officers Jenkins and Baldwin arrived at 7th and Mifflin Streets and took custody of Jean. (N.T. 9/11/08, p. 131). Before they placed him into the police wagon, they searched him and found a green hoodie. (N.T. 9/11/08, pp. 131-132). Inside this hoodie, they found pieces of a white latex glove. (N.T. 9/11/08, p. 132).

As Officers Robinson and Battles ran out to the backyard in pursuit of Jean, Christina encountered a man in dark clothes with a hood over his head running from the direction of the kitchen toward the front vestibule. (N.T. 9/10/08, pp. 82-85, 90). As this man ran past Christina and observed the police activity, he exclaimed: "[O]h shit, what's happening," and walked

outside. (N.T. 9/10/08, pp. 82-85). When Police Officer Birch arrived at 7th and Mifflin Streets, he observed the man, [petitioner], kneeling outside of the passenger side of the white Nissan Altima. (N.T. 9/11/08, pp. 80, 95-96, 105). [Petitioner] entered through the front passenger's side of the vehicle, put the car in reverse, and sped eastbound on the 600 block of Mifflin Street. (N.T. 9/11/08, pp. 80-81, 85-86, 96, 98).

At that point, Officer Birch pursued [petitioner] in his police vehicle. (N.T. 9/11/08, p. 96). As Sergeant Woods was approaching him from the opposite direction, [petitioner] crashed the Nissan Altima into a house at 524 Mifflin Street, jumped out of the car and ran westbound on the 500 block of Mifflin Street. (N.T. 9/11/08, pp. 90-91, 96-97, 99-100). Officer Birch parked his car next to the Nissan Altima and pursued [petitioner] on foot. (N.T. 9/11/08, pp. 96-97, 100). As [petitioner] jumped over a fence and exited the 500 block of Hoffman Street, he ran into Sergeant Woods who apprehended him. (N.T. 9/11/08, pp. 89, 97, 100). Officers Jenkins and Baldwin arrived at 5th and Mifflin Streets and took custody of [petitioner]. (N.T. 9/11/08, p. 132). Before placing [petitioner] into the police wagon, they recovered a blue camouflage hoodie from him. (N.T. 9/11/08, p. 132).

When Officer Robinson took Dina and Christina to their police wagon, the victims observed two men sitting inside. (N.T. 9/10/08, pp. 91-92; N.T. 9/11/08, p. 38). Dina immediately identified [petitioner] as the man who held Yun at gunpoint in the basement. (N.T. 9/10/08, pp. 130-131). Yun was unable to identify [petitioner] to the police because he had been ordered at gunpoint to not look at [petitioner]'s face. (N.T. 9/10/08, p. 107). On the next morning, Dina and Christina were taken to the South Detectives police station, where they provided written statements to the police. (N.T. 9/10/08, pp. 93-95). In Christina's statement, she identified Jean as one of the perpetrators. (N.T. 9/10/08, pp. 93-95). Later in the day, Detectives Conn and Detective Hopkins found Marable wearing a blue Adidas sweat jacket, hiding underneath clothes inside a bedroom closet on the second floor of the victims' home. (N.T. 9/11/08, pp. 10, 160). Marable was arrested and taken to the South Detectives police station. (N.T. 9/11/08, p. 161).[2]

Surveying the residence, Detective Conn observed that the kitchen window bars were spread apart wide enough for a person to enter Yun's home. (N.T. 9/11/08, pp. 11, 22-23). In the kitchen, Detective Conn recovered red string and a piece of a clear latex glove in the front vestibule of the house. (N.T. 9/11/08, pp. 22-24). In the backyard shed, Police Officer McGough recovered a .9mm semi-automatic loaded Heckler and Koch handgun underneath a pile of leaves and a latex glove. (N.T. 9/11/08, pp. 11-13, 24, 27, 128, 179). When Officer Birch walked toward his police vehicle, he saw a handgun in the front driver's side of the white Nissan Altima and

[2] On December 3, 2007, Marable entered a negotiated guilty plea to three counts of robbery, burglary, possession of an instrument of crime, and conspiracy. (N.T. 9/11/08, p. 78; CP-51-CR-0004827-2007). On March 11, 2008, Jean entered a negotiated guilty plea to three counts of first-degree robbery, conspiracy, burglary, and possession of an instrument of crime before this court. (N.T. 12/19/08, p. 9; CP-51-CR-0004828-2007).

latex gloves in the back. (N.T. 9/11/08, pp. 101, 112). Police Officer Seabron had also observed this gun when he parked the abandoned white Nissan Altima while Officer Birch pursued [petitioner]. (N.T. 9/11/08, pp. 118-124). For safety reasons, Officer Wilson took possession of this .9mm semi-automatic loaded Zig Zauer handgun. (N.T. 9/11/08, pp. 14, 25, 27). At trial, counsel stipulated that Police Officer Johnson from the Firearms Identification Unit test-fired the two recovered handguns and found them to be operable at the time they were submitted to his unit. (N.T. 9/11/08, p. 185). After obtaining a search warrant for the Nissan Altima, Detective Conn seized from the vehicle a title listing Roan Adderly as its owner, a driver's license listing the name of Smith Printemps, two men's coats, three plastic drink containers, three traffic tickets listing the name Jerry Jean, one Shoprite card listing the name Jacquelyn Jean, and one black tee shirt. (N.T. 9/11/08, pp. 16-21). Later, Yun discovered that sixty dollars ($60) had been taken from his wallet, which he left upstairs. (N.T. 9/10/08, pp. 106-107).

STATEMENT OF MATTERS

Petitioner raises the following issues in his statement of matters complained of on appeal:

1. Trial counsel made a series of objectively unreasonable decisions regarding the prosecutor's attempt to have Dyshon Marable testify against John In. Individually and cumulatively, these unreasonable decisions prejudiced Mr. In because they allowed the prosecutor to present and the jury to consider irrelevant, inadmissible, and highly prejudicial evidence regarding Mr. Marable's pre-trial statement and guilty plea without being subjected to cross-examination and without instructing the jury it could not consider Mr. Marable's guilty plea as substantive evidence of Mr. In's guilt. Had trial counsel lodged timely objections there is a reasonable probability the trial court would have prohibited the prosecutor from presenting Mr. Marable as a Commonwealth witness as well as the other evidence relating to his guilty plea and pre-trial statement. It would have also struck the prosecutor's impermissible closing arguments relating to Mr. Marable's refusal to testify, statement, and guilty plea. Trial counsel did not have a reasonable basis not to make the Individually and collectively, the introduction and consideration of this evidence undermines confidence in the jury's guilty verdicts warranting a new trial and the PCRA court erred when it refused to grant a new trial because the record supported Mr. In's right to a new trial based on trial counsel's ineffectiveness. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. 1, §§ 1, 6, 9.

2. In his supplemental amended PCRA petition, appointed PCRA counsel raised a cumulative prejudice claim, but did not set forth specific, reasoned, and legally and factually supported arguments for this claim. Appointed PCRA counsel did not have a strategic reason for not adequately briefing this claim. Appointed PCRA counsel's ineffectiveness prejudiced Mr. In because the

PCRA court ruled Mr. In did not "properly aver" this claim and thus waived it. U.S. Const. amdts. 5, 6, 8, 14; Pa. Const. art. 1, §§ 1, 6, 9.

DISCUSSION

The Post Conviction Relief Act affords collateral relief to those individuals convicted of crimes they did not commit and to those individuals serving illegal sentences. 42 Pa. C.S. §9542. Claims pursuant to the PCRA are extraordinary assertions that the judicial system failed; they are not merely direct appeal claims that are made at a later stage of the judicial proceedings. *Commonwealth v. Rivers*, 786 A.2d 923 (Pa. 2001). A petitioner is entitled to file all PCRA petitions, including second and subsequent petitions within one (1) year from the date his judgment of sentence becomes final. 42 Pa. C.S. §9545(b)(1); 42 Pa. C.S. §9545(b)(3). A petitioner is eligible for relief under the PCRA if he proves by a preponderance of the evidence that his conviction or sentence resulted from one or more of the enumerated circumstances found at 42 Pa. C.S. §9543(a)(2) (setting forth the eligibility requirements of the PCRA). *Commonwealth v. Ligons*, 971 A.2d 1125 (Pa. 2009).

A petitioner may be entitled to relief under the PCRA if he is able to plead and prove that a conviction or sentence resulted from 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(a)(2)(ii). It is the ineffectiveness claim, not the underlying error at trial, which is reviewed. *See Commonwealth v. Clayton*, 816 A.2d 217 (Pa. 2002). Under the PCRA, an allegation of ineffective assistance of counsel amounts to constitutional malpractice where counsel's incompetence deprived a defendant of his Sixth Amendment right to counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984); *Commonwealth v. Williams*, 782 A.2d 517 (Pa. 2001).

The law presumes that counsel was effective, and the petitioner carries the burden of proving otherwise. *Commonwealth v. Baker*, 614 A.2d 663, 673 (1992). To prevail on an ineffective assistance of counsel claim, a three-pronged test must be satisfied: (1) the underlying claim is of arguable merit; (2) that counsel had no reasonable strategic basis for his or her action or 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. Pierce*, 527 A.2d 973, 975 (Pa. 1987). Furthermore, counsel's choices cannot be evaluated in hindsight, but rather should be examined in light of the circumstances at that time. *See Commonwealth v. Hardcastle*, 701 A.2d 541 (Pa. 1997). Even if there was no reasonable basis for counsel's course of conduct, a petitioner is not entitled to relief if he fails to demonstrate prejudice. *See Commonwealth v. Douglas*, 645 A.2d 226 (Pa. 1994).

Our Superior Court, in its October 26, 2016 remand order, directed this court to conduct an evidentiary hearing and articulated petitioner's claims thusly:

> Stripped to its essence, Appellant's first issue subsumes six distinct ineffectiveness claims against his trial counsel. Trial counsel was ineffective for: (A) failing to object to the Commonwealth's presentation of Marable as a witness at trial when the Commonwealth knew that Marable would refuse to testify against Appellant; (B) requesting a cautionary instruction that the jury should not infer Appellant's guilt from Marable's refusal to testify; (C) stipulating to the fact that Marable entered into a guilty plea in connection with the home invasion robbery *sub judice*; (D) failing to request a cautionary instruction informing the jury that it should not infer Appellant's guilt from Marable's admitted guilt (guilt by association); (E) failing to object to the detective's testimony referencing Marable's post-arrest statement; and (F) failing to object to the Commonwealth's closing argument referencing Marable's silence and refusal to testify against Appellant on behalf of the Commonwealth. In his second issue, Appellant argues that his appointed PCRA counsel was ineffective insofar as counsel failed to develop a cumulative prejudice claim.

Superior Court Opinion at 8-9.

In accordance therewith, an evidentiary hearing was held on July 7, 2017, and petitioner called trial counsel Richard Giuliani, Esquire, as his only witness. The Commonwealth did not call any witnesses to testify. After the evidence was closed, this court took the matter under advisement and, on August 18, 2017, issued following findings of fact and conclusions of law:

> John In was tried to a jury before this Court in a home invasion case and convicted of numerous offenses, including robbery, burglary, conspiracy and weapons offenses. On appeal the Superior Court affirmed judgment of sentence.
>
> Mr. In, petitioner, herein filed a Post Conviction Relief Act petition and this Court dismissed his claims without an evidentiary hearing.
>
> On October 26, 2016, the Superior Court issued an order vacating this Court's dismissal and remanded the case for an evidentiary hearing.
>
> An evidentiary hearing was held on July 7, 2017 and PCRA counsel called one witness, Richard Giuliani, Esq., petitioner's trial counsel.
>
> The PCRA standard is straightforward, a petitioner may be entitled to relief if he pleads and proves that a conviction resulted from 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; COMMONWEALTH versus CLAYTON, 816 A.2d, 217, a 2002 case. Since the law presumes that counsel was effective, the petitioner, in order to prevail on an ineffectiveness claim, must meet the three prong PIERCE TEST which states the following:
>
> 1: The underlying claim is of arguable merit; 2: Counsel had no reasonable strategic basis for his action or inaction; 3: But for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceeding would have been different. PIERCE is at 527 A.2d 973, 1987.
>
> Further, to obtain PCRA relief, petitioner must meet the STRICKLAND "actual prejudice" test, which requires a showing that counsel's performance was deficient and that the deficient performance prejudiced him; that is, the outcome of the case would have been different but for counsel's deficient performance. PCRA counsel made the following claims before the Superior Court:
>
> One, trial counsel was ineffective for failing to object to the Commonwealth's presentation of co-defendant Marable where the prosecutor knew Marable would refuse to testify.
>
> Two, trial counsel was ineffective for failing to request a cautionary instruction that the jury should not infer petitioner's guilt from Marable's refusal to testify.
>
> Three, trial counsel was ineffective for stipulating to the fact that Marable entered a guilty plea in the same case wherein petitioner was charged.

Four, trial counsel was ineffective for failing to request a cautionary instruction that the jury should not infer petitioner's guilt from Marable's admission of guilt.

Five, trial counsel was ineffective for failing to object to the detective's testimony that Marable made a confession.

Six, trial counsel was ineffective for failing to object to the Commonwealth's closing argument referencing Marable's silence and his refusal to testify against the petitioner.

As the testimony from trial counsel makes abundantly clear, he, Mr. Giuliani, had a reasonable strategic basis for each of his challenged decisions, all designed to effectuate petitioner's best interest.

Taking these claims in order:

First, trial counsel testified that although he believed Marable would refuse to answer questions, such refusal inured to petitioner's best interest. Indeed, had Marable offered testimony, the Commonwealth would have admitted his statement as substantive evidence pursuant to the BRADY/LIVELY line of cases. Further, trial counsel wanted the jury to see co-defendant Marable, who was much taller than petitioner, as was the other co-defendant, Jerry Jean. The trial evidence established that three perpetrators committed the home invasion: Marable was found inside the house, and Jean was arrested in the backyard. The male victim, Mr. Yun, could not identify petitioner and gave a description of the third male that did not fit John In.

Second, in light of the foregoing, there was no sound reason to request a cautionary instruction because Marable's refusal to testify did not inculpate petitioner. Further, as Mr. Giuliani stated, and I'm paraphrasing here: "If something doesn't hurt my client, why highlight it by seeking a cautionary instruction?"

Third, trial counsel testified that his entire defense strategy was that Mr. In was not involved in the home invasion and it was committed by others; Mr. Marable, Mr. Jean and a third unidentified person. Thus, his stipulation that Marable entered a guilty plea was in petitioner's best interest as it placed blame for this home invasion on other persons who were not tied to John In in any manner whatsoever.

Fourth, in light of the foregoing, there was no reasonable basis to request an instruction that petitioner's guilt should not be inferred from Marable's guilty plea. As stated above, nothing in the case tied Marable to John In. A cautionary instruction would have served no purpose other than to highlight something that had not inured to petitioner's disadvantage.

Fifth, failing to object to the testimony of the detective who stated that Marable confessed was in John In's best interest. That testimony went to petitioner's claim of innocence. Someone with whom petitioner had no connection confessed. As the content of the confession was not admitted, petitioner was not implicated. Thus, there was no reason to object.

Sixth, here petitioner claims trial counsel was ineffective for failing to object to the prosecutor's closing argument wherein she is alleged to have argued that Marable failed to testify in order to protect John In.

The law is clear: "Every unwise or irrelevant remark made in the course of a trial does not compel the grant of a new trial." The focus must be on whether the defendant was denied a fair trial, not whether the defendant was denied a perfect trial. See COMMONWEALTH versus KEMP, 753 A.2d 1278, 2008. As this Court wrote in the original 1925 opinion, that remark did not adversely impact the verdict in this case.

Here the evidence against John In was substantial. Indeed, overwhelming. It included the following:

One: John In was identified by one of the home invasion victims, Dana Khem, as the gunman.

Two: Her father, Mr. Yun, described the gunman as wearing a hooded sweater and John In was wearing a sweatshirt, hooded sweatshirt when arrested shortly after the home invasion.

Three: Three men were involved in this home invasion. One was arrested inside the home, a second was arrested in the backyard and the third, John In, walked out of the house after dropping a latex glove.

Four: Immediately after police arrive John In was found in a car just outside the subject premises in which a gun was on the front seat and a box of latex gloves on the back seat.

Five: John In entered that car and attempted to flee. During flight he crashed the car and was arrested near the scene of the home invasion.

Thus, it can clearly be seen that trial counsel had reasonable basis for his decisions in this case. This is especially so in light of the teachings from COMMONWEALTH versus HARDCASTLE; "counsel's choices cannot be evaluated in hindsight but rather should be examined in light of the circumstances at the time." 701 A.2d 541. It's a 1997 case.

The foregoing notwithstanding, petitioner cannot demonstrate prejudice. In light of the overwhelming evidence in this case petitioner cannot show that but for counsel's alleged errors or omissions there was a reasonable probability that the outcome of this case would have been different.

Finally, petitioner argues that relief is due because of cumulative prejudice. However, his claims are all meritless and no number of failed claims may offer a route to relief.

Finally, this PCRA petition is meritless. Accordingly, this Court stands by its initial decision to formally dismiss petition.

The matter will be returned to the Superior Court where it is now on appeal.

N.T. 8/18/2017, 6-13.

As the court held in *Commonwealth v. Fisher*, 813 A.2d 761, 767 (Pa. 2002), "[s]peculation by hindsight that a different strategy might possibly have been successful is not the test which establishes ineffectiveness of counsel." In *Strickland v. Washington*, 466 U.S. 668, 689 (1984), the

United States Supreme Court instructed that "[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."

Additionally, "where matters of strategy and tactics are concerned, counsel's assistance is deemed constitutionally effective if he chose a particular course that had some reasonable basis designed to effectuate his client's interests." *Commonwealth v. Howard*, 719 A.2d 233, 237 (Pa. 1998). The Court has further declared that "[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.'" *Commonwealth v. Williams*, 899 A.2d 1060, 1064 (Pa. 2006) (quoting *Howard*, 719 A.2d at 237). Indeed, "a claim of ineffectiveness will not succeed by comparing, in hindsight, the trial strategy trial counsel actually employed with the alternatives foregone." *Commonwealth v. Miller*, 987 A.2d 638, 653 (Pa. 2009).

Accordingly, for the foregoing reasons, the dismissal of petitioner's PCRA petition should be AFFIRMED.

BY THE COURT:

SANDY L.V. BYRD J.