[J-34-2005]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 206 MAP 2004
	:	
Appellant	:	Appeal from the Order of the Superior Court, dated April 19, 2004, at No. 486 EDA 2004, affirming the Order of the Chester County Court of Common Pleas dated January 8, 2003 at No. 3014-99
v.	:	
	:	
BRIAN W. HAWKINS,	:	848 A.2d 954 (Pa. Super. Ct. 2004)
	:	
Appellee	:	SUBMITTED: February 24, 2004

CONCURRING OPINION

MR. CHIEF JUSTICE CAPPY **DECIDED: March 29, 2006**

I join the Majority Opinion in all respects save for its characterization of the Superior Court opinion in this matter and the analysis which proceeds from this view.

The Majority reads the opinion below to suggest that the Superior Court found it unreasonable per se for trial counsel to fail to make the request for the alibi instruction. See, e.g., Maj. Op. at 8. ("The lower court, however, found that Roxberry II in effect short circuits the Pierce test because Roxberry II 'does not permit either a finding that Appellee was not prejudiced or a finding that counsel had a reasonable strategy.'"). I disagree. I view the Superior Court's analysis as merely rejecting this particular trial counsel's basis for failing to seek the alibi instruction in this particular case. See Hawkins, 848 A.2d at 958-60. The Superior Court did not, in my view, remove the burden of pleading and proving the reasonable basis prong of the test set forth in Commonwealth v. Pierce, 527 A.2d 973 (Pa.

1987). Thus, I find the analysis which purports to rectify this perceived error on the Superior Court's part to be unnecessary to the resolution of the ultimate question before the Court. Respectfully, therefore, I disassociate myself from this discrete facet of the Majority's analysis.

Mesdames Justice Newman and Baldwin join this concurring opinion.