[J-161-2008]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 301 CAP
	:	
Appellee	:	Appeal from the Order of the Court of
	:	Common Pleas of York County, Criminal
	:	Division, at No. 3183 CA 1998, dated June
v.	:	28, 2006.
	:	
	:	
MILTON MONTALVO,	:	
	:	SUBMITTED: December 2, 2008
Appellant	:	
	:	
	:	
	:	
	:	

CONCURRING OPINION

MR. CHIEF JUSTICE CASTILLE **DECIDED: December 28, 2009**

I join the Majority Opinion. I write to make one point of elaboration.

The Majority deems appellant's prolix claims of ineffective assistance of counsel reviewable on this direct capital appeal on the basis of Commonwealth v. Bomar, 826 A.2d 831, 853-55 (Pa. 2003). Majority Slip Op. at 4 & n.5. This case is unlike Bomar in that this appeal did not present itself to us initially as one with a fully-developed trial court record and post-verdict findings on the claims of ineffectiveness of counsel. Instead, the reason for the full hybrid record is that this Court, over my objection, granted a pre-briefing remand of the case some eleven months before the decision in Commonwealth v. Grant, 813 A.2d 726, 738 (Pa. 2002), which held that claims of ineffective assistance of trial counsel should be deferred to collateral review. The unexplained remand for hybrid review (while Grant

itself was pending) arguably was defensible under the rule of Commonwealth v. Hubbard, 372 A.2d 687 (Pa. 1977). Hubbard had held that: "ineffectiveness of prior counsel must be raised as an issue at the earliest stage in the proceedings at which the counsel whose effectiveness is being challenged no longer represents the defendant" or else the claim is not properly preserved for appellate review. Id. at 695 n.6. Hubbard was overruled by Grant, and the remand in this case proved to be inconsistent with Grant's later directive that: "[t]he rule we announce today will be applied to the parties before us as well as to any other cases on direct appeal where the issue of ineffectiveness was properly raised and preserved." 813 A.2d at 738. Review is proper only because of the subsequent decision in Bomar.

As I made clear in my recent concurrence in Commonwealth v. Liston, 977 A.2d 1089 (Pa. 2009) -- and in this regard I spoke for a majority of the Liston Court[1] -- going forward, the lower courts should not indulge hybrid review by invoking Bomar:

> I would go farther than the Majority, however, and consistently with [Commonwealth v.] Wright, [961 A.2d 119 (Pa. 2008),] I would explicitly limit Bomar to Hubbard-era cases, and make clear that there is no "Bomar exception" to Grant. The Superior Court's opinion in this case, which applies Bomar to a new set of facts and, thus, extends its reach, exemplifies an unintended and unauthorized consequence arising from Bomar's continued application in the post-Grant setting and fails to take into account this Court's shift away from Hubbard-era unitary review and the concerns previously discussed. I have also recognized that unitary review may be appropriate under limited circumstances in order to provide the immediate vindication of a clear claim and noted that there is no such current system in place allowing for such a procedure. [Commonwealth v.]Rega, 933 A.2d [997,] 1033 [(Pa. 2007) (Castille, J., joined by Saylor, J., concurring)]. Consistently with this Court's approval in Wright, however, I would permit hybrid review only when

[1] Madame Justice Greenspan authored the Majority Opinion in Liston; I authored a largely-joining concurrence which was joined by Mr. Justice Saylor and Mr. Justice Eakin; and Mr. Justice Baer authored a separate concurrence. Madame Justice Todd and Mr. Justice McCaffery did not participate in the case.

> the request for such review is accompanied by an express, knowing and voluntary waiver of further PCRA review. Unless and until we take such steps, we will not be able to give this Court's corrective decision in Grant its full effect consistently with the terms of the PCRA.

Liston, 977 A.2d at 1100 (Castille, C.J., joined by Saylor and Eakin, JJ., concurring).

I join the Majority Opinion.