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INEFFECTIVENESS OF COUNSEL AND SHORT-TERM SENTENCES IN PENNSYLVANIA: A CLAIM IN SEARCH OF A REMEDY

by THOMAS M. PLACE*

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 . . .¹

INTRODUCTION

To protect the fundamental right to a fair trial, every defendant, without regard to the length of imprisonment imposed, is entitled to the effective assistance of counsel.² Prior to the Pennsylvania Supreme Court's decision in *Commonwealth v. Grant*,³ the rule in Pennsylvania was that a claim of ineffectiveness of trial counsel was reviewable on direct appeal.⁴ The general rule was that the claim was waived unless raised by new counsel at the first opportunity, even if that first opportunity was direct appeal and the issue had not been presented by way of post-sentence motion to the court below.⁵ *Grant* reversed this long-standing rule and held that claims of ineffectiveness of trial counsel would no longer be considered on direct appeal, but would be deferred to the post-conviction process governed by the Pennsylvania Post Conviction Relief Act⁶ (PCRA).⁷

The PCRA provides a procedure for defendants to collaterally challenge their conviction or sentence. The Act is the "sole means of obtaining collateral relief"⁸ and has been broadly interpreted as creating a unified statutory framework for reviewing claims that were traditionally cognizable in habeas corpus.⁹ The Act

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1. *Sibron v. New York*, 392 U.S. 40, 52-53 (1968).

2. *Commonwealth v. Cousin*, 888 A.2d 710, 714 (Pa. 2005).

3. 813 A.2d 726 (Pa. 2002).

4. *Commonwealth v. Dancer*, 331 A.2d 435, 437 (Pa. 1975), *abrogated by Grant*, 813 A.2d. at 726.

5. *Commonwealth v. Hubbard*, 372 A.2d 687, 695 n.6 (Pa. 1977), *overruled by Grant*, 813 A.2d at 726. *See, e.g., Dancer*, 331 A.2d at 437-38 (holding that, because the issue of ineffectiveness of trial counsel was not brought up on direct appeal, it cannot be brought up in Post Conviction Hearing Act (PCHA) proceedings).

6. 42 PA. CONS. STAT. §§ 9541-9546 (2006).

7. *Grant*, 813 A.2d at 738.

8. 42 PA. CONS. STAT. § 9542.

9. *Commonwealth v. Chester*, 733 A.2d 1242, 1250-51 (Pa. 1999), *abrogated by Grant*, 813 A.2d

authorizes relief when a conviction or sentence resulted from one or more of the Act's specifically enumerated errors or defects¹⁰ and when the claimed error has not been waived¹¹ or previously litigated on appeal or in a previous petition under the Act. The Act provides a forum for a defendant to establish that counsel's acts or omissions during trial or on direct appeal deprived him of his constitutionally guaranteed right to effective counsel.¹² An important limitation on the availability of post-conviction relief is the requirement that the defendant be in custody at the time relief is granted under the Act.¹³ In addition, the Act does not authorize a stay of sentence while relief is being sought.¹⁴

Post-*Grant*, the Superior Court created an exception in cases where the defendant was sentenced to a short term of imprisonment.¹⁵ Noting that strict application of *Grant* in such cases would preclude post-conviction review of claims of trial counsel ineffectiveness because the sentence would be served before post-conviction review was completed, the court held that claims of ineffectiveness in such cases would be considered on direct appeal.¹⁶ In *Commonwealth v. O'Berg*,¹⁷ the Pennsylvania Supreme Court rejected the Superior Court's short sentence exception to *Grant*, holding that the exception would undermine the reasons for deferring ineffectiveness claims to collateral review and was too ambiguous for lower courts to apply.¹⁸

As a result of *Grant* and *O'Berg*, unless the issue of trial counsel ineffectiveness is preserved for appeal by new counsel in a post-sentence motion, the more than fifteen percent of defendants who receive a sentence of one year or less¹⁹ do not have a forum to present a claim that counsel's performance at trial

at 726; *Commonwealth v. Ahlborn*, 699 A.2d 718, 721 (Pa. 1997).

10. 42 PA. CONS. STAT. § 9543(a)(2).

11. *Id.* § 9543(a)(3). See also *id.* § 9544(b) (describing when an issue has been waived for purposes of the statute).

12. *Id.* § 9543(a)(2)(ii). In *Commonwealth v. Kimball*, 724 A.2d 326 (Pa. 1999), the Pennsylvania Supreme Court held that the PCRA does not impose a higher burden on a defendant seeking post-conviction relief than when ineffectiveness is considered on direct appeal. *Id.* at 332. The court interpreted § 9543(a)(2)(i) of the Act as embodying the prejudice element of the Sixth Amendment standard for ineffectiveness claims set out in *Strickland v. Washington*. *Id.* (citing *Strickland*, 466 U.S. 668 (1984)). The Act has been interpreted by the Pennsylvania Supreme Court to apply where the defendant establishes ineffectiveness of counsel on discretionary appeal and in the representation of the defendant in a petition under the Act, notwithstanding the fact that in neither proceeding is the defendant entitled to counsel as a matter of state or federal constitutional law. See *Commonwealth v. Liebel*, 825 A.2d 630, 633-34 (Pa. 2003) (holding that petitioner had a rule-based right to counsel during direct appeal under criminal procedure rules, such that lack of a federal right to counsel on discretionary appeal did not preclude post-conviction relief based on ineffective counsel); *Commonwealth v. Albrecht*, 720 A.2d 693, 699 (Pa. 1998) (“[W]e have never found our power to review, and if necessary, remedy the deficiencies of counsel at the post-conviction stage circumscribed by the parameters of the Sixth Amendment.”).

13. 42 PA. CONS. STAT. § 9543(a)(1)(i).

14. *Commonwealth v. Salisbury*, 823 A.2d 914, 916 n.1 (Pa. Super. Ct. 2003).

15. *Id.* at 916.

16. *Commonwealth v. Blessitt*, 852 A.2d 1215, 1220 (Pa. Super. Ct. 2004); *Commonwealth v. Ingold*, 823 A.2d 917, 919 (Pa. Super. Ct. 2003); *Salisbury*, 823 A.2d at 916.

17. 880 A.2d 597 (Pa. 2005).

18. *Id.* at 600.

19. E-mail from Joan Lisle, Field Services Manager, Pa. Comm'n on Sentencing, to Thomas M.

deprived them of their constitutionally guaranteed right to effective counsel.²⁰ This Article begins with a discussion of the federal and Pennsylvania constitutional right to effective assistance of counsel and then examines the case law of waiver of claims of ineffectiveness prior to *Grant*. The article next discusses the *Grant* and *O’Berg* decisions deferring ineffectiveness claims to the post-conviction process and concludes with an examination of solutions to provide defendants who receive short sentences a remedy to challenge the ineffectiveness of trial counsel.

I. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

To protect the fundamental right to a fair trial, a defendant is entitled to effective assistance of counsel. The constitutional right to effective assistance of counsel was first recognized by the United States Supreme Court in *Powell v. Alabama*.²¹ In *Powell*, the Court stated that, when due process requires the state to provide counsel to an indigent defendant, “that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.”²² Later, in *Glasser v. United States*,²³ the Court held that the right to counsel under the Sixth Amendment was violated by judicial action that denied defendant’s “right to have the effective assistance of counsel.”²⁴ Following the Court’s decision in *Gideon v. Wainwright*,²⁵ which extended the right to appointed counsel in state cases to indigent felony defendants,²⁶ the Court in *McMann v. Richardson*²⁷ stated that “[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel.”²⁸

Place, Professor of Law, Penn State Univ., Dickinson School of Law (June 29, 2007, 12:00 EST) (on file with author).

20. U.S. CONST. amend. VI.

21. 287 U.S. 45 (1932).

22. *Id.* at 71.

23. 315 U.S. 60 (1942), *superseded by statute*, FED. R. EVID. 104(a), *as recognized in* *Bourjaily v. United States*, 483 U.S. 171, 181 (1987), *superseded by statute*, FED. R. EVID. 801(d)(2), *as recognized in* *United States v. Kemp*, Criminal Action No. 04-370, U.S. Dist. LEXIS 2072, at *6-7 (E.D. Pa. Feb. 10, 2005).

24. *Id.* at 76.

25. 372 U.S. 335 (1963).

26. *Id.* at 341.

27. 397 U.S. 759 (1970). In *McMann*, the Court stated that, “if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel . . .” *Id.* at 771.

28. *Id.* at 771 n.14. *See also* *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) (“[T]he right to counsel is the right to effective assistance of counsel.”). In *United States v. Cronin*, 466 U.S. 648 (1984), the Court explained that the constitutional right to effective assistance of counsel is grounded in the language of the Sixth Amendment:

The special value of the right to the assistance of counsel explains why “[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel.” . . . The text of the Sixth Amendment itself suggests as much. The Amendment requires not merely the provision of counsel to the accused, but “Assistance,” which is to be “for his defence.” Thus, “the core purpose of the counsel guarantee was to assure “Assistance” at trial . . . If no actual “Assistance” “for” the accused’s “defence” is provided, then the constitutional guarantee has been violated.

Id. at 654 (quoting first from *McMann*, 397 U.S. at 771 n.14, then from *United States v. Ash*, 413 U.S.

In holding that the constitutional right to counsel on first appeal encompasses the right to effective assistance of counsel, the Court in *Evitts v. Lucey*²⁹ noted that “a party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all.”³⁰ Because the right to counsel applies without regard to the length of the sentence imposed,³¹ as long as the defendant is constitutionally entitled to counsel, whether counsel is retained or appointed,³² the defendant is entitled to effective counsel.³³

In Pennsylvania, the right to effective assistance of counsel at trial and on direct appeal is guaranteed by article I, section 9 of the Pennsylvania Constitution.³⁴ The Pennsylvania Supreme Court has recognized that “the right to counsel is meaningless if effective assistance is not guaranteed.”³⁵ Although the court has not recognized a state constitutional right to counsel on discretionary appeal or in post-conviction proceedings, it has held that, because defendants in both proceedings have a rule-based right to counsel, that right includes the concomitant right to effective assistance of counsel.³⁶

300, 309 (1973)). See also *Strickland*, 466 U.S. at 685 (“The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results.”).

29. 469 U.S. 387 (1985).

30. *Id.* at 396. A defendant has a Sixth Amendment right to counsel when charged with a felony, *Gideon*, 372 U.S. at 344, and where a sentence of imprisonment is imposed for a less serious charge. *Scott v. Illinois*, 440 U.S. 367, 374 (1979) (“[N]o indigent criminal defendant [can] be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense.”); *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1972) (stating that defense counsel must be appointed in any criminal prosecution however classified “that actually leads to imprisonment even for a brief period . . .”). See also *Alabama v. Shelton*, 535 U.S. 654, 658 (2002) (holding that a suspended sentence may not be imposed unless defendant was provided counsel).

31. *Argersinger*, 407 U.S. at 33.

32. *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980).

33. See, e.g., *Wainwright v. Torna*, 455 U.S. 586, 587-88 (1982) (“Since respondent had no constitutional right to counsel [on discretionary appeal], he could not be deprived of the effective assistance of counsel . . .”).

34. PA. CONST. art. 1, § 9 (“In all criminal prosecutions the accused hath a right to be heard by himself and his counsel . . .”). See also *Commonwealth v. Arroyo*, 723 A.2d 162, 170 (Pa. 1999) (concluding that right to counsel under Pennsylvania Constitution is “coterminous with the Sixth Amendment right to counsel for purposes of determining when the right attaches”). The Pennsylvania Supreme Court has also held that the test for counsel ineffectiveness under the U.S. Constitution set out in *Strickland*, 466 U.S. 668, is coterminous with the three-part Pennsylvania test in *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987). *Cousin*, 888 A.2d at 715 n.6. See also Thomas M. Place, *Ineffective Assistance of Counsel under the Pennsylvania Post Conviction Relief Act*, 69 TEMPLE L. REV. 1389, 1392-93 (1996) (discussing the *Pierce* standard).

35. *Commonwealth v. Albert*, 561 A.2d 736, 738 (Pa. 1989).

36. *Liebel*, 825 A.2d at 634-35; *Albrecht*, 720 A.2d at 699-700.

II. WAIVER AND REVIEW OF INEFFECTIVENESS CLAIMS

A. Pre-Grant Case Law

The Pennsylvania Supreme Court initially considered the issue of waiver, and appellate and post-conviction review of ineffectiveness claims, in *Commonwealth v. Dancer*.³⁷ Dancer appealed from a denial of relief under the Post Conviction Hearing Act (PCHA).³⁸ Before seeking post-conviction relief, Dancer employed new counsel to appeal his conviction.³⁹ His appeal did not include claims of ineffectiveness of trial counsel.⁴⁰ After the conviction was affirmed on appeal, Dancer sought post-conviction relief alleging ineffectiveness of trial counsel.⁴¹ The petition did not allege the ineffectiveness of appellate counsel.⁴² The Pennsylvania Supreme Court affirmed the trial court's denial of collateral relief on grounds that the ineffectiveness claims were waived when new counsel had failed to raise the claims on direct appeal.⁴³ The court held that the finding of waiver was warranted by both the PCHA and principles of judgment finality.⁴⁴ The court noted that the PCHA established a rebuttable presumption that failure to raise an issue on appeal was "knowing and understanding."⁴⁵ Under the PCHA, the presumption could be rebutted only by offering evidence of "extraordinary circumstances" to justify failure to raise the issue on appeal or to otherwise challenge the effectiveness of direct appeal counsel.⁴⁶ The court noted that ineffectiveness claims could be raised in a collateral post-conviction proceeding only when (1) the defendant was represented on appeal by trial counsel, for it was "unrealistic to expect trial counsel on direct appeal to argue his own ineffectiveness,"⁴⁷ (2) the defendant has new counsel on appeal but the bases for the claim of ineffectiveness do not appear in the trial record, (3) the defendant is able to "prove the existence of other 'extraordinary circumstances' justifying his failure to raise the issue,"⁴⁸ or (4) the defendant rebuts the presumption of "knowing and understanding failure" to raise the issue on direct appeal.⁴⁹

In *Commonwealth v. Hubbard*,⁵⁰ the Pennsylvania Supreme Court reaffirmed the rule announced in *Dancer* that the ineffectiveness of prior counsel must be raised "at the earliest stage in the proceedings at which the counsel whose

37. 331 A.2d 435 (Pa. 1975).

38. *Id.* at 436; PCHA, 19 PA. STAT. ANN. §§ 1180-1 to -14 (Supp. 1974) (replaced by the PCRA, 42 PA. CONS. STAT. §§ 9541-9546 (2006)).

39. *Dancer*, 331 A.2d at 436.

40. *Id.* at 436.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 438.

45. *Dancer*, 331 A.2d at 437 (citing 19 PA. STAT. ANN. § 1180-4(c) (Supp. 1974)). The waiver provision of the PCRA, 42 PA. CONS. STAT. § 9544(b), does not contain the presumption provision.

46. 19 PA. STAT. ANN. § 1180-4(b)(2).

47. *Dancer*, 331 A.2d at 438.

48. *Id.*

49. 19 PA. STAT. ANN. § 1180-4(c).

50. 372 A.2d 687 (Pa. 1977), overruled by *Grant*, 813 A.2d at 726 (Pa. 2002).

ineffectiveness is being challenged no longer represents the defendant,” or the claim will be deemed waived.⁵¹ In *Hubbard*, the defendant was represented by new lawyers at both the post-trial stage and on direct appeal.⁵² Appellate counsel alleged the ineffectiveness of both trial and post-trial counsel.⁵³ Specifically, appellate counsel claimed post-trial counsel was ineffective in failing to raise the ineffectiveness of trial counsel.⁵⁴ The court concluded that, because post-trial counsel had failed to present to the trial court the allegations of trial counsel ineffectiveness, the claims were waived.⁵⁵ Trial counsel’s performance was nonetheless reviewed by the court through the lens of post-trial counsel’s ineffectiveness in failing to preserve the claims of ineffectiveness of trial counsel.⁵⁶ The court’s analysis of the abandoned claims of trial counsel ineffectiveness was limited to determining whether there was arguable merit to the claims not pursued by trial counsel and, if so, the basis for post-trial counsel’s decision not to raise the claim.⁵⁷ The court noted that, if trial counsel’s ineffectiveness was evident on the face of the record, the appellant would be entitled to file a post-trial motion *nunc pro tunc*.⁵⁸ On the other hand, a remand would be required if the record did not disclose a satisfactory basis for post-trial counsel’s omission.⁵⁹

After *Hubbard*, the Pennsylvania Supreme Court strictly applied the rule that claims of trial counsel ineffectiveness must be raised at the first opportunity the defendant was represented by new counsel or the issue was waived.⁶⁰ Application of the rule required that, when ineffectiveness was not raised on direct appeal by new counsel, post-conviction counsel was required to plead and prove a “layered” claim of ineffectiveness—namely, that appellate counsel was ineffective in failing to raise the ineffectiveness of prior counsel.⁶¹ In *Commonwealth v. McGill*,⁶² the Pennsylvania Supreme Court held that, when direct appeal did not include claims of ineffectiveness of trial counsel, or where direct appeal included review of some claims of ineffectiveness and PCRA counsel raised new claims of trial counsel ineffectiveness, the only viable claim under the PCRA was one of appellate counsel ineffectiveness.⁶³ In order to obtain relief in such a case, the defendant was required first to satisfy the three-prong standard of ineffectiveness with respect to

51. *Id.* at 695 n.6.

52. *Id.* at 695.

53. *Id.*

54. *Id.*

55. *Id.* at 696.

56. *Hubbard*, 372 A.2d at 696.

57. *Id.*

58. *Id.*

59. *Id.*

60. *See, e.g., Commonwealth v. Pierce*, 786 A.2d 203, 212 (Pa. 2001) (determining that because appellant’s claims of ineffective counsel could have been raised in post-verdict motions or on direct appeal, those claims were waived), *abrogated by Grant*, 813 A.2d at 726; *Commonwealth v. Hammer*, 494 A.2d 1054, 1058 n.2 (Pa. 1985) (citing *Hubbard* as support for denying review of allegation of substantial trial error not raised by trial counsel), *abrogated by Grant*, 813 A.2d. at 726.

61. *Grant*, 813 A.2d at 733.

62. 832 A.2d 1014 (Pa. 2003).

63. *Id.* at 1021.

trial counsel.⁶⁴ If successful, the defendant was also required to establish that appellate counsel did not have a reasonable basis for failing to raise the ineffectiveness of trial counsel.⁶⁵ Finally, the defendant had to establish that there was a reasonable probability that the outcome of the appeal would have been different had appellate counsel presented the claim of ineffectiveness of trial counsel.⁶⁶ The court in *McGill* acknowledged that its prior decisions had not clearly set out what a defendant was required to plead and prove in a layered ineffectiveness claim.⁶⁷ The court noted that a remand to the PCRA court may be appropriate where the layered claim had not been properly presented in a manner sufficient to warrant merits review, provided the defendant had at least pleaded and presented argument as to the alleged ineffectiveness of trial counsel.⁶⁸

B. The Grant Decision

Grant was convicted of first-degree murder and was represented on appeal by new counsel.⁶⁹ Following the Superior Court's decision dismissing two of Grant's claims relating to trial counsel's ineffectiveness for failure to adequately develop the claims,⁷⁰ the Pennsylvania Supreme Court granted limited allowance of appeal and directed the parties to address whether the court should reconsider its decision in *Commonwealth v. Hubbard*.⁷¹ In the Supreme Court, Grant claimed that the Superior Court's dismissal of the ineffectiveness claims was erroneous because procedural rules did not permit an appellant to supplement the record on appeal with evidence to support the claimed ineffectiveness of trial counsel.⁷² Grant argued that, rather than dismissing the claims, the Superior Court should have

64. See *Pierce*, 527 A.2d at 975 (noting that a defendant must demonstrate that (1) the underlying claim is of arguable merit, (2) counsel's performance was unreasonable, and (3) counsel's deficient performance prejudiced the defense). See also *Commonwealth v. Peterkin*, 649 A.2d 121, 123 (Pa. 1994) (applying the three-part *Pierce* standard for showing of counsel).

65. *McGill*, 832 A.2d at 1023.

66. *Id.*

67. *Id.* at 1020.

68. *Id.* at 1024. See also *Commonwealth v. Moore*, 860 A.2d 88, 94 (Pa. 2004) (stating that petitioner must "present argument on" appellate counsel's ineffectiveness and all prior counsel's ineffectiveness to preserve a layered claim); *Commonwealth v. Lopez*, 854 A.2d 465, 468-69 (Pa. 2004) (stating that only after petitioner has presented argument on appellate counsel's deficient representation has the petitioner preserved a layered claim of ineffectiveness); *Commonwealth v. Rush*, 838 A.2d 651, 656 (Pa. 2003) ("In order to preserve a claim of ineffectiveness, a petitioner must plead . . . that appellate counsel was ineffective for failing to raise all prior counsel's ineffectiveness.") (citing *McGill*, 832 A.2d at 1022) (internal quotation marks omitted); *Commonwealth v. Pitts*, 884 A.2d 251, 253-54 (Pa. Super. Ct. 2005) (noting that petitioner must assert not only that trial counsel was ineffective in some material way, but also that appellate counsel was ineffective); *Commonwealth v. DuPont*, 860 A.2d 525, 531-32 (Pa. Super. Ct. 2004) ("[F]or a petitioner to properly raise and prevail on a layered ineffectiveness claim, sufficient to warrant relief if meritorious, he must plead, present, and prove the ineffectiveness of Counsel 2 [appellate counsel], which . . . necessarily reaches back to the actions of Counsel 1 [trial counsel].") (citing *McGill*, 832 A.2d at 1022).

69. *Grant*, 813 A.2d at 729.

70. *Id.* (citing *Commonwealth v. Grant*, 761 A.2d 1233 (Pa. Super. Ct. 2000) (unpublished decision)).

71. *Id.* (citing *Hubbard*, 372 A.2d 687).

72. *Id.* at 732.

remanded the claims to the trial court to enable defendant to develop the claims adequately.⁷³ Although neither Grant nor the Commonwealth asked the court to reconsider its *Hubbard* decision, the court nonetheless overruled the *Hubbard* decision.⁷⁴

The court initially noted that the *Hubbard* rule, requiring an appellate court to consider an issue that had not been decided by the trial court, was at odds with well-established rules that appellate courts do not act as fact finders or consider matters outside the record or facts not in evidence.⁷⁵ The *Hubbard* rule was in fact the “exact opposite” of the appellate review process followed in other cases.⁷⁶ The court next surveyed how other jurisdictions address claims of ineffectiveness of counsel, noting that, although a small number of states employ a rule similar to *Hubbard*, most jurisdictions, and the majority of the federal courts, require ineffectiveness claims to be raised in collateral review proceedings.⁷⁷ A number of jurisdictions that defer ineffectiveness claims to collateral review recognize that, in some exceptional cases where the existing record permits review of the ineffectiveness claim, the ineffectiveness can be addressed on direct appeal.⁷⁸ Jurisdictions that defer ineffectiveness claims to collateral review do so because, in most cases, the record is not sufficiently developed to permit the appellate court to rule on the issue.⁷⁹ Other jurisdictions are of the view that the trial court is best situated to make findings about counsel’s performance and the impact of acts or omissions of counsel.⁸⁰ Finally, in the view of at least one court, appellate counsel is not charged with the responsibility of finding extra-record claims, such as ineffectiveness of trial counsel, and presenting the claim to the appellate court.⁸¹ The rationales offered by other jurisdictions to defer ineffectiveness claims to collateral review persuaded the court that the *Hubbard* rule ignored the valid concerns “that animated [the court’s] general approach to appellate review” and that these concerns should apply equally to claims of ineffectiveness of counsel.⁸² “Deferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings offers a petitioner the best avenue to effect his Sixth Amendment right to counsel.”⁸³ *Grant* holds that a claim of ineffectiveness of

73. *Id.*

74. *Id.* at 738.

75. *Grant*, 813 A.2d at 732.

76. *Id.* at 734.

77. *Id.* After *Grant* was decided, the U.S. Supreme Court held that, for defendants convicted of federal crimes, failure to raise an ineffective assistance of counsel claim on direct appeal did not bar the claim from being brought in a later federal collateral proceeding. *Massaro v. United States*, 538 U.S. 500, 504 (2003).

78. *Grant*, 813 A.2d at 734-35.

79. *Id.* at 736.

80. *Id.*

81. *Id.* (citing *Woods v. State*, 701 N.E.2d 1208, 1221-22 (Ind. 1998)).

82. *Id.* at 737.

83. *Id.* at 738. For many indigent defendants, deferring consideration of ineffectiveness claims to the post-conviction stage does not offer the “best avenue to effect” their right to effective counsel. In contrast to direct appeal, where the defendant is obligated only to communicate to counsel his wish to appeal, in order for claims to be reviewed in a post-conviction proceeding, an indigent defendant must file a timely pro se petition for relief. Unlike direct appeal, under the PCRA, a petition must be filed

counsel will not be considered waived because new counsel on direct appeal did not present the claim of prior counsel's ineffectiveness.⁸⁴ Instead, as a general rule,⁸⁵ claims of ineffectiveness of trial counsel will not be considered on direct appeal, but rather will be deferred to collateral review.⁸⁶

C. Post-Grant Case Law

1. Ineffectiveness Claims Raised by Post-Sentence Motion

In *Commonwealth v. Bomar*,⁸⁷ the Pennsylvania Supreme Court held that *Grant* did not apply when a defendant's claims of ineffectiveness were properly raised and preserved in the trial court.⁸⁸ In *Bomar*, trial counsel withdrew following sentencing and new counsel filed post-sentence motions including claims of trial counsel ineffectiveness.⁸⁹ The trial court conducted hearings on the motions that included the testimony of trial counsel and addressed the ineffectiveness claims in its opinion. The Supreme Court held that the concerns that led it to adopt the rule in *Grant* did not apply and, therefore, the ineffectiveness claims were reviewable on direct appeal.⁹⁰

In *Commonwealth v. May*,⁹¹ the Pennsylvania Supreme Court concluded that the *Bomar* exception did not apply where a claim of ineffectiveness was raised for the first time in the defendant's Rule 1925(b) statement⁹² and addressed by the trial court in its Rule 1925(a) opinion.⁹³ The court noted that the claim was "not raised when the matter was within the jurisdiction of the trial court and, as a consequence,

before a court is authorized to appoint counsel. 42 PA. CONS. STAT. § 9545(a). A defendant's failure to file a timely petition will result in waiver of the ineffectiveness claims. Post-conviction claims have been waived as the result of an untimely petition because defendant's housing status in prison limited his ability to gain access to legal materials, *Commonwealth v. Barrett*, 761 A.2d 145, 146-48 (Pa. Super. Ct. 2000), and where the defendant, because of mental illness, was unable to file a timely petition and thereby trigger the appointment of counsel. See *Commonwealth v. Hoffman*, 780 A.2d 700, 704 (Pa. Super. Ct. 2001) ("[W]e hold that Appellant's petition was properly dismissed as untimely under the PCRA statute and his claim of continuing mental illness does not constitute an exception to its jurisdictional time requirements.").

84. *Grant*, 813 A.2d at 738.

85. The court noted a possible exception to the general rule when the ineffectiveness claim involves "a complete or constructive denial of counsel" or when counsel breaches his or her duty of loyalty. *Id.* at 738 n.14.

86. See *id.* at 739 (Saylor, J., concurring) (noting that the *Hubbard* decision allows for a remand by the appellate court to allow the trial court to consider an ineffectiveness claim raised for first time on direct appeal). On the other hand, Justice Saylor also argued that the new rule in *Grant* should not apply when the claim of ineffectiveness has been duly developed in the trial court by a post-sentence motion. *Id.* at 740.

87. 826 A.2d 831 (Pa. 2003).

88. *Id.* at 855.

89. *Id.* at 839. It is also worth noting that the ineffectiveness claims in *Bomar* were presented to the trial court in 1999, prior to Pennsylvania Supreme Court's decision in *Grant*. *Id.*

90. *Id.* at 855.

91. 887 A.2d 750 (Pa. 2005).

92. PA. R. APP. P. 1925(b) (stating that the trial court may require an appellant to file and serve on the trial judge a concise statement of matters complained of on appeal).

93. *May*, 887 A.2d at 758.

the court did not hold an evidentiary hearing at which trial counsel testified.”⁹⁴ As an additional basis for deferring review to the post-conviction process, the court observed that there was no reason to believe that the defendant’s Rule 1925(b) statement exhausted all record or non-record based claims of ineffectiveness.⁹⁵ Considering the Rule 1925(b) claims on appeal, the court noted, would involve piecemeal review⁹⁶ and would require PCRA counsel to plead and prove a layered claim of ineffectiveness of counsel.⁹⁷

2. Sentences of Short Duration

Following *Grant*, the Pennsylvania Superior Court recognized a “short sentence” exception to the *Grant* rule.⁹⁸ The exception was originally set out in *Commonwealth v. Salisbury*,⁹⁹ where the defendant was sentenced to ninety days imprisonment and the court stayed the sentence pending direct appeal.¹⁰⁰ On appeal, the defendant alleged that trial counsel was ineffective.¹⁰¹ The Superior Court reviewed the claim of ineffectiveness relying upon language in *Grant* that the rule did not apply if it would result in harm to one of the parties to the appeal.¹⁰²

94. *Id.*

95. *Id.*

96. *Id.* In *Commonwealth v. Fowler*, 893 A.2d 758, 764-65 (Pa. Super. Ct. 2006), the Superior Court approved a form of piecemeal review when it declined to consider a claim that guilty plea counsel was ineffective in not ensuring that defendant was fully aware of the elements of the crime because the claim had not been developed at a hearing in the trial court. *Id.* As to a second claim of ineffectiveness that the guilty plea was improperly induced by counsel’s false representation that defendant would receive a lesser sentence than imposed, the court applied the *Bomar* exception because the claim had been presented to the trial court and fully developed at an evidentiary hearing. *Id.*

97. *May*, 887 A.2d at 758. *Bomar* was also distinguished in *Commonwealth v. Belak*, 825 A.2d 1252, 1255 n.6 (Pa. 2003) (noting absence of evidentiary record and trial court opinion on claims where ineffectiveness claim not raised until defendant filed Rule 1925(b) statement), but *Bomar* was followed in *Commonwealth v. Bohonyi*, 900 A.2d 877, 883 n.8 (Pa. Super. Ct. 2006) (noting that the adequacy of trial counsel’s representation was properly before the Superior Court where the trial court conducted an evidentiary hearing at which trial counsel testified) and *Commonwealth v. Chmiel*, 889 A.2d 501, 540 (Pa. 2005) (noting that it was appropriate for the Supreme Court to review ineffectiveness claims because new counsel filed amended post-sentence motion alleging ineffectiveness of trial counsel and trial court held evidentiary hearing and issued opinion with respect to the claim). *See also* *Commonwealth v. Ramos*, 827 A.2d 1195, 1199 n.8 (Pa. 2003) (noting that the *Bomar* exception was inapplicable because appellant did not raise ineffectiveness claims before trial court and trial court thus did not address them); *Fowler*, 893 A.2d at 764-65 (finding that the *Bomar* exception did not apply to the first claim because it had not been developed at a hearing in the trial court, but applying the *Bomar* exception to the second claim because it had been presented to trial court and fully developed at evidentiary hearing); *Commonwealth v. Watson*, 835 A.2d 786, 795-96 (Pa. Super. Ct. 2003) (denying ineffectiveness of counsel claim where trial court record lacked support for any conclusion of a manifest injustice); *Commonwealth v. Causey*, 833 A.2d 165, 175 (Pa. Super. Ct. 2003) (noting that a complete trial court record and opinion is sufficient to dismiss claim of ineffective counsel).

98. *See Salisbury*, 823 A.2d at 916 (addressing appellant’s ineffective assistance of counsel claim because he was sentenced to only ninety days imprisonment and thus would be precluded from raising that claim in a collateral petition).

99. 823 A.2d 914.

100. *Id.* at 916 n.1.

101. *Id.* at 915.

102. *Id.* at 916. The reference to harm in *Grant* was in the context of the court’s decision to apply the

Noting that to be eligible for PCRA relief, a defendant must be in custody and that there is no provision for stay of sentence pending PCRA review, the court concluded that the defendant would be harmed by the *Grant* rule because the defendant's short sentence would preclude collateral review of the claim of ineffectiveness.¹⁰³ The court stated that, in light of the defendant's sentence, "review delayed constitutes review denied."¹⁰⁴ The Superior Court followed the "short sentence" exception in *Salisbury* in *Commonwealth v. Ingold*,¹⁰⁵ where the defendant was sentenced to seven days time-served, and in *Commonwealth v. Viglione*,¹⁰⁶ where the defendant was ordered to pay a fine.

In *Commonwealth v. O'Berg*,¹⁰⁷ the Pennsylvania Supreme Court rejected the "short sentence" exception to *Grant*. O'Berg was convicted of misdemeanor and summary offenses and sentenced to thirty days to twenty-three-and-a-half months in prison.¹⁰⁸ The trial court permitted him to remain free on bail until his appeal was final, but O'Berg chose to begin serving his sentence while his case was pending in the Superior Court.¹⁰⁹

O'Berg's appeal challenged the effectiveness of trial counsel.¹¹⁰ After his brief had been filed in the Superior Court, the Pennsylvania Supreme Court rendered its decision in *Commonwealth v. Grant*.¹¹¹ Relying on the new precedent established by *Grant*, the Superior Court dismissed O'Berg's ineffectiveness claim without prejudice to O'Berg raising the issue in a PCRA proceeding.¹¹² No longer in custody, O'Berg sought review in the Pennsylvania Supreme Court, seeking an exception to *Grant* when PCRA review is not available because the defendant is no longer in custody.¹¹³ O'Berg argued that the Superior Court's decision to dismiss

new rule retroactively to cases pending on direct appeal where the issue of ineffectiveness had been properly raised and preserved. *Grant*, 813 A.2d at 738. The court was persuaded that retroactive application of the new rule would harm neither party because claims of ineffectiveness can be raised in a collateral proceeding. *Id.* at 739.

103. *Salisbury*, 823 A.2d at 916 n.1.

104. *Id.*

105. 823 A.2d 917 (Pa. Super. Ct. 2003). See also *Commonwealth v. Dent*, 837 A.2d 571, 588 (Pa. Super. Ct. 2003) (addressing ineffectiveness claim on direct appeal where defendant was sentenced to immediate term of probation concurrent with sentence on unrelated offense and term had expired); *Commonwealth v. Duda*, 831 A.2d 728, 732 (Pa. Super. Ct. 2003) (reviewing ineffectiveness claim where defendant was sentenced to ninety days). The Superior Court distinguished *Salisbury* and *Ingold* in *Commonwealth v. Millward*, 830 A.2d 991, 995 (Pa. Super. Ct. 2003) (concluding that defendant's sentence of ninety days imprisonment and a concurrent term of three years probation did not preclude him from presenting ineffectiveness claim in a PCRA petition) and *Blessitt*, 852 A.2d at 1220 (finding that prison term of sixteen to thirty-two months sufficient time within which to pursue ineffectiveness claims under the PCRA).

106. 842 A.2d 454 (Pa. Super. Ct. 2004). In *Viglione*, the court concluded that, given the nature of the ineffectiveness claim, namely counsel's failure to raise a claim of double jeopardy, the court was not without a record, and it was not required to go outside the record to rule on the ineffectiveness claim. *Id.* at 459-460.

107. 880 A.2d 597 (Pa. 2005).

108. *Id.* at 598.

109. *Id.*

110. *Id.*

111. *Id.* at 599.

112. *Id.*

113. *O'Berg*, 880 A.2d at 599.

his ineffectiveness claim pursuant to *Grant* placed him in the unfair position of losing his opportunity to litigate his ineffectiveness claim and that such a result conflicted with the intent of *Grant*, which was to offer “a petitioner the best avenue to effect his Sixth Amendment right to counsel.”¹¹⁴

In refusing to recognize a “short sentence” exception to *Grant*, the court noted that central to its rejection of *Hubbard* and its adoption of the rule in *Grant* was the absence of review of the ineffectiveness claim by the trial court, placing the appellate court in the role of fact finder.¹¹⁵ Acknowledging that a defendant should not be harmed by the *Grant* rule, the court nonetheless concluded that a “short sentence” exception would undermine the rationale of the general rule announced in *Grant*.¹¹⁶ In addition, the court held that the proposed exception was too ambiguous to give the lower courts any guidance on what is a sufficiently “short sentence” in order for the exception to apply.¹¹⁷

Although the prosecution claimed in *O’Berg* that the “short sentence” exception was not necessary because the *Bomar* exception allows defendants with short sentences an opportunity to obtain review of ineffectiveness claims by means of a post-sentence motion, Justice Castille, in his concurring opinion in *O’Berg*, rejected such an approach.¹¹⁸ Noting that ineffectiveness claims are “quintessentially collateral claims” expressly cognizable under the PCRA, Justice Castille stated that the court should not “subvert the PCRA” by allowing for “pre-litigation” of ineffectiveness claims by post-verdict motions in cases where defendants cannot pursue PCRA relief because they are not in custody.¹¹⁹

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. . . . The appropriate forum for litigating claims of ineffectiveness is under the PCRA. That “short sentence” defendants may not be able to pursue such claims is an appropriate consequence of a legislative choice. . . . 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.¹²⁰

114. *Grant*, 813 A.2d at 738.

115. *O’Berg*, 880 A.2d at 600.

116. *Id.* at 601-02.

117. *Id.* at 602.

118. *Id.* at 602-03 (Castille, J., concurring).

119. *Id.* at 604.

120. *Id.* at 605. Justice Castille recommended referral of the issue to the Criminal Procedural Rules Committee, but expressed concern that post-verdict process not be transformed into a new “round of collateral attack as of right,” noting that reconsideration of post-trial practice must take into account the fact that the PCRA “explicitly envisions a single collateral challenge.” *Id.* at 606.

Justice Saylor's dissenting opinion supported the Superior Court's effort to implement fundamental fairness by allowing a "short sentence" exception to *Grant*.¹²¹ Justice Saylor noted that *Hubbard* allows for a remand to the trial court for an evidentiary hearing of ineffectiveness claims raised for the first time on direct appeal.¹²² Justice Saylor stated that not allowing the Superior Court to determine which sentences qualify for the exception is to "curtail unduly the availability of appellate review," impinging upon the right to direct appeal guaranteed by article V, section 9 of the Pennsylvania Constitution.¹²³

III. REVIEWING INEFFECTIVENESS CLAIMS IN CASES WHERE A SHORT SENTENCE IS IMPOSED

Grant and *O'Berg* require that claims of ineffectiveness raised on direct appeal for the first time be deferred to the post-conviction process regardless of the sentence imposed.¹²⁴ To be eligible for post-conviction relief, a defendant must be in custody both at the time a post-conviction petition is filed and at the time relief is granted.¹²⁵ As a result, a defendant who receives a short sentence of imprisonment that has been stayed pending direct appeal but serves the sentence before post-conviction review is completed is without a remedy "to vindicate [his] right to effective trial counsel."¹²⁶ Even if the defendant waives other alleged trial errors and immediately seeks post-conviction relief after sentence is imposed,¹²⁷ if the sentence is served before the post-conviction process is completed, relief cannot be ordered. Clearly, for defendants with short sentences, deferring the ineffectiveness claim until the post-conviction stage is not, in the language of *Grant*, "the best avenue to effect [a defendant's] Sixth Amendment right to counsel."¹²⁸ Moreover, it conflicts with the specific language of the PCRA and the legislature's intent not "to limit the availability of remedies . . . on direct appeal from the judgment of sentence"¹²⁹ Finally, as noted by Justice Saylor in his dissent in *O'Berg*, the present practice of denying defendants with short sentences appellate review of claims of ineffectiveness when post-conviction review is unavailable constitutes an unreasonable restriction on a defendant's right to appeal guaranteed by article V,

121. *O'Berg*, 880 A.2d at 606 (Saylor, J., dissenting).

122. *Id.* at 607. See also *Commonwealth v. Musi*, 404 A.2d 378, 380 n.4 (Pa. 1979) ("Where one seeks to raise a claim of ineffective assistance on direct appeal and an enhanced record is required to support the claim, the proper procedure is to request a remand for an evidentiary hearing.").

123. *O'Berg*, 880 A.2d at 607 (Saylor, J., dissenting).

124. *Grant*, 813 A.2d at 738; *O'Berg*, 880 A.2d at 598.

125. 42 PA. CONS. STAT. § 9543.

126. *Kimmelman*, 477 U.S. at 378.

127. If new counsel is appointed for direct appeal where the defendant has received a short sentence, new counsel has an obligation to discuss with the defendant withdrawing the appeal and pursuing post-conviction relief when counsel believes that the undeveloped ineffectiveness claim is stronger than issues preserved for appeal and new counsel believes that the sentence will not be served before the post-conviction process is completed. If the direct appeal is withdrawn, the preserved issues are waived.

128. *Grant*, 813 A.2d at 738.

129. 42 PA. CONS. STAT. § 9542. *But see* PA. R. CRIM. P. 901 cmt. ("By statute, a court may not entertain a request for any form of relief in anticipation of the filing of a petition for post-conviction collateral relief.").

section 9 of the Pennsylvania Constitution.¹³⁰ An amendment to the PCRA, or modest changes to the current post-sentence procedure, would provide defendants with short sentences a forum to assert the ineffectiveness of trial counsel.

A. Amend the Post Conviction Relief Act by Providing for Stay of Sentence

The simplest way to address the *Grant/O’Berg* problem is an amendment to the PCRA that grants the PCRA court discretion to stay the defendant’s sentence by continuing the defendant on bail if the court concludes that the defendant’s sentence would be served before post-conviction review was completed.¹³¹ Such an amendment would provide defendants with short sentences with the opportunity for post-conviction review of claims of ineffectiveness of both trial and appellate counsel.

As noted, to be eligible for relief under the PCRA, a defendant must be “currently serving a sentence of imprisonment, probation, or parole for the crime.”¹³² Physical custody was not always required in Pennsylvania in order to seek post-conviction relief. Under the PCHA,¹³³ the predecessor to the PCRA, post-conviction review was available to persons who had completed their sentences but had suffered a collateral consequence of the conviction.¹³⁴ In 1997, the General Assembly amended section 9542 by adding the language that the Act does not “provide relief from the collateral consequences of a criminal conviction.”¹³⁵ Also

130. *O’Berg*, 880 A.2d at 607 (Saylor, J., dissenting). See *Commonwealth v. Wilkerson*, 416 A.2d 477, 479 (Pa. 1980) (describing the right to appeal under the Pennsylvania Constitution as “absolute”). In post-*Wilkerson* cases, the Pennsylvania Supreme Court has held that rights under the Pennsylvania Constitution “are not absolute” but subject to reasonable legislative restrictions. See *Commonwealth v. Morris*, 771 A.2d 721, 732 (Pa. 2001) (reasoning that, because “the legislature may put reasonable restrictions on constitutional rights,” the Court does not have to grant a stay of execution so that the petitioner may have a meaningful appellate review); *Commonwealth v. Peterkin*, 722 A.2d 638, 642 (Pa. 1998) (refusing to grant an extension to the one-year filing requirement to the PCRA, even though restricting petitioner’s access may have been unconstitutional, because “[i]t is axiomatic that no constitutional rights are absolute”). Even if the “reasonable restriction” rule applies to court decisions that restrict a state constitutional right, *Grant* imposes an unreasonable restriction on the right of appeal because it leaves a “short sentence” defendant without a remedy to “effect his Sixth Amendment right to counsel.” *Grant*, 813 A.2d at 737.

131. See *Commonwealth v. Grant*, 761 A.2d 1233 (Pa. Super. Ct. 2000) (unpublished decision).

132. 42 PA. CONS. STAT. § 9543(a)(1)(i).

133. 19 PA. STAT. ANN. §§ 1180-1 to 1180-14.

134. *Id.* See also, e.g., *Commonwealth v. Doria*, 364 A.2d 322, 323-24 (Pa. 1976) (extending the holding in *Sheehan* to cover civil matters as well), *superseded by statute*, PCRA, 42 PA. CONS. STAT. § 9543, *as recognized in* *Ahlborn*, 699 A.2d at 718 (Pa. 1997); *Commonwealth v. Sheehan*, 285 A.2d 465, 469 (Pa. 1971) (finding that attack on a satisfied sentence is proper when it would directly affect a subsequent criminal conviction or prosecution), *superseded by statute*, PCRA, 42 PA. CONS. STAT. § 9543, *as recognized in* *Ahlborn*, 699 A.2d 718. Under the Uniform Post-Conviction Procedure Act, custody is not a pre-condition to seeking relief under the Act. UNIF. POST-CONVICTION PROCEDURE ACT, 11 U.L.A. 201 cmt. to §§ 1 and 3(b) (2003). The growing body of legal consequences from a criminal conviction has prompted the National Conference of Commissioners on Uniform State Laws to begin drafting a Uniform Act on the Collateral Consequences of Criminal Conviction. Margaret Love, *Uniform Law Commissioners Drafting Collateral Consequences Act*, A.B.A. CRIM. JUST. SEC. NEWSL. Wash., D.C., (Spring 2007), at 4, *available at* <http://www.abanet.org/crimjust/newsletterspring2007.pdf>.

135. 42 PA. CONS. STAT. § 9542. Prior to the amendments, the Pennsylvania Supreme Court held that, because the PCRA supersedes common law remedies, collateral consequences alone did not entitle

in 1997, the General Assembly amended section 9543(a) to limit the Act to defendants who are in custody “at the time relief is granted.”¹³⁶ These changes to the Act were made prior to the Supreme Court’s decision in *Grant* to defer ineffectiveness claims to the post-conviction process.¹³⁷

Adding a discretionary stay provision to the PCRA does not alter the basic framework of the remedy. Rather, because *Grant* limits direct appeal, allowing the PCRA court to stay the sentence by continuing the defendant on bail simply extends to the post-conviction process the existing stay of sentence procedures that were available to short sentence defendants when ineffectiveness claims were reviewable on direct appeal. Pennsylvania Rule of Criminal Procedure 462(G)(2) permits a stay of sentence pending direct appeal for defendants convicted of summary offenses following a trial de novo.¹³⁸ Likewise, Pennsylvania Rule of Criminal Procedure 521(B) grants defendants with short sentences the same right to bail pending appeal as before conviction unless modified by the court.¹³⁹ Finally, a stay provision is not inconsistent with the requirement that a defendant be in custody in order to obtain post-conviction relief. The United States Supreme Court has held that a person released on his own recognizance following sentencing in state court was “in custody”¹⁴⁰ within the meaning of the federal habeas corpus statute.¹⁴¹ The defendant was in custody, the Court concluded, because he was subject to restraints under state law “not shared by the public generally”¹⁴² that placed his freedom of movement “in the hands of state judicial officers.”¹⁴³ Likewise, short sentence defendants in Pennsylvania whose sentences have been stayed pending appeal are subject to conditions that impose significant restrictions on their freedom of movement not shared by the public, including reporting requirements and travel restrictions.¹⁴⁴ Failure to comply with the conditions of release subjects the defendant to arrest.¹⁴⁵ A discretionary, post-conviction stay would provide defendants with short sentences the same opportunity to challenge

a defendant to relief under the Act. *Ahlborn*, 699 A.2d at 721. See also *Pierce*, 579 A.2d at 966 (concluding that the PCRA did not authorize “relief for those whose sentences had expired, regardless of the collateral consequences”).

136. 42 PA. CONS. STAT. § 9543(a)(1). See *Ahlborn*, 699 A.2d at 720 (Pa. 1997) (finding that the plain language of the statute “clearly contemplates that the petitioner will be serving a sentence at both the pleading and proof stages of the proceeding”).

137. In contrast to the PCRA, the “in custody” requirement in the federal habeas corpus statute is satisfied if the petitioner was in custody at the time the petition was filed. *Carafas v. LaValle*, 391 U.S. 234, 238 (1968) (citing 28 U.S.C. § 2243 (2006)). A subsequent release from custody while a petition challenging a criminal conviction is pending does not divest the court of jurisdiction. See *Spencer v. Kemma*, 523 U.S. 1, 7 (1998) (finding petitioner’s petition for relief moot because it no longer satisfied the “case or controversy requirement,” not because he was no longer in custody); *Carafas*, 391 U.S. at 239 (allowing petitioner, who had been in custody at the time he filed his application, relief even though he was released from custody two weeks before filing for certiorari).

138. PA. R. CRIM. P. 462(G)(2).

139. PA. R. CRIM. P. 521(B).

140. 28 U.S.C. § 2241 (2006).

141. *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973).

142. *Id.* (quoting *Jones v. Cunningham*, 371 U.S. 236, 240 (1963)).

143. *Id.*

144. PA. R. CRIM. P. 527(A)(1)-(3).

145. PA. R. CRIM. P. 536(A)(1)(b).

ineffectiveness of prior counsel that is available to defendants who receive longer sentences.

B. Proposed Changes in Post-Sentence Procedure

In the absence of a stay provision that would allow defendants who receive short sentences to raise ineffectiveness of counsel claims in a post-conviction proceeding, fairness requires that a procedure be established post-sentence to permit the trial court to consider a claim of ineffectiveness of trial counsel. Such a procedure would result in a record and opinion reviewable by an appellate court, thereby addressing the concerns that led the court to adopt the deferral rule in *Grant* and to reject the “short sentence” exception in *O’Berg*. Because the rules of criminal procedure already provide defendants with the option to file a post-sentence motion for a new trial,¹⁴⁶ only minimal changes need to be made to the rule governing appointment of counsel and to post-sentence motion procedure to provide short sentence defendants a forum to litigate their constitutional right to effective counsel.

1. Amend Pennsylvania Rule of Criminal Procedure 122

Pennsylvania Rule of Criminal Procedure 122 provides that, when counsel is appointed in both summary and court cases, the appointment is “effective until final judgment, including any proceedings upon direct appeal.”¹⁴⁷ Because “it is unrealistic to expect trial counsel . . . to argue his own ineffectiveness,”¹⁴⁸ Rule 122 should be amended to provide the trial court with the discretion to appoint new counsel for an indigent defendant when a sentence of short duration is imposed. The appointment of new counsel should occur in any case where the trial court imposes a minimum sentence that the court, in its discretion, concludes may be served before post-conviction review is completed.¹⁴⁹ In essence, new counsel here plays the role of counsel that would have been appointed¹⁵⁰ had defendant remained in custody and sought post-conviction relief following direct appeal. Only new counsel can advise the defendant as to whether there is a basis for claiming ineffectiveness of trial counsel.¹⁵¹ If so, a post-sentence motion preserves the issue

146. PA. R. CRIM. P. 720(B)(1)(a)(iv).

147. PA. R. CRIM. P. 122(B)(2).

148. *Dancer*, 331 A.2d 435, 438 (Pa. 1975), *abrogated by Grant*, 813 A.2d at 726. *See also* Commonwealth v. Saranchak, 866 A.2d 292, 299 n.9 (Pa. 2005) (“Under Pennsylvania law, trial counsel cannot be expected to raise his own ineffectiveness on direct appeal.”); Commonwealth v. Green, 709 A.2d 382, 384 (Pa. 1998) (noting that a public defender may not argue the ineffectiveness of another member of the same public defender’s office because appellate counsel would then essentially be asserting a claim of his or her own ineffectiveness).

149. *See* Donald J. Harris, Kim Nieves & Thomas M. Place, *Dispatch and Delay: Post-Conviction Relief Act Litigation in Non-Capital Cases*, 41 DUQ. L. REV. 467, 488 (2003) (noting that, in the author’s 2003 study, the median time statewide for a non-capital PCRA petition to be decided was ten months).

150. PA. R. CRIM. P. 904(C) (providing for appointment of counsel as a matter of right following filing of a first petition for post-conviction relief).

151. *See Dancer*, 331 A.2d at 438 (“[I]t is unrealistic to expect trial counsel on direct appeal to argue his own ineffectiveness . . .”).

for appeal and will result in a record and opinion by the trial court that will be available to the appellate court as required by the court in *Bomar*.¹⁵² Once new counsel is appointed, a claim of ineffectiveness should not be considered waived if the defendant decides that his sentence affords him sufficient time to pursue post-conviction relief in lieu of filing a post-sentence motion. Moving the claim directly to collateral review is consistent with the court's view in *Grant* that, as a general rule, ineffectiveness claims should be resolved in the post-conviction process and that waiver will occur only after a petitioner has had the opportunity to raise the claim on collateral review and has failed to avail himself of that opportunity.¹⁵³ If new counsel determines that there is no basis to assert a claim of ineffectiveness of trial counsel, and the defendant requests an appeal on other grounds, new counsel would represent the defendant on direct appeal.

2. Amend Pennsylvania Rule of Criminal Procedure 720¹⁵⁴

With the exception of after-discovered evidence, Pennsylvania Rule of Criminal Procedure 720, which gives defendants the option to file a post-sentence motion, requires that the motion be filed no more than ten days after imposition of sentence.¹⁵⁵ In addition, the Rule provides that there shall be no post-sentence motion in summary case appeals following trial de novo in the court of common pleas.¹⁵⁶ Both provisions of the Rule should be amended in light of *Grant* and *O'Berg*.

If new counsel is appointed by the trial court post-sentence to give the defendant an opportunity to raise the ineffectiveness of trial counsel, the ten day limit in the Rule should be enlarged to provide new counsel sufficient time to become familiar with the case, including reviewing the trial transcript to determine whether trial counsel provided effective assistance of counsel.

The Rule should also be amended to provide for a post-sentence motion raising the ineffectiveness of trial counsel in summary case appeals. Indigent defendants in summary cases have a rule-based right to counsel if there is a likelihood that imprisonment will be imposed¹⁵⁷ and they also, like defendants in court cases, have a right to direct appeal. In light of *Grant*, in order for an appeal to

152. 826 A.2d at 854. In a post-*Grant* case, *Commonwealth v. Hudson*, 820 A.2d 720 (Pa. Super. Ct. 2003), a panel of the Superior Court concluded it could address the merits of an ineffectiveness claim when the claim was properly raised by new counsel in a timely post-sentence motion which was heard and decided by the trial court. *Id.* at 726.

153. *Grant*, 813 A.2d at 738 (concluding that a decision to seek immediate post-conviction review would waive all claims that could have been reviewed on direct appeal).

154. In 2005, prior to *O'Berg*, the Criminal Procedural Rules Committee reconsidered amendments to Rule 720 that were proposed following the *Grant* decision. Based on comments the Committee received, and reconsideration of the issue, the Committee concluded that the bench and bar would be better served if the text of Rule 720 was not amended to address the ineffective assistance of counsel issue. CRIM. PROCEDURAL RULES COMM., FINAL REPORT: AMENDMENTS TO PA. R. CRIM. P. 720 (2005).

155. PA. R. CRIM. P. 720(A)(1).

156. PA. R. CRIM. P. 720(D).

157. PA. R. CRIM. P. 122(A)(1).

be meaningful, a defendant in a summary case appeal must be provided a forum in the trial court to challenge the effectiveness of trial counsel.

CONCLUSION

As the result of *Grant* and *O'Berg*, defendants who receive short sentences do not have a forum to challenge the effectiveness of trial counsel, even though every defendant, regardless of the length of the sentence imposed, has a federal and state constitutional right to effective assistance of counsel.¹⁵⁸ If the right to counsel is meaningless if effective assistance is not guaranteed,¹⁵⁹ effective counsel is equally meaningless if the state provides no procedure to enforce the right. This principle was the basis for decisions by the Pennsylvania Supreme Court granting defendants collateral review of ineffectiveness claims in discretionary appeal and post-conviction proceedings when the right to counsel was not constitutionally guaranteed but based instead upon a rule of criminal procedure. It follows that, where the right to counsel is constitutionally guaranteed, a forum must be available for defendants without regard to the length of the sentence imposed to protect their right to effective counsel. "[T]he constitution does not afford some lesser right to effective counsel on those charged with non-capital crimes. The right to counsel inures to the . . . felon and the misdemeanor alike."¹⁶⁰ Waiving direct appeal of preserved issues in favor of filing a PCRA petition is not a choice if the defendant's sentence will be served before the PCRA court rules on the ineffectiveness claim. Moreover, denying direct review of ineffectiveness claims when there is no other forum for the defendant to raise the issue deprives short sentence defendants of their state constitutional right to direct appeal.

One solution is for the legislature to amend the PCRA to grant the PCRA court the discretion to stay the sentence imposed following the filing of a post-conviction petition if the court concludes that the sentence will be served by the time the PRCA process is completed. A stay of sentence would permit collateral review of claims of ineffectiveness of both trial and appellate counsel. Absent an amendment authorizing a discretionary stay of sentence, post-sentence motion procedure should be amended to provide defendants who will not be eligible for collateral review a means to vindicate their right to effective trial counsel. For indigent defendants, a post-sentence remedy in lieu of collateral review begins with the court appointing new counsel following sentencing. Defendants with retained counsel should be advised by the trial court that, unless the issue of ineffectiveness is presented by way of a post-sentence motion, there will be no review of the claim if the sentence imposed is served before post-conviction review is completed. Post-

158. See U.S. CONST. amend. VI (citing the federal constitutional right to assistance of counsel in a criminal case); PA. CONST. art. I, § 9 (citing a state constitutional right to assistance of counsel in a criminal case); *O'Berg*, 880 A.2d at 598 (declining to impose a "short sentence" exception to the general rule that claims of ineffective assistance of counsel should be deferred until the collateral review proceedings); *Grant*, 813 A.2d at 738 ("[As] a general rule, a petitioner should wait to raise claims of ineffective assistance of trial counsel until collateral review.").

159. *Albert*, 561 A.2d at 738.

160. *Commonwealth v. Brooks*, 839 A.2d 245, 255 (Pa. 2003) (Eakin, J., concurring).

sentence motion procedure should be amended to allow new counsel adequate time to investigate and fully develop a claim of ineffectiveness of trial counsel. Either approach addresses the unfairness of deferring ineffectiveness claims to the post-conviction process, where post-conviction relief for ineffectiveness of trial counsel will not be available to the more than fifteen percent of defendants sentenced each year in Pennsylvania to less than a year of imprisonment.