[J-155-2006]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	Nos. 506 & 507 CAP
	:	
Appellee	:	Appeal from the Judgment of Sentence entered on June 21, 2002, in the Court of Common Pleas of Jefferson County at CP-33-CR-0000026-2001 and CP-33-CR-0000524-2001
v.	:	
	:	
ROBERT GENE REGA,	:	
	:	
Appellant	:	ARGUED: December 5, 2006
	:	

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: October 17, 2007**

I join the Majority Opinion, with the exception of the two points I address below.

First, although this is a direct appeal, the Majority entertains and reviews appellant's four claims of ineffective assistance of trial counsel notwithstanding that, in Commonwealth v. Grant, 813 A.2d 726 (Pa. 2002), this Court held, as a general rule, that claims of counsel ineffectiveness should be deferred to collateral review under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. The Grant Court abrogated the prior procedural rule represented by Commonwealth v. Hubbard, 372 A.2d 687 (Pa. 1977), which had required new counsel to raise claims of previous counsel's ineffectiveness at the first opportunity after new counsel is appointed. Grant, 813 A.2d at 738.

The Majority reviews the instant claims under authority of Commonwealth v. Bomar, 826 A.2d 831 (Pa. 2003), *cert. denied*, 540 U.S. 1115, 124 S.Ct. 1053 (2004). Bomar was

litigated in the trial court under the Hubbard rule. Bomar's trial counsel withdrew after sentencing and new counsel entered the matter and filed post-sentence motions, raising claims of ineffective assistance of counsel. The trial court conducted hearings at which trial counsel testified, and the trial court later wrote an opinion addressing the merits of the claims. In such a circumstance, the Bomar Court determined that the concerns which powered the rule in Grant were not implicated; the Court therefore reviewed the trial court's ineffectiveness rulings on the merits on direct appeal. Id. at 853-55; see also Commonwealth v. O'Berg, 880 A.2d 597, 600-01 (Pa. 2005) (discussing Bomar). The case *sub judice* is not the first time we have followed the "Bomar exception" to Grant, and thus, there certainly is precedent supporting the Majority's determination to review these collateral claims. See, e.g., Commonwealth v. Chmiel, 889 A.2d 501 (Pa. 2005), *cert. denied*, ___ U.S. ___, 127 S.Ct. 101 (2006); Commonwealth v. Singley, 868 A.2d 403 (Pa.), *cert. denied*, 546 U.S. 1021, 126 S.Ct. 663 (2005).

Nevertheless, given this Court's experience with Grant, with Bomar, and with other attempts to generate exceptions to Grant, I continue to believe that we should examine more squarely the procedural question of whether and when criminal defendants, upon demand, should be afforded the post-verdict and direct appeal unitary review which occurred in Bomar. In light of this Court's August 11, 1997, order suspending the Capital Unitary Review Act ("CURA"), 42 Pa.C.S. §§ 9570-79 (and provisions in the PCRA which referred to unitary review or to specific CURA provisions), a defendant afforded such hybrid direct review faces no existing impediment in the PCRA, the Criminal Rules, or the caselaw to pursuing a second round of collateral claims under the PCRA, after a first round of direct/unitary review concludes. Affording an advanced and additional layer of collateral attack to select defendants necessarily occasions delay in those cases. Moreover, in the absence of a procedural rule or other guidance from this Court, it is difficult to explain why certain defendants have been afforded two collateral attacks upon request, while others are

not, but instead are consigned to the single collateral review statutorily authorized under the PCRA. As matters now stand, it is within the unconstrained discretion of the trial judge whether a defendant will get one or two bites at the collateral review apple. Furthermore, there is no statutory authorization for the redundant, of-right collateral attacks that result from hybrid direct appeal review.

I have outlined my concern in this regard previously in my Concurring Opinion in O'Berg, a case where this Court rejected a suggested "short-sentence exception" to Grant's recognition that ineffectiveness claims should be deferred to the collateral review stage. I noted that the Bomar Court's decision to review the hybrid claims there "did not purport to approve such a review paradigm prospectively, as a post-Grant matter. Rather, this Court merely took the Hubbard-era record as we found it in Bomar, and proceeded to determine if direct review, or a pointless deferral to PCRA review, of the collateral claims was appropriate." O'Berg, 880 A.2d at 603 (Castille, J., concurring). I addressed the difficulties in allowing for post-sentence litigation of collateral claims in light of the holding and rationale of Grant:

> Our present state of jurisprudence properly recognizes that claims of ineffective assistance of counsel are quintessentially collateral claims and that they are expressly cognizable under the PCRA. 42 Pa.C.S. § 9543(a)(2)(ii). Therefore, the PCRA, which is the "sole means of obtaining collateral relief" in Pennsylvania, unquestionably is the appropriate repository for such claims, and our decision in Grant recognized as much. 42 Pa.C.S. § 9542; Grant, 813 A.2d at 734-38. . . .
>
> * * * *
>
> In light of the now-settled PCRA construct, I do not believe that this Court is remotely obliged to permit **any** criminal defendant -- no sentence, short sentence, long sentence, capital sentence -- to raise collateral claims, such as ineffective assistance of trial counsel, **as a matter of right** upon post-trial motions. One of the salutary, corrective, and visionary features of Grant was its recognition that direct and collateral review should be permitted to play the distinct and essential roles they are supposed to serve in the

> criminal justice system. The appropriate forum for litigating claims of ineffectiveness is under the PCRA. . . . It makes no more sense to torture post-trial practice to convert it into a quasi-PCRA role than it does to torture the direct appeal process to serve the same quasi-collateral function. Ineffective assistance of counsel claims, as a class, are no more important than other substantive constitutional claims deemed cognizable under the PCRA, such that they must be afforded an *ad hoc*, judicially-created, extra-PCRA forum. . . .
>
> In my view, the jurisprudential underpinnings of Grant, the practical effect of the decision, and the requirements of the PCRA necessarily call for a careful reconsideration of post-trial practice . . . . Furthermore, I believe that any consideration of whether and when claims of ineffectiveness may appropriately be pursued upon post-trial motions must account for the proper role played by the PCRA, as well as the consequence that should follow upon a determination that a defendant will be permitted to advance his collateral claims and litigate them in some "unitary" post-trial proceeding and on direct appeal. For instance, it seems logical that, in a case where the defendant is serving a lengthy sentence, if the trial court is essentially asked to permit a defendant to compress collateral/PCRA review into his post-trial motions and direct appeal, the cost of doing so should be an explicit waiver of the right to pursue a later petition as of right under the PCRA. The post-verdict process should not be allowed to become a vehicle by which a defendant secures a second round of collateral attack as of right, raising new claims of ineffective assistance, where the PCRA explicitly envisions a single collateral challenge, in the absence of the extraordinary circumstances governing serial petitions as set forth in 42 Pa.C.S. § 9545(b).

Id. at 605-06 (footnote omitted). I suggested a referral to the Criminal Procedural Rules Committee for a recommendation.

Further reflection and experience, including in this case, merely corroborates and strengthens my view that prolix ineffectiveness claims should not be entertained as of right on post-verdict or post-sentencing motions -- unless, perhaps, the defendant expressly enters a record waiver of his of-right, first PCRA petition. Allowing pre-PCRA hybrid review raises questions of avoidable delay, abuse, arbitrariness, and avoidable complication.

This case well illustrates the delay inherent in permitting hybrid direct review. Trial counsel's post-trial motions were filed on July 8, 2002. The trial court's decision to grant

appellant's subsequent request for new counsel, so that counsel could file new motions assailing trial counsel's performance, led to **three and one-half years of delay** in the disposition of this direct appeal. That delay might be tolerable, if the collateral review so conducted represented appellant's of-right PCRA. But since appellant presumably is free now to pursue a "first" PCRA petition as of right after this appeal, the delay serves no justifiable purpose.

The question of abuse is a function of the practical benefit to capital defendants of as many rounds of review as possible, and as much attending delay as possible. As I have noted elsewhere:

> In capital cases, of course, delay is often an end in itself for the death-sentenced prisoner. As Chief Justice Rehnquist has noted, there are "different litigating incentives facing capital and noncapital defendants." Lindh v. Murphy, 521 U.S. 320, 340, 117 S.Ct. 2059, 2070, 138 L.Ed.2d 481 (1997) (Rehnquist, C.J., dissenting).
>
> > Noncapital defendants, serving criminal sentences in prison, file habeas petitions seeking to be released, presumably as soon as possible. They have no incentive to delay. . . . In contrast, capital defendants, facing impending execution, seek to avoid being executed. Their incentive, therefore, is to utilize every means possible to delay the carrying out of their sentence.
>
> Id. I would be careful not to create any incentive for a capital defendant to build delay into his appeal.

Commonwealth v. Michael, 755 A.2d 1274, 1284 (Pa. 2000) (Castille, J., concurring) (omission in original). Every day of litigation delay, in a capital case, is another day of deferring the date with the announced penalty. Savvy or politically-attuned capital defense practitioners undoubtedly will deem it their obligation to invoke Bomar and thereby insure an extra round of review and delay.

The question of arbitrariness arises because there are no existing standards or guidelines governing when a trial judge should permit litigation of ineffectiveness claims, or other collateral claims, on post-verdict review or should defer to review at the collateral stage. Even those judges who entertain such claims may fail to hold an evidentiary hearing, thereby impeding review and failing to satisfy Bomar. Other judges may allow for review of select collateral claims, but not others. It is impossible to imagine a workable discretionary rule which allows some defendants a full, pre-PCRA collateral attack in the direct appeal context, and confines others to preserved claims. Given the existence of the PCRA as the presumptive repository for collateral claims, the general rule should be that the defendant **cannot** expand post-verdict motions and direct appeal to encompass collateral claims (at least, absent an agreement to waive his PCRA rights). There may be certain fundamental, albeit collateral complaints (such as a relevant new and retroactive rule of constitutional law) that require immediate vindication. But, post-verdict motions should not become an accepted repository for laundry lists of collateral-appropriate complaints, with concomitant delay, such as occurred here -- all in advance of a second round of statutorily-authorized collateral attack via the PCRA as of right.

The question of avoidable complication is an inevitable byproduct of entertaining ineffectiveness claims in advance of PCRA review. In a case such as this one and Bomar, when the defendant finally proceeds to PCRA review, he will have to couch his claims in terms of layered counsel ineffectiveness, *i.e.*, claiming that post-verdict/direct appeal counsel was ineffective for failing to raise different and additional claims of ineffective assistance of trial counsel. The question of how properly to approach such "layered" ineffectiveness claims caused such difficulties that this Court found it necessary to devise an appropriate protocol in Commonwealth v. McGill, 832 A.2d 1014 (Pa. 2003). Nor has this Court fully come to terms with the standard for reviewing claims sounding in the ineffectiveness of appellate and/or collateral counsel. Such complications disappear, or at

least are severely minimized, if we devise and enforce a rational scheme consisting of a single direct review of preserved claims, followed by one collateral attack as of right.

I have no objection to a form of unitary review taking place on post-verdict motions and direct appeal. Some defendants seek not delay, but immediate vindication of a clear claim. But any such unitary review should be a substitute for, and not an advance supplement to, PCRA review. A single and binding, unitary review procedure is certainly what the General Assembly envisioned for capital cases when it enacted CURA in 1995. This Court suspended that sweeping legislation because it invaded our exclusive procedural rule-making authority under the Pennsylvania Constitution. See In Re Suspension of Capital Unitary Review Act, 722 A.2d 676 (Pa. 1999) (explaining suspension of CURA). But that action, premised upon existing conflict between the statute and the Criminal Rules, does not act as a bar to this Court considering the advisability of altering our Criminal Rules to allow for unitary review and, of course, that consideration can look to the intent, purpose, and wisdom of the CURA model. We have also seen modifications in the review of direct capital appeals and in PCRA review generally, including Grant (which applies to all criminal cases) and the elimination of the discretionary relaxed waiver doctrine (exclusive to capital cases). Also, in the time since we suspended CURA, this Court has seen firsthand the seemingly interminable delay that still exists in capital review in Pennsylvania, notwithstanding our attempts to streamline matters. It is time for the Court to take up the mantle and address, through our rule-making authority, the advisability of adopting a procedure by which unitary review may be achieved in an appropriate case. Accordingly, I would refer this matter to the Criminal Procedural Rules Committee to consider the unitary review legislatively contemplated in CURA, and to suggest whether and how a similar procedure could be achieved, in an appropriate instance, via rulemaking. As part of the referral, I would have the Committee consider whether, as a corollary to

adopting appropriate changes or additions to the existing rules, it would be necessary or proper to lift the suspension of any of the CURA provisions currently under suspension.

Pending the result of that referral, however, I would take this opportunity to disapprove of trial courts entertaining prolix collateral claims on post-verdict motions, absent a concomitant waiver of PCRA review. Thus, if left to my own devices, because appellant did not waive his PCRA rights, I would defer consideration of all of appellant's ineffectiveness claims to PCRA review.

My second area of concern involves the Majority's disposition of appellant's claim that trial counsel were ineffective in failing to investigate, prepare and present a fuller and better penalty phase case in mitigation. As the Majority notes, the record supports the trial court's conclusions that appellant: (1) instructed trial counsel not to pursue a mitigation defense based on his mental health and abusive upbringing; and (2) knowingly and voluntarily waived his right to have counsel present further mitigation evidence. Majority Slip Op. at 41. These twin findings are all that is necessary to decide this claim of ineffective assistance, as it is posed on this appeal, and particularly in light of recent authority from the U.S. Supreme Court.

In Schriro v. Landrigan, ___ U.S. ___, ___, 127 S.Ct. 1933, 1941 (2007), the High Court observed that, where a capital client instructs his counsel not to offer mitigating evidence, "counsel's failure to investigate [mitigation evidence] further could not have been prejudicial under Strickland."[1] In this case, appellant does not dispute that counsel acted in accordance with his express wishes respecting mitigation evidence. As a matter of law, counsel were not ineffective in acceding to their client's wishes, and the inquiry should end there.

[1] Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).

Of course, a defendant theoretically could seek to attack the reasonableness of his attorneys' decision to abide by his directive respecting mitigation evidence -- say, for example, by claiming that counsel knew or should have known that the defendant's directive to waive certain mitigation was not knowing and intelligent. But see Schriro, ___ U.S. at ___, 127 S.Ct. at 1942 ("We have never imposed an 'informed and knowing' requirement upon a defendant's decision not to introduce evidence."); id. at 1943 ("[W]e have never required a specific colloquy to ensure that a defendant knowingly and intelligently refused to present mitigating evidence."). At one point in his argument, appellant offhandedly adverts to such a claim, complaining that counsel supposedly "allowed themselves to be directed by their client who was suicidal at the time; a person who could not knowingly and intelligently waive this right." Appellant's Brief at 52. However, this theory was not the gravamen of appellant's complaint below, and he does not develop it here beyond the boilerplate declaration quoted. Allegedly suicidal persons are not, by that status alone, rendered incapable as a matter of law of waiving the presentation of evidence. Thus, I would not pass upon the cognizability or merits of this distinct, theoretical claim. See Schriro, supra.

The law, by necessity, presumes competence and free will. Appellant was empowered to direct his counsel not to pursue mitigation evidence, either wholly or in part, and there is nothing inherently unreasonable in a lawyer abiding by his client's decision in that regard. Because no preserved and cognizable claim is presented challenging the validity of appellant's directive to his counsel, which is what caused his waiver of the opportunity to present other evidence of alleged mitigation, appellant's current claim of ineffectiveness necessarily fails. The absence of this mitigation evidence was appellant's own choice, and not the fault of his counsel.

Subject to the two points of concern I have articulated above, I join the Majority Opinion.

Mr. Justice Saylor joins this concurring opinion.