[J-86-2012] [MO: Baer, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 52 EAP 2011
	:	
Appellant	:	Appeal from the Order entered in the
	:	Court of Common Pleas, Criminal Division,
	:	Philadelphia County, on July 15, 2011 at
v.	:	No. CP-51-CR-0006247-2007
	:	
	:	ARGUED: September 11, 2012
EMMA TURNER,	:	
	:	
Appellee	:	

DISSENTING OPINION

MADAME JUSTICE TODD **DECIDED: November 22, 2013**

I agree with the view expressed by Justice Saylor in his Dissenting Opinion that post-conviction petitioners such as Appellee should not be penalized for abiding by this Court's mandate in Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (2002), and that Appellee "should be permitted at least one opportunity to present her constitutional challenges to her judgment of sentence." Dissenting Opinion (Saylor, J.) at 1- 2.

Indeed, regarding the majority's contention that Appellee could have relied on Commonwealth v. Bomar, 573 Pa. 426, 826 A.2d 831 (2003), to raise her ineffectiveness claims on direct appeal, given that this Court and the lower courts have struggled with the viability of Bomar, I find it unfair for this Court to now impute a *requirement* that Appellee should have invoked Bomar, on pain of loss of her ability to challenge trial counsel's ineffectiveness. Bomar is an optional avenue for raising trial counsel ineffectiveness claims on direct appeal in the unusual situation where: (1) trial counsel withdraws post trial; (2) new counsel is retained and identifies claims of trial

counsel's ineffectiveness in post-trial motions; and (3) in its discretion, the trial court decides to hold a hearing on those ineffectiveness claims. Bomar, 573 Pa. at 463-66, 826 A.2d at 853-55. Critically, none of these requirements were met in Appellee's case.

Yet, despite this, the majority faults Appellee for failing to invoke Bomar. To avoid a conclusion that due process principles were offended under the circumstances of this case, it is important to consider the retroactive obligation the majority has thus placed on Appellee. Here, Appellee did not obtain new counsel until she filed her PCRA petition. Therefore, to have invoked Bomar as the majority suggests, Appellee would have had to do all of the following within the 10-day period for filing post-sentence motions: First, as under our caselaw counsel is not obliged to raise his own ineffectiveness, Appellee, herself, would have had to identify trial counsel's ineffectiveness. Second, Appellee would have had to seek to replace trial counsel. Third, Appellee would have had to instruct new counsel to file post-sentence motions raising the claims of trial counsel ineffectiveness she previously identified. All in 10 days. And who was obliged to have read this Court's post-Grant pronouncements and discern that Appellee was required to take these steps lest she potentially lose her ability to challenge trial counsel's effectiveness? Again, it would appear it was Appellee herself, as trial counsel's own ineffectiveness was implicated. The majority has thus seemingly transformed Bomar, intended to provide an optional avenue for relief under an unusual confluence of events, into a mandate that a counseled litigant act, for a time, *pro se*. The unreasonableness of such expectation should be obvious. That resort to Bomar is insufficient to satisfy due process in this case is equally so.

For all these reasons, I dissent.