[J-66-2013][M.O. – Castille, C.J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 40 MAP 2010
	:	
Appellant	:	Appeal from the Superior Court entered on 7/15/09 at No. 932 MDA 2008 which remanded the PCRA Order of Centre County Court of Common Pleas, Criminal Division, entered on 5/16/08 at No. CP-14-CR-0002169-2005
v.	:	
	:	
JUSTIN DAVID HOLMES,	:	
	:	SUBMITTED: October 26, 2010
Appellee	:	RESUBMITTED: August 13, 2013

CONCURRING OPINION

MR. JUSTICE SAYLOR **DECIDED: October 30, 2013**

I join the majority opinion, but I believe the prescribed framework for review should be further refined to provide specific accommodations pertaining to short-sentence scenarios. As reflected in my dissenting opinion in Commonwealth v. O'Berg, 584 Pa. 11, 26-29, 880 A.2d 597, 606-08 (2005) (Saylor, J., dissenting), the courts cannot reasonably "defer" constitutional claims to PCRA proceedings which they know will not be available. Where it is clear that there will be no PCRA review, I do not see that there is any other rational choice but to consider all constitutional claims on direct appellate review (or via some other guaranteed-review procedure). See generally Sibron v. New York, 392 U.S. 40, 52-53, 88 S. Ct. 1889, 1897 (1968) ("Many . . . abiding constitutional problems are encountered . . . in the context of prosecutions for minor

offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level be left . . . remediless . . .."), quoted in Thomas M. Place, Ineffectiveness of Counsel and Short-Term Sentences in Pennsylvania: A Claim in Search of a Remedy, 17 TEMP. POL. & CIV. RTS. L. REV. 109, 109 (2007).[1]

To the extent there is doubt concerning whether a sentence is sufficiently lengthy to implicate post-conviction review (as there will be across a wide category of cases), "deferral" may be appropriate, but if the courts are incorrect in their assumption that the post-conviction forum will be available, there should be an avenue available to accomplish the essential review of the "deferred" claims. In this regard, it seems to me, the choice is: (1) to channel such claims through the PCRA despite the conflict with its express limitations, similar to the approach of Commonwealth v. Lantzy, 558 Pa. 214, 736 A.2d 564 (1999); or (2) to invoke or devise a common-law review procedure. It is untenable, in my view, to contemplate that "deferred" claims should evaporate merely

[1] I recognize that the scheme of review reflected in the majority opinion mitigates the harshness of deferral in the short-sentence scenario (and otherwise) by offering the option to waive post-conviction review. It is problematic, however, to require a waiver as a prerequisite to the conferral of something to which the defendant already is entitled (i.e., appellate review of his constitutional claims). Moreover, the matter is further complicated by the good-cause overlay. Obviously, in my view, absent some other guaranteed-review procedure, there is always good cause for non-deferral where a sentence is not sufficiently long to implicate PCRA proceedings.

Parenthetically, this Court is otherwise considering the constitutionality of the PCRA's requirement that a petitioner be "currently serving a sentence of imprisonment, probation or parole for the crime" at the time relief is granted, 42 Pa.C.S. § 9543(a)(1)(i), and the arguments in that case discuss the feasibility of utilizing the Bomar exception in the short sentence context to alleviate the constitutional dilemma. See Commonwealth v. Turner, No. 52 EAP 2011, 19 Pa. D. & C. 5th 129 (C.P. Phila. Oct. 22, 2010).

because the courts have guessed, wrongly, that there would be a forum available for their later review.

Finally, I recognize that the endeavor undertaken in the majority opinion is in the nature of rulemaking, and that the adjudicatory setting rarely offers the most favorable conditions for such exercises. Nevertheless, given the need for prompt clarification concerning Bomar's appropriate scope and the presence of several institutional constraints, I agree with and support the approach reflected in the majority opinion, subject only to the potential for ongoing refinements via the rulemaking avenue. While the approach delineated in the opinion authored by the Chief Justice does entail some line drawing, it is clear to me that this was undertaken with an eye toward reasonable fairness and the orderly administration of justice.