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The Unnecessary Harshness of Automatic Waiver for Failure to File a Timely Concise Statement of Matters Complained of on Appeal

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Ten years ago, Rule of Appellate Procedure 1925 was a sleepy backwater of appellate practice. Since then, Rule 1925 has become a "hot zone" of litigation and a central focus of many appellate opinions. This is true despite the fact that the text of Rule 1925 has remained unchanged. What has changed is the Pennsylvania Supreme Court's interpretation of the Rule.

The court significantly altered the meaning and significance of the Rule in two phases. First, in 1998, the court announced *Commonwealth v. Lord*.[2] In December 2005, the court re-affirmed and strengthened the *Lord* decision in *Commonwealth v. Castillo*.[3] In this article, I will examine the effect of *Lord* and *Castillo* on Rule 1925, and on Pennsylvania appellate practice in general.

Rule 1925 reads in pertinent part as follows:

> **Opinion in Support of Order**
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> (a) **General Rule.** Upon receipt of the notice of appeal the judge who entered the order appealed from, if the reasons for the order do not already appear of record, shall forthwith file of record at least a brief statement, in the form of an opinion, of the reasons for the order, or for the rulings or other matters complained of, or shall specify in writing the place in the record where such reasons may be found.
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> (b) **Direction to file statement of matters complained of.** The lower court forthwith may enter an order directing the Appellant to file of record in the lower court and serve on the trial judge a concise statement of

1. The author is a law clerk for a judge on the Pennsylvania Superior Court. The views expressed in this piece are those of the author, and not necessarily those of any member of the court.

2. 719 A.2d 306 (Pa. 1998).

3. 888 A.2d 775 (Pa. 2005).

> the matters complained of on appeal no later than 14 days after entry of such order. A failure to comply with such direction may be considered by the appellate court as a waiver of all objections to the order, ruling, or other matter complained of.[4]

The mechanics of Rule 1925 are relatively straightforward. Rule 1925 comes into play only after a party (the "appellant") has filed a notice of appeal from a judgment or order of the trial court. After the appellant files the notice of appeal, the trial court has the option of ordering the appellant to file a concise statement of matters complained of on appeal ("concise statement"). The concise statement is meant to be a list of all of the issues that the appellant will raise on appeal. After the trial court reads the concise statement, the court can write a Rule 1925 opinion explaining why the court ruled as it did on all of the appellant's issues. The court will then file its opinion in the trial court record. At that point, the entire trial court record is compiled and transferred to the superior court for disposition.

The salutary purpose of Rule 1925 is to provide the appellate court with an opinion which explains the trial court's reasoning on the specific issues that the appellant will raise on appeal.[5] Indeed, superior court judges and clerks often find it quite helpful to have a Rule 1925 opinion. Often, the reasons for a trial court's ruling are not apparent from the record. For example, the court may grant or overrule an evidentiary objection during trial, without explanation. Rule 1925 allows the trial court an opportunity to review the case as a whole, review its own orders, and thoughtfully explain its reasoning after the "heat of battle" has subsided and the case is complete.

It should be obvious that when the appellant *fails* to file a concise statement, he deprives the trial court of that critical list of issues that will be raised on appeal. In so doing, the appellant might ultimately deprive the appellate court of a meaningful Rule 1925 opinion. Thus, Rule 1925 contains a waiver provision in order to ensure compliance. The waiver provision states, in pertinent part: "A failure to comply with such direction *may* be considered by the

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4. PA. R.A.P. 1925.

5. *Lord*, 719 A.2d at 308 ("The absence of a trial court opinion poses a substantial impediment to meaningful and effective appellate review. Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal. Rule 1925 is thus a crucial component of the appellate process.").

appellate court as a waiver of all objections to the order, ruling, or other matter complained of."[6]

Prior to 1998, the superior court found waiver where an appellant's failure to file a concise statement did in fact impair meaningful appellate review.[7] The decision to find waiver was at the discretion of the superior court.[8] In other words, the court decided whether to impose the waiver penalty on a flexible, case-by-case basis.[9]

In October 1998, the Pennsylvania Supreme Court unexpectedly changed Rule 1925 from a discretionary rule to a mandatory rule.[10] After explaining that "Rule 1925 is thus a crucial component of the appellate process,"[11] the court held that "from this date [October 28, 1998] forward, in order to preserve their claims for appellate

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6. PA. R.A.P. 1925(b) (emphasis added).

7. *See* Commonwealth v. Butler, 812 A.2d 631, 632-33 (Pa. 2002) (citations omitted).

8. *Butler*, 812 A.2d at 632-33.

9. *Id.*

10. The underlying superior court decision in *Lord* was an unpublished memorandum. Commonwealth v. Lord, 664 A.2d 1057 (Pa. Super. Ct. 1995). When the supreme court granted a petition for allowance of appeal, the court stated that its review would be limited to the following question: "Have the recent amendments to Pa.R.Crim. P. No. 1410 [making post-sentence motions optional] precluded an appellate court from asserting the waiver of an appellate issue for the reason that the issue was omitted from the Statement of Matters Complained of on Appeal?" Commonwealth v. Lord, 670 A.2d 640 (Pa. 1996).

In *Lord*, the supreme court attempted to resolve an apparent conflict among different superior court panels on the question of whether parties were required to include all of their issues in a concise statement, under penalty of waiver. Certain superior court panels had held that including all issues in a concise statement was unnecessary, in light of the fact that newly-enacted Rule of Criminal Procedure 1410 made post-sentence motions optional. *Lord*, 719 A.2d at 308 (citing Commonwealth v. Cortes, 659 A.2d 573 (Pa. Super. Ct. 1995)). Other panels, such as the superior court panel in *Lord* itself, held that failing to include an issue in a concise statement renders the claim waived because the absence of an opinion on that issue hampered appellate review. *See Lord*, 719 A.2d at 307. Arguably there was no actual conflict between these superior court panels, because in each case the superior court made its waiver decision based on an individualized, case-by-case determination of whether the absence of an opinion hampered appellate review.

It is also arguable that *Lord*'s automatic waiver rule was unnecessary, because the superior court is always in the best position to determine whether (or to what extent) noncompliance with Rule 1925 hampers effective review on a case-by-case basis. For example, assume that a criminal defendant moves for suppression, and the trial court denies the motion in a lengthy and scholarly opinion. The case then goes to trial, where the defendant is ultimately convicted. The defendant appeals, and seeks to raise the suppression claim on appeal. Before *Lord*, if the defendant failed to include the suppression claim in his concise statement, the superior court may not have found waiver because the court understood the suppression court's reasoning. After *Lord*, if the defendant failed to include the suppression claim in his concise statement, the suppression issue is waived automatically, even if the court's appellate review is not actually hampered. Moreover, as a practical matter, appellate courts always have the authority to remand for a Rule 1925 opinion if the existing opinion is inadequate. *See* Commonwealth v. DeJesus, 868 A.2d 379, 383-384 (Pa. 2005).

11. *Lord*, 719 A.2d at 308 (emphasis added).

review, Appellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. Any issues not raised in a 1925(b) statement *will* be deemed waived."[12]

Through that holding, by judicial fiat, the court fundamentally changed the substance of Rule 1925.[13] As the court itself recognized, *Lord* "eliminated any aspect of discretion and established a bright-line rule for waiver under Rule 1925[.]"[14] "Thus, waiver under Rule 1925 is automatic."[15]

While the waiver rule in *Lord* was clear and unambiguous, courts still struggled with the question of whether to find waiver under various factual circumstances.[16] One of the most common scenarios arose in *Commonwealth v. Ortiz*.[17] In that case, the appellant filed his concise statement *untimely* (two weeks beyond the 14-day deadline set forth in the Rule).[18] The trial court overlooked the untimeliness of the concise statement, and issued a Rule 1925 opinion thereon.[19] On appeal, the superior court chose not to find waiver, because the underlying purpose of the rule had been served.[20]

Over the years, the superior court routinely cited *Ortiz* as an exception to *Lord*'s strict waiver rule.[21] Over time, the superior court developed a rule that where an appellant files an untimely concise

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12. *Id.* at 309.

13. Again, the text of the rule itself remains unchanged. *See Butler*, 812 A.2d at 635 (Castille, J., concurring). The court certainly has the power to amend the text of the rule to align it with *Lord*. In Pennsylvania, the supreme court has the exclusive authority to promulgate Rules of Civil, Criminal, and Appellate Procedure. PA. CONST. art. V § 10(c). Rule 1925 provides the single clearest example of the proposition that practitioners who read a rule but ignore judicial interpretations thereof do so at their own risk.

14. *Butler*, 812 A.2d at 633.

15. *Id. Butler* expressly applied the *Lord* waiver rule to proceedings under the Post Conviction Relief Act (PCRA), 42 PA. CONS. STAT. ANN. §§ 9541-9546. *Butler* also held that because waiver was "automatic," the superior court could find waiver *sua sponte*. In other words, the superior court can (and often does) find waiver under *Lord* even where the appellee makes no argument on the issue.

16. *See, e.g.*, Everett Cash Mut. Ins. Co. v. T.H.E. Ins. Co., 804 A.2d 31 (Pa. Super. Ct. 2002) (applying waiver rule where appellant may have served the Concise Statement on the trial judge, but failed to file it as part of the certified record); Commonwealth v. Alsop, 799 A.2d 129 (Pa. Super. Ct. 2001) (*en banc*) (applying waiver rule even when the trial court correctly guesses the issue to be raised on appeal, and includes an opinion thereon in its Rule 1925 opinion); Commonwealth v. Dowling, 778 A.2d 683, 686-687 (Pa. Super. Ct. 2001) (applying waiver rule to *vague* concise statements).

17. 745 A.2d 662 (Pa. Super. Ct. 2000).

18. *Ortiz*, 745 A.2d at 663 n.3.

19. *Id.*

20. *Id.*

21. *See, e.g.*, Commonwealth v. Sohlneiter, 884 A.2d 307 (Pa. Super. Ct. 2005).

statement, he risks waiver under *Lord*, depending on whether or not the trial court chose to enforce the 14-day deadline.[22] Specifically, if the trial court overlooked the untimeliness and wrote an opinion, no waiver would result because appellate review would not be hampered.[23] However, if the trial court enforced the deadline and refused to write an opinion because the concise statement was late, waiver would result.[24]

The Pennsylvania Superior Court's adoption of that flexible approach did not go unnoticed by the supreme court. In August 2004, the supreme court granted *allocatur* in *Commonwealth v. Castillo*,[25] to decide whether to permit such an approach.[26] On December 29, 2005, the court issued its ruling. The supreme court soundly rejected the superior court's approach, re-asserted the bright-line waiver rule of *Lord*, and applied it to untimely concise statements.[27]

The *Castillo* court's rationale was based almost exclusively on the perceived need for clarity, simplicity, and uniformity. In response to the Philadelphia Defender's Association's argument for a lenient and flexible approach, the court wrote:

> The Defenders Association, however, fails to provide a solution for the problems caused by inconsistent application of discretion which plagued the system prior to *Lord* and

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22. *In re D.H.*, 863 A.2d 562, 565 (Pa. Super. Ct. 2004).

23. *Id.*

24. *Id.* In *Commonwealth v. Smith*, 854 A.2d 597, 600 (Pa. Super. Ct. 2004), the trial court found waiver because the appellant's concise statement was late. However, the trial court issued a substantive opinion "in the alternative." *Smith*, 854 A.2d at 600 The superior court chose to find waiver, reasoning as follows: "The [trial] court addressed Appellant's issue in the **alternative** not because Appellant had preserved the issue for review but only on the possibility that we would override its decision to reject the late filing, which we decline to do." *Id.*

25. 858 A.2d 1156 (Pa. 2004).

26. *See also* Commonwealth v. Schofield, 888 A.2d 771 (Pa. 2005) (deciding the merits in a companion case); Commonwealth v. Schofield, 858 A.2d 1157 (Pa. 2004) (granting *allocatur* in companion case). In *Schofield*, a *pro se* appellant served her concise statement on the trial judge, but she did not file it with the prothonotary. As a result, the concise statement did not appear in the certified record transmitted to the appellate courts. The trial court opinion did not indicate when the appellant served the concise statement, nor did it expressly list all of the issues that the appellant raised therein. After granting *allocatur*, the supreme court ruled that the appellant's issues were waived because she failed to comply with the "minimal requirements" of serving *and filing* the concise statement within 14 days. Commonwealth v. Schofield, 888 A.2d 771, 773-774 (Pa. 2005). For ease of reference, I will refer primarily to *Castillo*.

27. *Castillo*, 888 A.2d at 780 (expressly disapproving of *Ortiz* and "prior decisions of the intermediate courts to the extent they have created exceptions to Lord and have addressed issues that should have been deemed waived.").

Butler. Even in arguing for relaxation of the rule, the Association demonstrates the potential for inconsistent results in its exposition of the permutations of non-compliance, where it suggests the certain kinds of non-compliance might justify waiver and others should not, depending on a fact-specific determination of the sufficiency of the record. In so doing, the Association reinforces the need for a bright-line rule to provide litigants and courts with clarity and certainty. The bench and bar under the *Lord/Butler* rule are not left to ponder whether the record sufficiently allows the appellate court to glean the trial court's rationale, either from a filed Pa.R.A.P. 1925(a) opinion or elsewhere in the record. Moreover, Courts are not forced to ascertain whether an explication of the trial court's rationale is unnecessary for appellate review. To hold otherwise is to turn back the clock to a time of inconsistent results and uneven justice.

In the same vein, while the Association suggests that some degree of untimeliness does not hinder the trial court or the appellate court when the trial court obtains the Pa.R.A.P. 1925(b) statement prior to drafting its opinion, the question remains as to how long is too long. Allowing for discretion regarding timeliness will result in inconsistencies. For example, when faced with the lack of a timely Pa.R.A.P. 1925(b) statement, one trial court might file quickly and efficiently an opinion waiving all issues, while another might address the issues it believes the appellant will raise, and still another might delay filing an opinion until a statement is received. If the appellant in each hypothetical case eventually files an equally untimely statement, the appellate court in the first case would waive the issues that the trial court waived, while in the second two scenarios, under current Superior Court precedent, the appellate court could address the issues so long as the trial court addressed the same issues in its opinion. As a result, the same factual situation could produce diametrically opposed results depending on how quickly a trial court files its opinion after the expiration of the Pa.R.A.P. 1925(b) filing period. As referenced above, we decline to adopt a position which will yield unsupportable distinctions between similarly situated litigants.

> Thus, the *Lord/Butler* rule remains necessary to insure trial judges in each appealed case the opportunity to opine upon the issues which the appellant intends to raise, and thus provide appellate courts with records amendable to meaningful appellate review. *See Lord*, 719 A.2d at 308. This firm rule avoids the situation that existed prior to *Lord* where trial courts were forced to anticipate which issues the appellant might raise and appellate courts had to determine "whether they could conduct a 'meaningful review' despite an appellant's failure to file a Pa.R.A.P. 1925(b) statement or to include certain issues within a filed statement." *Butler*, 812 A.2d at 633. Moreover, the system provides litigants with clear rules regarding what is necessary for compliance and certainty of result for failure to comply.[28]

While the *Castillo* rule has the benefit of simplicity and clarity, it is flawed in other respects.

First, in this author's opinion, *Castillo* addressed a largely nonexistent problem. There is no evidence that justice was not served by the existing rule, which conditioned waiver on whether the trial court chose to overlook the timeliness of the concise statement. Under prior practice, if the trial court chose to enforce the rule, then the appellant was appropriately penalized for noncompliance. Similarly, if the trial court chose to overlook the untimeliness, then the case could proceed because the appellate court obtained a meaningful trial court opinion. There was nothing particularly arbitrary, unfair, or confusing about that system.[29] It contained a serious risk of penalty for noncompliance, while retaining an essential measure of flexibility. While it may be true that similarly-situated appellants could be treated differently, this is no different from any other area of legal practice where the court has the discretion to enforce deadlines.

Second, *Castillo* will often create results which are inconsistent with the underlying purpose of Rule 1925 and *Lord* itself. Again,

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28. *Id.* at 779-80.

29. At least one court in dicta has stated: "The rationale for [the *Castillo* rule] is plain: whether an appellate court reviews an issue cannot be based on the conduct, decision or whim of the trial court; rather, it must be based on the actions of the appellant in properly preserving issues for review." Thomas Jefferson Univ. v. Wapner, 903 A.2d 565, 573 n.7 (Pa. Super. Ct. 2006).

the stated purpose of the Rule and *Lord* is to ensure that the appellate court receives a helpful trial court opinion. In cases such as *Ortiz*, the trial court wrote an opinion on the very issues that the appellant raised in his concise statement. The *Castillo* rule would find waiver simply because the concise statement happened to be untimely. Such a result needlessly elevates form over substance. Indeed, *Castillo's* inflexibility is patently inconsistent with Pa.R.A.P. 105(a), which provides that the Rules of Appellate Procedure "shall be liberally construed to secure the just, speedy and inexpensive determination of every matter to which they are applicable." Rules 105(a) and 105(b) allow an intermediate appellate court to relax or disregard most rules of appellate procedure, including filing deadlines, in the interest of justice. The only stated exception to this general rule is found in Rule 105(b), which states that appellate courts may not enlarge "the time for filing a notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for review."[30] Perhaps the supreme court should also re-write Rule 105 to clarify that after *Castillo*, appellate courts may no longer extend the time for filing concise statements in the interest of expediency and justice.

Finally, the waiver rule is extraordinarily harsh. Waiver will result in dismissal of the entire case, without any disposition on the merits. This is true even if the appellant consistently raised the substantive claim at trial and in post-trial or post-sentence motions. It is also true if the record contains a trial court opinion on the issue at hand (*e.g.*, a suppression opinion or a Rule 1925 opinion).

The *Castillo* court does recognize the harshness of the rule, but notes "that the harshness is alleviated by the ability of criminal defendants to seek relief by challenging the effectiveness of their counsel and civil defendants to file malpractice actions."[31] It is true that criminal defendants are able to challenge their counsel's ineffectiveness through the PCRA.[32] Indeed, our supreme court has essentially held that relief is guaranteed, because prejudice is pre-

30. *See also* PA. R.A.P. 903 and official note thereto. The timely filing of a notice of appeal affects the jurisdiction of the Superior Court to hear a case. *See, e.g.*, Commonwealth v. Dreves, 839 A.2d 1122, 1126 n.4 (Pa. Super. Ct. 2003) (*en banc*); Morningstar v. Hoban, 819 A.2d 1191, 1194 (Pa. Super. Ct. 2003). The timely filing of a concise statement certainly does not implicate such jurisdictional concerns.

31. 888 A.2d at 780.

32. Commonwealth v. Halley, 870 A.2d 795, 800 (Pa. 2005).

sumed when counsel fails to file a concise statement.[33] On the other hand, the prospect of relief may be of little comfort to an individual who may have to remain in jail for up to a year or more before regaining his or her direct appeal rights. Moreover, in the highly unfortunate event that PCRA counsel fails to raise counsel's ineffectiveness for failing to comply with *Castillo*, chances are remote that the petitioner will be able to revive that issue in a subsequent PCRA petition. This is so because of the strict jurisdictional one-year time limit on filing PCRA petitions.[34] One must assume, however, that nearly every case of waiver under *Castillo* will simply result in the case being processed through the PCRA. After that laborious and arguably unnecessary process,[35] the case will be essentially reinstated to the superior court at the point before the *Castillo* waiver occurred. Assuming, as we must, that *Castillo* does result in an increase in collateral proceedings, one must wonder whether the net burden on our judicial system will outweigh any benefit from the clarity of the *Castillo* rule itself.

The effect of *Castillo* on civil litigants is equally harsh. In the civil arena, there is no simple mechanism in the trial court or appellate courts for reviving issues that have been waived on appeal. Rather, a litigant who has his or her issues waived under *Castillo* will have to file a malpractice claim against prior counsel. In order to succeed in a malpractice claim, the plaintiff must establish a "case within a case" — in other words, the plaintiff must establish that counsel was negligent *and* that the underlying action (here, the appeal) would have been successful.[36] Merely describing that process suggests how expensive and cumbersome it would be.

Castillo's strict waiver rule would have a uniquely prejudicial effect on family-law appeals involving child custody. Such appeals are particularly time-sensitive for obvious reasons. The superior

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33. *Halley*, 870 A.2d at 800. The *Halley* court did not state that prejudice is presumed when counsel files a statement but neglects to include an issue. The *Halley* court also did not state that prejudice is presumed when counsel files a ***late*** concise statement. Given the court's recent announcement in *Castillo*, however, it is fair to assume that prejudice would now be presumed when counsel files the statement late. Under *Castillo*, filing the statement late is the functional equivalent of not filing it at all, because waiver is now automatic and absolute in both scenarios.

34. For a thorough discussion of how the PCRA's strict time limitations preclude a court from granting relief even where multiple counsel have committed patently obvious and prejudicial errors, see *Commonwealth v. Bennett*, 842 A.2d 953 (Pa. Super. Ct. 2004) (*en banc*).

35. *See Commonwealth v. West*, 883 A.2d 654 (Pa. Super. Ct. 2005), discussed *infra* at n. 45.

36. Myers v. Robert Lewis Seigle, P.C., 751 A.2d 1182, 1184 (Pa. Super. Ct. 2000).

court, in fact, has a "fast-track" program for processing custody appeals as quickly as possible. If the issues in a custody appeal are deemed waived under *Castillo*, those issues will be waived for the foreseeable future, even when the best interests of the child would call for reversing the decision of the trial court.

One particularly questionable aspect of the *Castillo* rule is that it can produce waiver even when an appellant supplies a concise statement to the trial court within 14 days. For example, it is apparently the traditional practice in certain Pennsylvania counties for a litigant to "file" a concise statement by simply serving/handing it to the judge in chambers. This practice, however, does not comport with the rule in *Butler*, *Castillo*, and *Schofield* that the concise statement must be actually *filed* (*i.e.*, submitted and time-stamped) with the prothonotary/clerk of courts. Thus, it is easy to imagine a scenario where the appellant hands his concise statement to the trial judge in a timely fashion, but fails to actually file the document within 14 days. Even though the court received the concise statement on time and used it to write a meaningful opinion for the appellate court, the issues would still be waived under *Castillo*. In this scenario, nearly all relevant aspects of Rule 1925 would be satisfied, except for the ministerial act of filing. One must conclude that according to the supreme court, the value of uniformity and predictability has in many ways outstripped the original stated value of the rule, which was to facilitate meaningful appellate review.[37]

Of course, the *Castillo* rule is hardly the only rule calling for waiver. On the other hand, the harsh effects of waiver are usually justified by institutional and systemic concerns. For example, appellate courts find waiver where the appellant has failed to raise an issue in the trial court, because of the strong public policy reasons supporting the idea that trial proceedings should not be a mere "dress rehearsal" for a later appeal.[38] Appellate courts also find waiver where a litigant has failed to develop adequately an

37. Yet another recurrent problem under *Castillo* arises where: (1) counsel files an untimely concise statement; (2) the superior court dismisses the appeal, finding all issues waived under *Castillo*; (3) counsel files a petition for reconsideration, alleging that he received informal assurances from the trial judge or the judge's law clerk that counsel could file the concise statement by an extended deadline; and (4) this alleged assurance is found nowhere in the certified record. In *Commonwealth v. Woods*, 909 A.2d 372 (Pa. Super. 2006), the court recently held that extensions of time are permissible, but only if they are requested and granted through formal petitions and orders on the record.

38. PA. R.A.P. 302(a); Straub v. Cherne Indus., 880 A.2d 561, 566 (Pa. 2005) (citing Dilliplaine v. Lehigh Valley Trust Co., 322 A.2d 114 (Pa. 1974)).

argument through citation to the law or legal authority because under such circumstances meaningful appellate review is truly limited.[39] As noted above, however, the problems associated with an untimely concise statement do not rise to the level at which courts should impose waiver so inflexibly.[40]

Castillo is only the most recent example of cases where the Pennsylvania Supreme Court has struck down the superior court's attempts to create or recognize equitable exceptions to general rules. This recent trend began in the PCRA arena, where the court consistently struck down the superior court's attempts to create equitable exceptions to the PCRA's strict timeliness requirements.[41]

The trend has continued with the supreme court's own general rules. In *Commonwealth v. Grant*[42] the supreme court announced a general rule that claims of ineffectiveness should be deferred to the PCRA. In *Commonwealth v. Salisbury*,[43] the superior court attempted to recognize an equitable "short sentence" exception to this rule. In *Commonwealth v. O'Berg*,[44] the supreme court struck down this equitable exception. Moreover, the court "[took] this opportunity to disapprove of *any* decisions of the superior court that [create exceptions to the general rule]") (emphasis added).

Approximately three weeks after *O'Berg* was decided, the superior court recognized (at its own peril) another exception to the *Grant* rule.[45] In *West,* the superior court began with the recognition that where counsel fails to file a Concise Statement, resulting in waiver of all claims, prejudice is presumed under recent supreme court precedent.[46] The *West* court then reasoned as follows:

> Under the reasoning of *Halley*, counsel's unjustified failure to file a Concise Statement represents a complete or

39. *See* PA.R.A.P. 2119; Commonwealth v. Alsop, 799 A.2d 129, 135 (Pa. Super. Ct. 2001).

40. The Pennsylvania Superior Court has recognized that waiver under *Castillo* will not take place if the trial court failed to provide proper notice of the Rule 1925 order directing the Appellant to file a concise statement. Commonwealth v. Hart, 2006 PA Super 324.

41. *See* Commonwealth v. Robinson, 837 A.2d 1157 (Pa. 2003) (striking down the Superior Court's equitable "relation back" doctrine exception); Commonwealth v. Hall, 771 A.2d 1232 (Pa. 2001) (rejecting Superior Court's theory that reinstatement of appellate rights *nunc pro tunc* is an equitable exception to the PCRA's strict time limitations).

42. 813 A.2d 726 (Pa. 2002).

43. 823 A.2d 914 (Pa. Super. Ct. 2003).

44. 880 A.2d 597, 602 (Pa. 2005).

45. *See* Commonwealth v. West, 883 A.2d 654 (Pa. Super. Ct. 2005).

46. *Id.* at 657 (citing *Commonwealth v. Halley*, 870 A.2d 795, 800 (Pa. 2005)).

> constructive denial of counsel, where prejudice is presumed. Under *Grant*, such a clear-cut claim may be heard on direct appeal, rather than be deferred to the PCRA. Given the decision in *Halley*, it would be a pointless exercise to defer this claim to the PCRA for an examination of the traditional three-pronged ineffectiveness test. Thus, we will not defer Appellant's ineffectiveness claim to the PCRA.[47]

The *West* court held that the appropriate remedy for failure to file a concise statement would be an immediate remand for counsel to file a concise statement.[48]. The supreme court recently denied *allocatur* in *West*.[49] *West* would have provided the Pennsylvania Supreme Court with an opportunity to examine the complex interplay between the its newly-announced strict general rules in cases such as *Lord*, *Grant*, *O'Berg*, *Halley*, and, now, *Castillo*.[50]

In my view, the next "frontier" of waiver under Rule 1925 will be the area of ***vague*** concise statements. Rule 1925 itself does not set forth the form of a concise statement, other than to say that: (1) it must list the issues to be raised on appeal; and (2) it must be "concise." In *Dowling*, the superior court held that a concise statement which is too vague to identify the issues that the appellant will be actually raise on appeal "is the functional equivalent of no concise statement at all."[51] Recently, in Commonwealth v. Reeves,[52] the superior court provided the following guidance:

> There is a common sense obligation to give the trial court notice as to what the trial court should address in its Rule 1925(a) opinion. While there is a middle ground that counsel must travel to avoid having a Rule 1925(b) statement so vague that the trial judge cannot ascertain what issues should be discussed in

47. *West*, 883 A.2d at 657.

48. *Id.* at 658.

49. 903 A.2d 538 (Pa. 2006).

50. Even more vexing is the question of how to manage those principles where counsel petitions to withdraw from representation on direct appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967). *See* Commonwealth v. Myers, 897 A.2d 493 (Pa. Super. Ct. 2006) (following *West* and *Halley*, and remanding for additional Rule 1925 procedures where counsel seeks to withdraw but failed to file a concise statement); Commonwealth v. Flores, 909 A.2d 387 (Pa. Super. Ct. 2006) (remanding for additional Rule 1925 procedures where counsel seeks to withdraw, but filed a vague and incomplete concise statement).

51. *Commonwealth v. Dowling*, 778 A.2d 683, 686-87 (Pa. Super. Ct. 2001).

52. 907 A.2d 1 (Pa. Super. Ct. 2006).

> the Rule 1925(a) opinion or so verbose and lengthy that it frustrates the ability of the trial judge to hone in on the issues actually being presented to the appellate court, see Kanter v. Epstein, 2004 PA Super 470, 866 A.2d 394 (Pa. Super. 2004), that is not an onerous burden to place on counsel. It only requires using a little common sense.
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> The Rule 1925(b) statement must be detailed enough so that the judge can write a Rule 1925(a) opinion, but not so lengthy that it does not meet the goal of narrowing down the issues previously raised to the few that are likely to be presented to the appellate court without giving the trial judge volumes to plow through.[53]

Overbroad concise statements raise similar problems to vague concise statements. For example, assume that a criminal defendant is convicted of 12 different charges. A concise statement alleging simply that the evidence was generally insufficient to support the jury's verdict would most likely be too vague.[54] Such a statement does not help the court focus on any particular charge, or any particular deficiency in the evidence.[55] Similarly, in a lengthy civil case, an appellant may not simply claim that the court erred in its evidentiary decisions, without being more precise about the specific decision to be challenged on appeal. If the appellant than raises a highly specific complaint on appeal, the chances are good that the trial court will not have addressed it, because the concise statement did not notify the court that the Appellant would raise that specific claim.

Occasionally, trial courts will decline to issue a Rule 1925 opinion on the ground that the concise statement is too vague to provide for a meaningful response. It is often true that the concise statements about which the courts complain are indeed too vague. On the other hand, appellants sometimes counter that the trial court is simply being disingenuous, complaining about vagueness when in fact the issue was perfectly clear. At present, this issue is being handled on an *ad hoc* basis in the superior court. It is diffi-

53. *Id.* at 2-3.
54. Commonwealth v. Lemon, 804 A.2d 34, 37 (Pa. Super. Ct. 2002).
55. *Lemon*, 804 A.2d at 37.

cult to predict whether, or when, the supreme court will address it. Moreover, that issue does legitimately affect meaningful appellate review, because it affects the quality of the trial court's opinion.

As written, the text of Rule 1925 is wildly at odds with a series of increasingly strict supreme court decisions interpreting that rule. Moreover, in the year since *Castillo* was published, it has been the subject of sustained criticism among appellate practitioners.[56]

Perhaps in response to this criticism, the Pennsylvania Appellate Court Procedural Rules Committee has proposed extensive revisions to both the text of Rule 1925 and its supporting official notes. These proposals have been the subject of public comment, and are now being considered by the supreme court. While it is beyond the scope of this article to set forth the proposed amendments in detail, the most important proposals are as follows.

First, subsection (b) would be expanded to explain precisely how, where, and when to file and serve the concise statement. Subsection (b)(2) would provide a deadline of 21 days from the date of the court's order. The court could also enlarge the time for filing or allow a supplemental concise statement "for good cause shown." A court could even cure a party's failure to file by ordering a concise statement nunc pro tunc "in extraordinary circumstances."

Second, subsection (b)(3) would direct the trial court to provide the appellant full instructions on how and when to serve the statement, as well as fair warning that any issue not included therein "shall be deemed waived."

Third, subsection (b)(4) would require the appellant to identify "each *ruling* that the Appellant intends to challenge with sufficient detail to identify all pertinent *issues* for the trial judge." (emphasis added). In other words, the focus would be on the court's rulings, not on any particular issue. According to proposed subsection (b)(4)(ii), "each ruling identified in that manner will be deemed to include every subsidiary issue included therein; any rulings not included in the statement of errors complained of shall be deemed waived."

Fourth, subsection (c) would provide a "fallback" procedure in both civil and criminal cases that could avoid automatic waiver. Specifically, subsection (c) would allow the superior court to re-

56. *See, e.g.*, Howard J. Bashman, "Pa. Supreme Court Rejects Opportunity To Relax Its Harsh Appellate Waiver Jurisprudence," reprinted at http://hjbashman.blogspot.com/2006_02_01_hjbashman_archive.html.

mand for further Rule 1925 procedures *nunc pro tunc*, "upon application of the appellant and for good cause shown." Thus, criminal cases would not necessarily be deferred to the PCRA, and civil cases could go forward as intended, without having to resort to a malpractice action against defaulting counsel. Subsection (c) would also explain how new Rule 1925 interplays with *Anders* petitions to withdraw.

These proposed amendments do more than just rewrite Rule 1925 to reflect current practice. Rather, the proposed amendments add back an essential measure of "fair warning", flexibility, and common sense to Rule 1925 procedures. While it is unclear when and to what extent the supreme court will adopt these amendments, practitioners may reasonably expect that much-needed Rule 1925 reform is on the horizon.