APPELLATE WAIVER IN PENNSYLVANIA AND ITS EFFECT ON LITIGANTS’ RIGHTS TO APPEAL

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ABSTRACT

This Comment will analyze how Pennsylvania courts are applying appellate waiver doctrine, and how excessive application of this doctrine is detrimentally impacting litigants’ exercise of their state constitutional right to appeal. Appellate courts have discretion to determine that litigants have waived their arguments if litigants do not strictly comply with a complicated morass of procedural and technical requirements legally necessary to preserve their arguments. While scholarly articles have engaged with the doctrine of appellate waiver, there is important empirical work that has not yet been done regarding the seemingly disproportionate use of the doctrine in Pennsylvania specifically. Ultimately, this Comment will use empirical findings to put forth three main arguments: (1) Pennsylvania appellate court judges are concluding that litigants have waived their appellate claims too frequently (and far more frequently than are the judges in other Third Circuit states); (2) the rigorous and overly formalistic rules of appellate procedure in Pennsylvania are contributing to the excessive number of cases finding that litigants have lost their rights to appeal; and (3) productive reform can be achieved through: arguing that Pennsylvania is infringing on the constitutional right to appeal, increased judicial restraint regarding the application of waiver doctrine, amendments to Pennsylvania’s formal waiver doctrine, and/or clearer instructions to Pennsylvania litigants regarding the steps they must take to preserve their claims.

While this Comment specifically focuses on the doctrine of appellate waiver in Pennsylvania, it also brings to light the possibility that many of the rights that we assume to be uniform across the states may actually mean quite different things in different jurisdictions. Thus, broadly speaking, there is a need for more deep empirical dives into the operation of state-to-state procedure in order to further uncover areas in which particular state practices and procedures might be creating obstacles to justice.

INTRODUCTION

The right to appeal is crucial to the American judicial system. Litigants across the United States take comfort in knowing that they would be granted

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the opportunity to appeal an adverse or erroneous judgment. Pennsylvania’s constitution specifically guarantees litigants the right to appeal:

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court . . . and there shall be such other rights of appeal as may be provided by law.¹

Despite this constitutional guarantee, however, Pennsylvania courts are substantially constricting litigants’ opportunities to have their claims heard on appeal by excessively finding that litigants have waived their claims. Such a trend is testing the limits of the constitutional right to appeal in Pennsylvania. By overusing and abusing appellate waiver doctrine, Pennsylvania appellate courts risk infringing on this fundamental state constitutional right.

In order to have claims heard on appeal, litigants must properly preserve each of their claims by raising them both at the trial court level and at the appellate court level.² Arguments that are not properly raised by litigants may be deemed by the appellate courts to be “waived” for appeal. Waived claims may be dismissed, in which case appellate courts will not hear the merits of such claims. However, appellate waiver is determined quite differently in different states. The states differ substantially in what they require of litigants in order to consider a claim properly raised and preserved for appeal. Further, the appellate courts have immense discretion in determining whether to find that a litigant who has procedurally defaulted has, in fact, waived their claim.³ States differ from each other greatly in both their formal waiver doctrines and in how stringently their appellate courts apply such doctrines in practice.

Likely because Pennsylvania’s rules for claim preservation are particularly exacting and because Pennsylvania appellate courts rarely utilize

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¹ PA. CONST. art. V, § 9.
² See Tory A. Weigand, Raise or Lose: Appellate Discretion and Principled Decision-Making, 17 SUFFOLK J. TRIAL & APP. ADVOC. 179, 182 (2012) ("Appellate ‘waiver’ presents in two primary forms: where an issue or contention is made on appeal that was not raised or sufficiently raised in the lower proceedings and where, regardless of whether or not raised below, there is a failure to raise or sufficiently raise the issue or contention on appeal.").
³ See generally id. at 179 (dedicating an entire section to judicial discretion).
their discretion to hear claims that have not been properly preserved, Pennsylvania appellate courts are finding litigants’ claims to be waived on appeal far more frequently than are courts in other states across the United States. The bulk of my empirical research compares the on-the-ground application of waiver doctrine in Pennsylvania to that of New Jersey and Delaware over a three-month time period. New Jersey and Delaware serve as useful comparators for Pennsylvania because the three states are geographically close to one another. I reviewed 30% of all cases discussing waiver in these three states during that period to determine whether and why courts were finding that litigants had waived their claims. Although I do not do the same analysis for the other states, my research suggests that Pennsylvania courts find claims to be waived on appeal far more frequently than courts of other states across the United States.

Within the time period I studied, Pennsylvania courts were not only discussing waiver at a seemingly excessive frequency when compared to New Jersey and Delaware but were also more likely to find that litigants had waived their claims based on procedural defaults (rather than concluding that litigants had not waived claims or finding other, irrelevant forms of waiver, such as waiver of Miranda rights). In the three-month period, 20.9% of all Pennsylvania opinions discussed the term “waiver.” In 55.6% of those cases, the court found that a litigant waived their claim by failing to properly preserve it. By way of contrast, in New Jersey and Delaware, appellate courts only found litigants’ claims waived due to procedural defaults in 16.6% and 18.2% of cases discussing waiver, respectively. And, while Pennsylvania courts found litigants’ claims waived for twenty-seven separate procedural reasons, New Jersey and Delaware each only found claims waived for two distinct reasons.

4 These states are also all in the Third Circuit, meaning that a subset will be reviewed for habeas under Third Circuit law.

5 For instance, from February 2019 through May 2019 across all states, there were 5,008 total cases that mentioned the term “waive” at least twice. Pennsylvania courts comprised more of these cases than any other state—686 cases (or 13.7% of all results) were from Pennsylvania. A similar search within the same period for the term “waive” in the same sentence as the term “claim” generated 5,767 results. Again, the highest number of results of any state came from Pennsylvania courts—848 of the 5,767 cases (or 14.7% of all results) were from Pennsylvania. California (a much larger state) was the second most represented, with a total of 795 results. After California, the next most represented state was Texas, with only 371 results.

6 See infra Part II.A. (I read a total of 215 Pennsylvania cases, 45 of which mentioned the term “waiver”).
This trend has real and substantial consequences. Excessive use of appellate waiver doctrine seriously puts into question Pennsylvania’s constitutional promise that litigants will be afforded a right to a meaningful appeal. Because litigants in Pennsylvania must comply with countless and meticulous procedural requirements in order to have their claims heard, simple, inadvertent defaults can render the constitutional guarantee to appellate review meaningless. Rigorous procedural rules are particularly dangerous for pro se criminal defendants who are given no additional grace by Pennsylvania courts regarding the intricate issue preservation rules and who are likely underinformed regarding the steps they must take in order to preserve their claims.\(^7\) One particularly exacting procedural rule, Pa. R.A.P. 1925(b), which has been repeatedly criticized as a “waiver trap,”\(^8\) accounted for nearly 17% of the waivers in the Pennsylvania cases in my study. For criminal defendants, losing a claim due to inadvertent waiver not only impedes their right to immediate appellate review, but can also eliminate their right to Supreme Court review and significantly restrict their opportunity to obtain habeas review.\(^9\) And, unfortunately, waiver in the Pennsylvania appellate courts seems to be particularly salient in criminal cases.\(^10\)

To deliver on the promises laid out in the Pennsylvania state constitution, Pennsylvania courts must carefully consider the effects waiver has on litigants (and, in particular, on criminal defendants) and there must be movement towards a relaxing of the formal waiver doctrine applied in Pennsylvania. This Comment proceeds as follows: Part I outlines the development of the right to appeal in the United States and explains how the doctrine of appellate waiver operates. This section also lays out the formal waiver

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\(^9\) See Wainwright v. Sykes, 433 U.S. 72 (1977) (concluding that the petitioner is barred from federal habeas review because he did not follow Florida state procedural waiver rules).

\(^10\) Within the Pennsylvania cases that found claims waived for a relevant reason, 50.4% were criminal, 16.8% were Post-Conviction Relief Act (PCRA), and 32.8% were civil.
doctrine as it exists in Pennsylvania, New Jersey, and Delaware—that is, the statutory and common law rules that courts in each of these states use to determine whether a litigant has waived their claim for appeal. Part II consists of an empirical dive into the on-the-ground application of appellate waiver doctrine by the courts in Pennsylvania as compared to the courts in New Jersey and Delaware. The data in this section make clear that Pennsylvania appellate courts are finding that litigants have waived their claims at a dramatically higher frequency than are the courts of other U.S. states. This section also delves into specific egregious instances of waiver in the Pennsylvania courts. Finally, Part III lays out the importance of this trend as well as suggestions for reform. It also discusses the implications of my research for state-controlled practices more generally.

I. THE RIGHT TO APPEAL

A litigant’s right to appeal an unfavorable trial court decision is critical to American jurisprudence. This section will briefly (1) explain the history and importance of the right to appeal in the United States, (2) describe what appellate waiver is and how it works, (3) explain judicial exceptions and discretion with respect to the “raise or waive” rule, and (4) lay out what formal waiver doctrine looks like in Pennsylvania, New Jersey, and Delaware.

A. Importance of Appeals in the United States

“The right to appeal at least once without obtaining prior court approval is nearly universal . . . the right has become, in a word, sacrosanct.”11 Every state in the United States has at least one level of appellate court12; and numerous state constitutions, including the Pennsylvania state constitution, explicitly guarantee appeals as of right.13

The concept behind a robust appellate review process is not new. Historically, however, the right to appeal reached far more broadly than it

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13 See PA. CONST. art. V, § 9, (“There shall be a right of appeal in all cases to a court of record from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.”).
does today. Whereas today, the appellate process grants a higher court the opportunity to correct a lower court’s errors of law, in the eighteenth and nineteenth centuries, appeals allowed a higher court to “completely and broadly rehear and redecide not only the law, but also the entire facts of a case.” Conversely, a “writ of error” referred to the process that removed only the law for re-examination (a process more closely synonymous with what we call “appeals” today). In *Appellate Courts as First Responders*, Joan Steinman argues that the fact that scholars, lawyers, and judges continue to use the term “appeal” rather than “writ of error” to refer to the current appellate review process suggests that we “perhaps still continue to believe in, this early, broader and more flexible and equitable notion of appeal.”

Regardless of potential American aspiration for a more flexible right to appeal, it is a general principle in today’s court system that appellate courts will only make holdings on claims that were raised at the lower court level and will not consider new issues on appeal. The next sub-section will explain appellate waiver, will elaborate on what is colloquially referred to as the “raise or waive” rule, and will discuss potential exceptions to that rule.

**B. Operation of Appellate Waiver Doctrine**

There are two scenarios that can result in a litigant waiving their argument for appeal. First, a litigant can waive a claim by failing to raise or to sufficiently raise it in the lower court proceedings. Second, regardless of whether the claim was raised below, a litigant can waive a claim by failing to raise or to sufficiently raise the issue on appeal. When an appellate court finds that a litigant has waived a claim by failing to raise or properly preserve that claim, the court will then not rule on the merits of the claim. Technically, waiver is defined as the “intentional relinquishment of a known right.” Since the failure to properly preserve an issue for appeal is usually inadvertent, it is more precisely termed “forfeiture.” However, courts

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14 Steinman, *supra* note 12, at 1547.
15 *Id.*
16 *Id.*
17 *Id.* at 1548.
18 Weigand, *supra* note 2, at 182.
19 *Id.*
20 *Id.*
21 See United States v. Olano, 507 U.S. 725, 733 (1993) ("[F]orfeiture is the failure to make a timely assertion of a right.").
across the U.S. typically use the term “waive” to describe the consequences of procedural defaults (even inadvertent procedural defaults)—thus, my use of the term “waiver” throughout this Comment refers to unintentional relinquishment of claims through procedural defaults.\(^{22}\)

An appellate court can undoubtedly find that a litigant has waived their claim after the litigant’s opposing party has successfully argued that the litigant waived their claim by procedurally defaulting. It is less clear, however, whether it is appropriate for appellate courts to find a litigant’s claim waived *sua sponte*, when neither party has raised a waiver-related argument. The “well-established rule” is that “failure to raise ‘waiver’ at the time of the motion for judgment notwithstanding the verdict, never mind on appeal, is itself a waiver.”\(^{23}\) In other words, appellate court judges should not waive a litigant’s claim unless the other party has argued that their claim has been waived. However, this has not stopped many appellate courts, including the Superior Court of Pennsylvania, from finding litigants’ claims waived even in the absence of waiver-related arguments by either party.\(^{24}\)

\(^{22}\) I conducted searches including the term “forfeiture” to confirm that states were, in fact, using the term “waiver,” not the term “forfeiture” to describe the loss of a claim due to inadvertent procedural defaults. It is possible that certain states are using other terms to discuss waiver (e.g., by simply saying “failure to preserve”). That is beyond the scope of this Comment and is perhaps an area for future research.

\(^{23}\) Weigand, *supra* note 2, at 249 (citing Fox v. F & J Gattozzi Corp., 672 N.E.2d 547, 549 (Mass. App. Ct. 1996)) ("[I]f the nonmoving party fails to object to the [trial] judge’s consideration of new grounds in deciding whether to grant the [jnov] motion, then the nonmoving party is said to have waived the right to object on appeal."); see also Williams v. Runyon, 130 F.3d 568, 572 (3rd Cir. 1997) ("[W]here a party did not object to a movant’s Rule 50(b) motion specifically on the grounds that the issue was waived by an inadequate rule 50(a) motion, the party’s right to object on that basis is itself waived."); Collins v. Illinois, 830 F.2d 692, 698 (7th Cir. 1987) (stating same); Cox v. Freeman, 321 F.2d 887, 891 (8th Cir. 1963) (stating that plaintiff was precluded from raising waiver issue because plaintiff failed to raise it when the trial court directed the verdict).

\(^{24}\) See, e.g., Matley v. Minkoff, 859 N.E.2d 887, 890–91 n.8 (Mass. App. Ct. 2007) (noting that the appellant never raised or briefed the waiver issue but rather simply stating in a footnote that the court had the power to consider the issue *sua sponte*). See also Thode v. Ladany, No. 29 EDA 2014, 2014 WL 10790507, at *2 n.6 (Pa. Super. Ct. Nov. 6, 2014) ("Although the University did not raise the issue of waiver, we still have the authority to rule *sua sponte* that Thode waived her right to pursue judgment n.o.v."); Commonwealth v. Edmondson, 718 A.2d 751, 752 n. 7 (Pa. 1998) ("This Court may raise the issue *sua sponte*."); Wirth v. Commonwealth, 95 A.3d 822, 836–37 (Pa. 2014) (finding that it was proper for lower court to hold *sua sponte* that appellant waived issue by failing to properly develop it in appellate brief); Commonwealth v. Hill, 16 A.3d 484, 494 (Pa. 2011) ("Rule 1925 violations may be raised by the appellate court *sua sponte* . . .").
The raise or waive rule is subject to exceptions. The most widely recognized exception is the “fundamental error” exception, which has been adopted by all but eight states.25 This exception allows courts to hear the merits of a claim when the trial court made an obvious and crucial error. Pennsylvania, however, is one of the eight states that does not recognize the fundamental error exception.26 However, Pennsylvania does recognize an exception for claims involving the “legality of a sentence.” Such claims cannot be waived.27

Further, the raise or waive rule is discretionary. Not only do the states differ substantially in their formal waiver doctrine, but the courts themselves also differ in how often they choose to utilize their discretion to hear the merits of claims despite litigants’ procedural defaults. In *Hormel v. Helvering*, Justice Black famously wrote, “[t]here may always be exceptional cases or particular circumstances which will prompt [an] . . . appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court . . . below . . . Orderly rules of procedure do not require sacrifice of . . . rules of fundamental justice.”28 Justice Stevens similarly remarked that it is “well settled that a litigant’s waiver or forfeiture of an argument does not, in the absence of a contrary statutory command, preclude the courts of appeals from considering those arguments.”29

Justice Black’s rationale for allowing appellate courts to exercise such broad discretion when deciding whether to apply an exception to the raise or waive rule is one of many. In *Raise or Lose: Appellate Discretion and Principled Decision-Making*, Tory Weigand argues that appellate courts are given discretion in determining whether to consider or waive claims because they are responsible for clarifying what the law is when disputes arise, and thus

25 Weigand, supra note 2, at 222.
26 Id.; Schmidt v. Boardman Co., 11 A.3d 924, 942 (Pa. 2011). The other states refusing to adopt the exception are Alabama, Arkansas, California, Georgia, North Carolina, Rhode Island, and South Carolina.
should not “have [their] hands tied by the parties[’] presentation.”\textsuperscript{30} She writes, “appellate court[s] cannot be restrained from considering legal rules, claims, or issues omitted by the parties.”\textsuperscript{31} In \textit{Appellate Courts as First Responders}, Joan Steinman justifies judicial discretion by reasoning that, “[w]e want courts to have some discretion because [it allows them to make use of] . . . case-specific information that [firm rules cannot accommodate].”\textsuperscript{32}

Broadly speaking, the grant of discretion to appellate judges aims to promote equality and justice. However, largely as a result of the discretion given to judges in determining how to handle claims that were not raised below, state courts differ substantially in their approaches to allowing appellate review of new, or improperly preserved, claims.\textsuperscript{33} “An examination of cases in state appellate courts clearly shows that for every exception to the general rule one court has permitted, another court has refused to permit a similar exception.”\textsuperscript{34} Very few courts have developed objective criteria for determining whether to recognize an exception to the general raise or waive rule,\textsuperscript{35} further contributing to the lack of uniformity among the states’ approaches to appeals and to waiving claims. As a result, litigants in states (like Pennsylvania) with strict procedural rules and less lenient appellate court judges are far more likely to have their claims, even meritorious ones, waived due to procedural defaults.

D. \textit{Formal Waiver Doctrine in Pennsylvania, New Jersey, and Delaware}

As mentioned above, the general rule is that, if a litigant fails to raise an argument either at the trial or appellate level, that argument may be found waived for appeal. However, this simple idea can encompass an enormous range of practices. What constitutes properly “raising” an argument varies

\begin{footnotesize}
\begin{enumerate}
\item Weigand, \textit{supra} note 2, at 190.
\item \textit{Id.}
\item Steinman, \textit{supra} note 12, at 1567 (quoting Aaron-Andrew P. Bruhl, \textit{Deciding When to Decide: How Appellate Procedure Distributes the Costs of Legal Change}, 96 \textsc{Cornell L. Rev.} 203, 249 (2011) [alteration in original]).
\item Weigand, \textit{supra} note 2, at 225–227 (“Approximately eight (8) states apply plain error to criminal cases but not civil matters, while twenty (20) states utilize the Olano formulation, including the public interest prong discretionary element. There are generally three groups of plain error type of review among the state courts: the Olano-public interest approach, the outcome determinative only approach, and hybrids of both or either.”).
\item \textit{Id.} (“The cases indicate . . . that very few courts have attempted to develop objective criteria.”).
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from state to state. I will term a state’s formal rules regarding what an appellant must do to properly preserve their claims the state’s “formal waiver doctrine.”

In this sub-section, I will discuss the formal waiver rules in Pennsylvania, New Jersey, and Delaware. This is distinct from how judges apply those rules (which will be discussed in Part II of this Comment). The formal waiver doctrines in Pennsylvania and the other Third Circuit states (New Jersey and Delaware) differ from one another in how much competence and precision they expect in an appeal.

i. Formal Waiver Doctrine in Pennsylvania

Pennsylvania’s formal rules regarding how to preserve claims for appeal are quite rigorous. Pennsylvania has a rule of appellate procedure, Rule 1925, that, if not properly followed by litigants, may result in complete waiver of a litigant’s claims. Rule 1925(b) provides that, should the judge entering the order giving rise to the notice of appeal desire clarification of the complaints in the appeal, they may order the appellant to file in the trial court and serve on the judge a “concise statement of the errors complained of on appeal.”

If the litigant does not comply with strict service and timing requirements for their Rule 1925(b) statement, they risk waiver of the claims included in that statement.

In addition to the rules set by Rule 1925(b), the Pennsylvania Rules of Appellate Procedure also set forth intricate substantive requirements for an appellant’s brief. For instance, a party must set forth discussion and citation of authorities in their appellate brief, in relation to the points of the party’s

36 PA. R. APP. P. 1925(b).
37 See PA. R. APP. P. 1925(b)(1) (explaining that service on the judge must be at the location specified in the order, and must either be in person, by mail, or by any other means specified in the order); PA. R. APP. P. 1925(b)(2)(i) (declaring that the appellant will have at least twenty-one days from the date of the order’s entry on the docket to file and serve the statement. The judge can extend the time period provided for good cause (which includes delay in the production of a necessary transcript so long as “delay is not attributable to a lack of diligence in ordering or paying for such transcript by the party.”)); PA. R. APP. P. 1925(b)(4) (stating that the statement the party serves on the judge must: set forth “only those errors that the appellant intends to assert,” concisely identify each error the appellant intends to assert with sufficient detail, and not be redundant or provide lengthy explanations as to any error).
38 See PA. R. APP. P. 1925(b)(4)(vii) (“Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.”); PA. R. APP. P. 1925(b)(5)(iv) (stating that appellate claims are waived if the Rule 1925(b) statement is untimely).
argument or arguments.\textsuperscript{39} These citations must follow the appellate rules regarding citation of authorities.\textsuperscript{40} If a brief fails to provide citation to relevant legal authority or to otherwise adequately develop a claim, that claim will be waived on appeal.\textsuperscript{41} Issue spotting without analysis or legal citation “precludes appellate review of a matter.”\textsuperscript{42} Additionally, a claim will be waived if the party fails to adequately argue a point mentioned in their brief on appeal.\textsuperscript{43} And, as discussed above, issues must be raised in the lower court in order to be preserved for appeal.\textsuperscript{44}

There are also several specific requirements for how a party must format their appellate brief in order to preserve their claims. For example, to preserve an issue, a party must discuss the issue in the questions presented section of the appellate brief\textsuperscript{45} and in the body of the appellate brief.\textsuperscript{46} And, the party must be specific about the issues it raises in the questions presented.\textsuperscript{47} An appellate court will also waive a litigant’s claim in Pennsylvania if the party poses a “litany of rhetorical and hypothetical

\textsuperscript{39} PA. R. APP. P. 2119(a).
\textsuperscript{40} Id.; PA. R. APP. P. 126 (“When citing authority, a party should direct the court’s attention to the specific part of the authority on which the party relies. . . . If a party cites a decision . . . the party shall indicate the value or basis for such citation in a parenthetical following the citation.”).
\textsuperscript{42} 16A Standard Pennsylvania Practice 2d § 91:15.
\textsuperscript{44} See In re Pleasanton’s Estate, 159 A. 711,712 (Pa. 1932) (stating that a Pennsylvania court need not go further than the questions specified in the statement of questions in the appeal); but see Werner v. Werner, 149 A.3d 338, 341 (Pa. Super. Ct. 2016) (stating that although “[i]ssues not presented in the statement of questions involved are generally deemed waived . . . such a defect may be overlooked where [an] appellant’s brief suggests the specific issue to be reviewed and appellant’s failure does not impede our ability to address the merits of the issue.”) (third alteration in original).
\textsuperscript{45} See, e.g., Krishnan v. Cutler Grp., Inc., 171 A.3d 856, 894 (Pa. Super. Ct. 2017) (holding that a party waived a challenge to sufficiency of the evidence or the weight of the evidence underlying a trial court’s finding where the party’s statement of issues framed the question as one of weight of the evidence, while the argument section of the brief seems to present a sufficiency argument).
questions” along with underdeveloped arguments or if a litigant merely puts forth “general complaints” in their brief without stating factual findings.

And, as mentioned above, Pennsylvania is one of the few states that does not recognize the “fundamental error exception” to the raise or waive rule. In Commonwealth v. Clair, the Supreme Court of Pennsylvania eliminated the fundamental error doctrine for criminal litigants, holding that “no longer will allegations of basic and fundamental error serve to enable parties in criminal matters to seek reversal on alleged errors not properly raised below.” Perhaps this is indicative of a sentiment among Pennsylvania appellate courts that properly preserving claims is a critical pre-requisite to appellate review. In Schmidt v. Boardman, the Supreme Court of Pennsylvania, reaffirming the removal of the fundamental error doctrine, albeit in the civil context, voiced such a sentiment:

[In recent decades, this Court has taken a stricter approach to waiver than many other jurisdictions, for example, by abolishing the plain error doctrine. Compare, e.g., Dilliplaine v. Lehigh Valley Trust Co., 457 Pa. 255, 258-60, 211 A.2d 114, 116-17 (1974) (dispensing with the plain error doctrine in civil cases in Pennsylvania), with Conn, Practice Book 1998, § 60-5 (embodying the plain error doctrine as applicable in Connecticut). While ... we recognize there are countervailing considerations, on balance, we believe the general requirement that one challenging a civil verdict must raise and preserve challenges at all stages best reconciles with our existing rules and approach to trial and appellate practice.]

ii. Formal Waiver Doctrine in Delaware

Delaware’s formal waiver doctrine is also relatively robust. In Delaware, “[o]nly questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented.”

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50 Fundamental error had already been eliminated in civil cases by Dilliplaine v. Lehigh Valley Tr. Co., 457 Pa. 255, 322 A.2d 114, 115 (Pa. 1974).
53 DEL. SUP. CT. R. 8.
Pursuant to this rule, the court will not consider questions that were not fairly presented\textsuperscript{54} to the trial court absent plain error.\textsuperscript{55}

Failure to raise a legal issue in an opening brief may also result in waiver in Delaware.\textsuperscript{56} Additionally, Delaware has specific requirements for the filing of a notice of appeal.\textsuperscript{57} Failure to comply with these requirements can result in dismissal of appeal for lack of jurisdiction.\textsuperscript{58} If a litigant fails to file an opening brief or an appeal in a timely manner, they also risk waiver.\textsuperscript{59} A claim may not be raised solely in a footnote,\textsuperscript{60} the headings, or the table of contents of an opening brief.\textsuperscript{61} To avoid dismissal,\textsuperscript{62} a copy of the order of judgment sought to be reviewed must be attached to the notice of appeal.
and, if not available, a statement noting the unavailability must be included. Failure to arrange for payment of cost of the transcript may also result in dismissal of an appeal.

Delaware distinguishes between appellate waiver due to a party’s failure to raise an issue and due to trial counsel’s affirmative statement that there is no objection to opposing counsel’s argument. The latter is considered a “stronger demonstration of a waiver ‘than the mere absence of an objection’” and considered an “express and effective waiver as to any appellate presentation on an issue . . .”

iii. Formal Waiver Doctrine in New Jersey

Finally, New Jersey’s formal waiver doctrine is far less extensive than Pennsylvania’s or Delaware’s. In New Jersey, an issue presented for appeal must be briefed or it may be waived. This rule, however, is not absolute. Further, an appellate court will generally confine itself to the record when reviewing trial errors. If evidence submitted on appeal was not before the trial court, the appellate court will generally not consider it. A litigant may also waive a claim through inaction. Finally, for an appeal to be heard, it

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63 DEL. SUP. CT. R. 7(c)(9).
67 See N.J. CT. R. 2:10-2 (“[T]he appellate court may, in the interests of justice, notice plain error not brought to the attention of the trial or appellate court.”). This plain error rule is helpful to litigants who fail to properly preserve issues before a trial court. New Jersey appellate courts apply the same standard of review regardless of whether an issue was properly raised before the trial court. See Ellen T. Wry & Christina Oldenburg Hall, New Jersey Standards for Appellate Review 1, 18 (2022) (“All error, including both plain error and harmful error [error brought to the trial judge’s attention], is tested by the standard set forth in Rule 2:10-2, that is, as set forth above, whether the error is ‘clearly capable of producing an unjust result.’”). Therefore, if an error is properly preserved for appeal, but is harmless, the court will not reverse the verdict for that error. However, if an error is not properly preserved for appeal, and the error is harmful, the court will reverse the verdict.
69 N.J. CT. R. 2:5-4[a).
70 See State v. Dorn, 182 A.3d 938, 944 (N.J. 2018) (“It is a longstanding principle that litigants may waive objections through inaction.”).
must be served and filed in a timely manner.\textsuperscript{71} Appellate courts may dismiss an appeal due to procedural difficulties.\textsuperscript{72}

In sum, although the right to appeal is critical to the American legal system and to our conception of fundamental due process, state appellate courts have broad discretion regarding when to waive or to consider litigants’ arguments on appeal. As a result, state appellate doctrine differs vastly from state to state regarding how much precision is expected of litigants in order to preserve their claims. Both a state’s formal waiver doctrine and the way that the appellate courts apply that doctrine affect a litigant’s chances at having their claims heard on appeal. Because of Pennsylvania’s strict formal waiver doctrine and Pennsylvania appellate courts’ tendency to decide to waive rather than to use their discretion to hear claims that were not perfectly preserved, litigants in Pennsylvania are facing severe hurdles to accessing their constitutionally guaranteed right to appeal. The next section will be an empirical dive into how formal waiver doctrine and judicial discretion is practically impacting litigants in Pennsylvania in comparison to litigants in other states.

II. EMPIRICAL FINDINGS AND SUB-TRENDS

While extensive scholarship has analyzed the intricacies of the raise or waive rule and its potential exceptions, the aim of this Comment is to analyze the practical impact that judicial discretion, in combination with formal waiver doctrine, has on litigants’ access to appellate review in Pennsylvania. Pennsylvania’s state constitution guarantees a right to appeal, “[t]here shall be a right of appeal in all cases to a court of record from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.”\textsuperscript{73} Notwithstanding this constitutional mandate, appellate courts in Pennsylvania are waiving litigants’ claims, thereby denying their right to have the merits of those claims heard on appeal, far more frequently than appellate courts in other states.

\begin{itemize}
\item \textsuperscript{71} N.J. Ct. R. 2:5-1.
\item \textsuperscript{72} N.J. Ct. R. 2:8-2.
\item \textsuperscript{73} PA. CONST. ART. V, §9.
\end{itemize}
A. Methodology

To analyze the practical effects of waiver doctrine on litigants in Pennsylvania, I began by investigating how frequently Pennsylvania courts waive litigants’ claims in comparison to courts in New Jersey and Delaware. I selected New Jersey and Delaware as comparators for Pennsylvania because they are in the same geographical region as Pennsylvania and are also in the Third Circuit.

I initially conducted a Westlaw search for how frequently the term “waiver” was mentioned in Pennsylvania, New Jersey, and Delaware appellate court opinions (both published and unpublished) during a five-year period. I wanted to analyze cases from a relatively recent time frame while also ensuring that my results would not be affected by the COVID-19 pandemic. Thus, I chose to confine my results to the time period between January 2015 and January 2020 (the most recent five-year time frame prior to the onset of the pandemic). The results demonstrated that 14.4% of all Pennsylvania opinions during that time frame contained both the term “waiver” and the term “appeal”, while the same was true for only 5.39% of New Jersey opinions and 5.33% of Delaware opinions. Furthermore, when running a Westlaw search for cases mentioning the term “waiver” at least twice, results showed that 14.9% of Pennsylvania opinions mentioned waiver two or more times, while only 6.9% of New Jersey cases and 11.6% of Delaware cases did so. Similar trends arose for numerous other waiver-related searches, some of which are displayed in Figure 1, below.

By way of a baseline comparison, while each of the “waiver” related searches by far yielded the largest percentage of cases in Pennsylvania, similar searches for neutral terms like “jurisdiction” and “justification” showed a much more similar percentage across the states within the same time frame (and, in fact, Pennsylvania had slightly smaller percentages than New Jersey and Delaware). For example, 21% of Pennsylvania cases, 23% of New Jersey cases, and 27% of Delaware cases discussed “jurisdiction.” And 2.08% Pennsylvania cases, 3.30% of New Jersey cases, and 5.87% of Delaware cases discussed “justification.”

When I conducted a search for just the term “waiver” (without including any reference to appeals) during the same five-year time period, the results were less drastic. “Waiver” was mentioned at least one time in 20.9% of Pennsylvania opinions, 20.13% of Delaware opinions, and 13.4% of New Jersey opinions. One potential explanation for this is that the bulk of the New Jersey and Delaware waiver cases studied dealt with forms of waiver that are irrelevant to the subject of this Comment and that do not necessarily occur in the appellate courts. In New Jersey, 72% of the waiver cases I studied discussed irrelevant forms of waiver (i.e., waiver of Miranda rights, waiver of right to jury trial, Medicaid waiver, waiver of right to counsel). In Delaware, 59% of waiver cases
These initial search results made clear that Pennsylvania courts were finding, or at least discussing, waiver as it relates to appeals at a shockingly higher rate than appellate courts in other Third Circuit states. Although this Comment focuses primarily on New Jersey and Delaware as comparators, a preliminary Westlaw search across the United States indicated that Pennsylvania is likely a broader outlier as well.\textsuperscript{76}

\begin{figure}[h]
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\includegraphics[width=0.5\textwidth]{figure1.png}
\caption{Percentage of Cases Containing Waiver-Related Terms From 2015-2019}
\end{figure}

\textsuperscript{76} discused irrelevant forms of waiver (i.e., guilty plea as waiver, waiver of right to counsel, voluntary waiver of conflict of interest). In Pennsylvania, however, only 28% of the waiver cases concerned irrelevant types of waiver (i.e., waiver of Miranda rights, waiver of counsel, waiver of immunity). From February 2019 through May 2019 across all states, there were 5,008 total cases that mentioned the term “waive” at least twice. Pennsylvania courts comprised more of these cases than any other state—686 cases (or 13.7% of all results) were from Pennsylvania. A similar search within the same time period for the term “waive” in the same sentence as the term “claim,” generated 5,767 results. Again, the highest number of results of any state came from Pennsylvania courts—848 of the 5,767 cases (or 14.7% of all results) were from Pennsylvania. California (a much larger state) was the second most represented, with a total of 795 results. After California, the next most represented state was Texas, with only 378 results. When searching for cases containing at the term “waiver” and the term “issue preservation” between February 1, 2019 and May 1, 2019, the total number of cases from all states was 17 and Pennsylvania cases made up 13 of those 17 cases. The other states that generated results—Kansas, Michigan, North Carolina, and Wyoming—each had only one result. When that same search is done over a five-year period, between January 1, 2015 and January 1, 2020, there were 282 results, 162 of which were from Pennsylvania. The next most represented state was Washington with 20 results. Finally, when searching for the term “waive” in the same sentence as the word “claim” between January 1, 2015 and January 1, 2020, about 25%
To gain deeper insight into the substance of the opinions mentioning “waiver” in each state, I read 30% of each state’s waiver cases that were decided between February and May of 2019. Because a larger percentage of Pennsylvania cases discussed waiver in comparison to New Jersey or Delaware cases (and because the overall number of opinions filed per month in each state varies), this amounted to the reading of 215 Pennsylvania cases, 50 New Jersey cases, and 22 Delaware cases. I wanted to read a substantial number of cases from each of the three states in the relevant time period in order to: (1) ensure that the cases discussing waiver were cases in which the court was, in fact, finding claims waived, and (2) to gain further data on why claims were waived in Pennsylvania, New Jersey, and Delaware.

B. Findings across Pennsylvania, New Jersey, and Delaware

i. Sub-trends within Pennsylvania Cases

The vast majority of the Pennsylvania opinions discussing waiver were issued in the Superior Court of Pennsylvania (89.6%).

Of the 215 Pennsylvania cases in my study mentioning waiver, the largest subset was criminal. Specifically, 45.9% of cases were criminal cases, 15.2% were Post Conviction Relief Act (PCRA) cases, and 38.9% were civil cases. And, as demonstrated in Figure 2, below, within the cases that found claims waived for one of the relevant reasons, 50.4% were criminal, 16.8% were PCRA, and 32.8% were civil.

77 I chose this time period because the percentages of cases discussing waiver most closely mimicked the five-year range and because this was a recent time period prior to the onset of the COVID-19 pandemic.

78 Within each state, after searching for “waiver” in the specified time period, I read an equal number of cases from the front of the Westlaw search results, the back of the Westlaw search results, and the middle of the Westlaw search results. In doing so, I aimed to control for the possibility that the cases at the beginning of the search results would be the cases most likely to be discussing waiver frequently and most likely to actually be finding claims waived.

79 By way of contrast, in New Jersey 30% of cases waiving claims were criminal and 70% were civil and in Delaware 66.6% of cases waiving claims were criminal and 33.4% were civil.
Within the PCRA, criminal, and civil cases mentioning waiver, 67.6%, 60.2%, and 53.6%, respectively, found at least one claim waived. The frequency of waiver findings in PCRA, criminal, and civil cases is demonstrated in Figure 3, below.
ii. Comparison of Pennsylvania Results to New Jersey and Delaware Results

Not only are Pennsylvania courts discussing waiver at a much higher frequency than New Jersey or Delaware courts, but it is also more likely that when they do discuss waiver, it is in situations where the court is, in fact, waiving litigants' claims.

Within each state, there were inevitably several cases that dealt with types of waiver that are entirely irrelevant to the subject of this Comment (i.e., waiver of right to counsel, waiver of Miranda rights, waiver of right to jury trial). This was especially true in New Jersey and Delaware. Further, some cases discussed the possibility of waiver, but ultimately found that litigants’ claims were not waived. Thus, I sorted through the cases to discern: (1) how many opinions in each state discussed the relevant type of waiver (i.e. waiver

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\[80\] Supra, note 75.
as a result of failing to comply with procedural and/or technical rules, elaborated on in Section 1 of this Comment), and (2) how many of those cases actually found litigants’ claims to be waived.

In 55.6% of the Pennsylvania cases in my study, the court found that litigants waived claims for one of the reasons discussed in Section 1 of this Comment. Specifically, Pennsylvania courts most frequently found waiver of claims for: failure to adequately comply with Rule 1925(b); failure to raise claims in the lower court; failure to raise or develop claims in the appellate brief; and failure to adequately cite legal authority in support of claims. In New Jersey, only 16.6% of the cases that I read found waiver for one of the relevant reasons. Of those cases, New Jersey courts most frequently found claims waived for failure to raise claim in appellate brief and for inaction. And, in Delaware, only 18.2% of waiver cases found a relevant form of waiver. Of those cases, Delaware courts most frequently found claims waived for failure to raise claim in a timely manner and for failure to raise the issue on appeal. These results are demonstrated visually in the Figure 4, below.

**Figure 4: Percentage of Cases Mentioning Waiver in Which the Court Found at Least One Relevant Waiver**

Pennsylvania courts cycled through at least twenty-seven reasons for finding waiver in the cases I studied, while New Jersey and Delaware courts

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81 Pennsylvania courts’ reasons for finding waiver included, but were not limited to: 1925(b) (lack of specificity); 1925(b) (failure to raise claims); 1925(b) (untimely statement); failure to raise before filing 1925(b) statement; failure to cite legal authority; failure to develop or argue in brief; failure to raise
each found claims waived for only two reasons. This is likely in part a result of Pennsylvania’s intricate issue preservation rules. However, such a trend also indicates that Pennsylvania judges are applying their formal waiver doctrine more stringently than are the judges in New Jersey and Delaware.

C. Particularly Egregious Findings of Waiver in PA Criminal Cases

Notably, not only are Pennsylvania appellate courts finding waiver at a significantly higher rate than other Third Circuit courts, but there are also several cases in which I found the findings of waiver to be particularly egregious.

i. Egregious Criminal Cases Generally

In Commonwealth v. Brock, for example, the appellate court found eight separate reasons to waive each of the appellant’s first eight claims. The appellant was a criminal defendant appealing his sentence of 15.5 to 31 years in prison plus five years of probation following his conviction for “aggravated assault, carrying a firearm without a license, carrying a firearm on public streets in Philadelphia, possession of an instrument of crime, and person not to possess a firearm, and his guilty plea to possession with intent to deliver (PWID).”

The court found that the appellant’s first claim—that the trial court forced the appellant to plead guilty in front of the jury—was waived because objection at trial court; failure to file a post-sentence motion; failure to challenge discretionary aspects of new sentence during the sentencing hearing; untimely challenge to merits of decision; failure to raise challenge in petition for review; failure to raise on direct appeal; failure to raise in post-trial motion; failure to raise in PCRA petition; failure to raise at sentencing hearing; failure to preserve claim in motion to suppress; failure to produce hearing transcript at trial; failure to mention or identify any specific grounds in post-verdict motion; failure to include argument in argument section; failure to include Appellant’s post-sentence motion in the record; failure to raise issue in concise statement; failure to include argument in preliminary objections to the Complaint or in Answer; failure to raise issues challenging discretionary aspects of a sentence in post-sentence motion; failure to include Rule 2119(f) statement in brief and thus waived challenge to discretionary aspects of sentence; post-sentence motion consisted of mere boiler-plate; issue was too ambiguous.

82 New Jersey courts’ reasons for finding waiver were failure to raise in brief and waiver through inaction. Delaware courts’ reasons for finding waiver of claims were failure to raise claim in a timely manner and failure to raise on appeal.


84 Id. at *1.
the appellant failed to raise a contemporaneous objection to the question.\(^{85}\)

The court found that appellant waived his second claim—that the trial court erred in overruling the appellant’s objection to an expert’s stated degree of scientific certainty regarding the conclusions he drew—because the appellant “raise[d] new theories on appeal unrelated to his cited objection at trial.”\(^{86}\)

His third claim, that “the trial court erred in allowing the Commonwealth to read into the record the dates of Appellant’s trial listings,” was found to be waived because the appellant only objected to one of the dates being read into the record at trial “whereas on appeal Appellant alleges that the trial court erred in admitting the complete list of trial dates into the record.”\(^{87}\)

The court held that the appellant waived his fourth claim, that the trial court erred in denying Appellant’s motion to suppress, because the appellant apparently failed to “develop it in any meaningful way in his brief.”\(^{88}\) His fifth claim, that the trial court erred in granting the Commonwealth’s motion in limine, was waived because he abandoned it within his argument, “instead focusing on his sixth claim.”\(^{89}\) But his sixth claim was waived due to his failure to raise it in his Rule 1925(b) statement.\(^{90}\) The court found the appellant’s seventh claim, that the trial court erred in denying the appellant’s motion to suppress, waived due to the appellant’s guilty plea.\(^{91}\) And finally, the court held that the appellant waived his eighth claim of violation of right to a speedy trial because Appellant failed to raise this claim at the trial court level.\(^{92}\)

Instead of spending time assessing and analyzing the merits of the Appellant’s first eight claims, the Superior Court of Pennsylvania searched for ways to conclude that Appellant waived each of those claims on technicalities.

\(^{85}\) Id. at *2.

\(^{86}\) Id. at *3.

\(^{87}\) Id.

\(^{88}\) Id.

\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id.

\(^{92}\) Id. at *4.
Rule 1925(b), which has been repeatedly criticized as a “waiver trap,”93 accounted for 16.8% of the waivers in the Pennsylvania cases in my study. This rule is one of the major contributors to the overwhelming amount of waiver occurring in Pennsylvania. It has been amended at least three times in the last fifteen years in hopes of ameliorating the waiver concerns it creates. Although Rule 1925(b) was amended slightly in 2019 to address waiver-related concerns, it is unlikely that these changes will decrease the frequency of appellate waiver in Pennsylvania by any quantifiable measure.94 In the following section I will suggest further amendment to the rule.

Pennsylvania requires Rule 1925(b) statements because the trial court generally does not, absent an appeal, produce an opinion. Thus, Pennsylvania litigants often appeal a result with no knowledge of the court’s reasoning. Rule 1925 requires the trial court to provide the appellate court reasons for its decisions upon receipt of appeal, and Rule 1925(b) allows the trial court to direct the appellant to provide a statement of errors complained of on appeal.95 In other words, if a 1925(b) statement is requested, the litigant must explain to the court what the litigant believes the court did wrong.96 Then, the court will likely respond with a defensive opinion, designed to defeat the appeal.

If a litigant’s 1925(b) statement does not comply with Rule 1925’s procedural requirements, the litigant’s claim will likely be waived. As mentioned above, in nearly 17% of the Pennsylvania waiver cases in my study, waiver was based on a litigant’s failure to adequately comply with Rule 1925(b). This affected criminal litigants most significantly (61.8% of the cases waiving on Rule 1925(b) grounds were criminal or PCRA).

Waivers due to technical Rule 1925(b) errors are often unnecessarily technical and particularly unjust for pro se defendants who were likely underinformed regarding the numerous deadlines and standards they must have met in order to have preserved their claims. For example, in Commonwealth v. Mayer, the appellant was a pro se defendant, appealing from an order denying

93 See Sargent; McKeon, supra note 8.
94 See Reform Rule 1925(b), Part III (B)(ii), infra.
95 PA. R. APP. P. 1925.
96 See Commonwealth v. Rogers, 250 A.3d 1209, 1224 (Pa. 2021) (“The function of the concise statement is to clarify for the judge who issued the order the grounds on which the aggrieved party seeks appellate review – so as to facilitate the writing of the opinion.”).
his petition under the PCRA.\textsuperscript{97} While initially represented by counsel, the appellant entered a guilty plea for burglary and robbery and was sentenced to five to ten years in prison.\textsuperscript{98} The appellant later filed a timely, \textit{pro se} PCRA petition and was appointed new counsel.\textsuperscript{99} Five months later, the appellant’s counsel filed a petition seeking to withdraw, and the PCRA court granted counsel’s petition.\textsuperscript{100} Shortly thereafter, the PCRA court denied relief to the appellant under the PCRA, and he appealed \textit{pro se}, setting forth the following issues: “1. Ineffective Assistance of Counsel. Defendant forced into Plea. 2. Ineffective Assistance of Counsel, Failure to call witnesses to cast doubt on Prosecution key witness. 3. Ineffective Assistance of Counsel, Failure to Suppress Discovery evidence.”\textsuperscript{101} The Superior Court of Pennsylvania held, however, that all of Appellant’s claims were waived because he failed to file a Rule 1925(b) concise statement responding to the lower court’s order requiring him to do so.\textsuperscript{102} In so holding, the Court wrote, “\textit{pro se} status does not entitle a litigant to any particular advantage due to the lack of legal training and the \textit{pro se} litigant must comply with the Pennsylvania Rules of Appellate Procedure.”\textsuperscript{103}

Similarly, in \textit{Commonwealth v. Enriques}, the Superior Court of Pennsylvania found waiver of all of the \textit{pro se} appellant’s claims because he filed his 1925(b) statement eight days late.\textsuperscript{104} And, in \textit{Commonwealth v. Hart}, the Superior Court of Pennsylvania waived all but one of the criminal defendants’ arguments (and did so in a footnote) because the defendant failed to raise each issue in his 1925(b) statement.\textsuperscript{105} Additionally, in \textit{Commonwealth v. Williams}, the Superior Court of Pennsylvania held that a \textit{pro se} litigant waived his claim

\begin{itemize}
  \item \textsuperscript{98} Id.
  \item \textsuperscript{99} Id.
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} Id.
  \item \textsuperscript{102} Id. at *2.
  \item \textsuperscript{103} Id. at *1.
  \item \textsuperscript{104} Commonwealth v. Enriques, 2019 WL 1300640, at *3 (Pa. Super. Ct. Mar. 20, 2019) (“[W]e are constrained to conclude that Appellant’s Rule 1925(b) statement was untimely filed, leaving no issues preserved therein for our review.”).
  \item \textsuperscript{105} Commonwealth v. Hart, 2019 WL 1500128, at *2 (Pa. Super. Ct. Apr. 4, 2019) (“All other issues are waived for purposes of this appeal.”).
\end{itemize}
because his 1925(b) statement was too “vague.” These egregious findings of waiver further suggest the need for reflection and reform.

III. IMPLICATIONS AND SUGGESTIONS FOR PRACTICE

The preceding section compared Pennsylvania’s on-the-ground application of the waiver doctrine to that in New Jersey and Delaware. In sum, Pennsylvania courts are discussing waiver at a much higher frequency than are courts in any other state in the U.S. And, when compared to New Jersey and Delaware, Pennsylvania courts are not only discussing waiver at a seemingly excessive frequency, but it is also more likely that when Pennsylvania courts do discuss waiver, it is in situations where the courts are, in fact, finding litigants’ claims waived. Further, while Pennsylvania courts found litigants’ claims waived for twenty-seven separate procedural reasons, New Jersey and Delaware each only found claims waived for two distinct reasons. When discussing waiver, Pennsylvania courts are more likely in criminal cases than in civil cases to find that a litigant has waived their claims.

106 Commonwealth v. Williams, 204 A.3d 489, 495 (Pa. Super. Ct. 2019) (“Clearly, the PCRA had to guess what issues Appellant intended to raise on appeal. As such, the Rule 1925(b) statement was insufficient for meaningful review by this Court.”).

107 The Superior Court has, on occasion, allowed prosecution to bring claims despite failures to properly file 1925(b) statements. It is difficult to conclude based on the data gathered for this Comment whether this is indicative of a pro-Commonwealth (or anti-criminal defendant) bias, but it seems that there is perhaps an imbalance in the way waiver doctrine is applied. See, e.g., Commonwealth v. Landis, 277 A.3d 1172, 1183 (Pa. Super. Ct. 2022) (finding that the Commonwealth had not waived its weight of the evidence claim despite defendant’s argument that Commonwealth had waived the claim by way of its very vague 1925(b) statement: “As the Commonwealth’s concise statement has not impeded meaningful review, we decline to find the Commonwealth’s weight of the evidence claim waived.”); id. at 1186-87 (Kunselman, J. dissenting) (“I would find that the Commonwealth waived its challenge to the trial court’s discretionary ruling. . . . [B]y failing to indicate how the trial court abused its discretion, the Commonwealth has not properly framed its issue for our review.”); see also Commonwealth v. Hamlett, 234 A.3d 486, 510 (Pa. 2020) (Wecht, J. dissenting) (“The point that the Majority appears not to appreciate is that we will enforce an appellant’s ‘waiver’ for failure to develop a claim upon which the appellant bears the burden of persuasion, but we are appreciably hesitant to impose any consequence whatsoever upon the Commonwealth’s identical failure, or even to acknowledge it as such.”).

108 Litigants whose claims have been waived have different potential remedies depending on whether they are in the civil or criminal context. To the extent a criminal defense lawyer waives an issue, a criminal defendant might be able to bring an ineffectiveness of counsel claim. By contrast, in the civil context, a litigant might be able to bring a malpractice claim.
While this Comment does not attempt to draw conclusions regarding whether the applications of existing waiver doctrine in Pennsylvania were meritorious under the formal waiver doctrine, the data clearly demonstrates that, comparatively, there are greater barriers to appellate review for litigants in Pennsylvania than in other states. This section will discuss the practical implications of this fundamental disparity and will put forth suggestions for reform.

A. Implications of Pennsylvania’s Frequent Finding of Waiver

Despite the pervasiveness of the right to appeal across America, the right has quite different meanings in different states. States’ broad freedom to formulate their own doctrines regarding appellate procedure and waiver has resulted in vast disparities among the states regarding what the right to appeal truly means in practice. Not only do the states have varying expectations with respect to the amount of precision they require from litigants on appeal, but they also possess immense discretion regarding whether to hear or waive claims that contain procedural defects. The divergence among state courts on the issues of appeal and waiver suggests that there is a need for discussion about not only substantive, but also procedural justice.

Because of the rigorous appellate procedural precision demanded by courts in Pennsylvania, litigants there are frequently denied the opportunities to have the merits of their claims heard by Pennsylvania’s appellate courts. My research indicates that Pennsylvania courts are finding that litigants have waived their claims on appeal due to procedural defaults in over 8% of all cases. By way of contrast, New Jersey and Delaware courts are each finding litigants’ claims waived due to procedural defaults in fewer than 1% of cases (0.89% and 0.01%, respectively). This pattern is especially unsettling considering that many claims found to be waived by the Superior Court of Pennsylvania would likely be heard by the appellate courts in New Jersey or Delaware, even if they were identical claims brought in an identical manner.

Not only does waiver impede a litigant’s right to immediate appellate review, but also, for criminal defendants, waiver of claims by reason of procedural default has significant implications for their rights to habeas and Supreme Court review. *Wainwright v. Sykes* established that a state rule that serves as an independent and adequate procedural ground preventing direct review also bars federal habeas review, absent a showing of cause and
prejudice\textsuperscript{109} or of actual innocence (both of which are exceedingly high thresholds). Such a procedural default also entirely bars Supreme Court review and litigants have no means of surpassing that jurisdictional barrier. Conversely, if the highest state court disregards the default and addresses the merits of the claim (a rare occurrence in Pennsylvania), both Supreme Court and federal habeas review will be permitted. This gives broad discretion to appellate courts to decide not only whether to hear claims on appeal, but also to determine the fate of such claims on attempted collateral and Supreme Court review. If a litigant’s claim was waived due to an unintentional procedural default on appeal, the merits of that claim will likely never be heard, either on direct or collateral review.\textsuperscript{110}

In Pennsylvania, PCRA is the “sole means of obtaining collateral relief”\textsuperscript{111} and encompasses the right to habeas corpus. The PCRA provides a method of seeking legal remedy for individuals who were given illegal sentences or were convicted of crimes that they did not commit.\textsuperscript{112} However, under the PCRA, defendants in custody may only seek relief regarding their conviction or their sentence if their claim has not been waived or previously litigated.\textsuperscript{113} PCRA petitions have their own procedural requirements in addition to the requirements necessary to preserve a claim for an appeal. For instance, PCRA petitions must be filed within one year from when judgment

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\textsuperscript{109} See Wainwright v. Sykes, 433 U.S. 72 (1977) (holding that a state rule that serves as an independent and adequate procedural ground preventing direct review also bars federal habeas review, absent a showing of cause for the procedural default and prejudice resulting therefrom).
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\textsuperscript{110} See David E. Vandercoy, \textit{Waiver of Claims by Inadvertent Procedural Defaults: Collateral Attacks on Criminal Judgments in Indiana}, 18 VALPARAISO L. REV. 231, 233–34 (1984) ("[T]he rules or principles utilized to determine whether there has been a waiver of the right to assert a claim by reason of an antecedent procedural default will commonly determine the actual scope of post-conviction review. The waiver doctrine employed in any given jurisdiction becomes the primary vehicle for accommodation between the competing demands of making effective curative processes available and yet attaching some measure of finality to criminal judgments.").
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\textsuperscript{111} See 42 PA. STAT. AND CONS. STAT. ANN. § 9542.
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\textsuperscript{112} Thomas M. Place, \textit{Pennsylvania Post Conviction Relief Act—Recent Developments}, PA. BAR ASS’N Q. (Oct. 2018).
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\textsuperscript{113} See § 9543(a) ("To be eligible for relief under this subchapter, the petitioner must plead and prove by a preponderance of the evidence . . . . that the allegation of error has not been previously litigated or waived; see also § 9544 (b) ("[A]n issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal, or in a prior state postconviction proceeding.").
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As mentioned in the preceding section, over 15% of the Pennsylvania cases discussing waiver in the time period I analyzed were PCRA cases.

Furthermore, without intervention or reform, the Pennsylvania Superior Court’s frequent waiver of claims is likely to be a continuing phenomenon. In the context of habeas, Justice Brennan argued in his dissent in *Wainwright* that “to subordinate the fundamental rights contained in our constitutional charter to inadvertent defaults of rules . . . would essentially leave it to the States . . . to determine whether a habeas applicant will be permitted the access to the federal forum that is guaranteed [to] him by Congress” and noted that “a lawyer’s unintentional errors by closing the federal courthouse door to his client is . . . a senseless . . . method of deterring the slighting of state rules . . . because unplanned and unintentional action of any kind generally is not subject to deterrence.”

Because it is highly unlikely that attorneys and pro se litigants in Pennsylvania are purposefully waiving claims through procedural defaults, it is difficult to believe that Pennsylvania’s stringent application of waiver doctrine is serving as an effective deterrent. The next sub-section will lay out potential avenues for reform.

**B. Suggestions for Reform**

Courts, judges, and practitioners should use the information put forth in this Comment to insist on a reining in of the use of waiver in Pennsylvania, or, perhaps to create more concrete and uniform guidelines regarding when appellate waiver is appropriate.

i. *Legal Scholars and Practitioners: Constitutional Arguments*

I would encourage legal scholars, practitioners, and lawyers to argue that the use of waiver doctrine by the Pennsylvania Superior Court is infringing on Pennsylvania litigants’ right to appeal, guaranteed to them by their state constitution. While any singular ground for finding waiver may be insufficient on its own to demonstrate that the Superior Court of Pennsylvania is infringing on the right to appeal, the sheer volume of waivers

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114 Further, in addition to satisfying the procedural requirements for regular appellate review, PCRA petitions must also raise all relevant claims, cite to legal authority, and adequately develop arguments to avoid waiver at the PCRA stage.

occurring in Pennsylvania and the number of separate grounds on which the Superior Court is finding claims waived suggests that, in the aggregate, Pennsylvania litigants are not enjoying a meaningful right to appeal, at least not to the same extent as litigants in other states. Lawyers should argue (perhaps, by challenging judicial waiver in cases like Commonwealth v. Brock, mentioned in Section II, and pointing to the larger empirical trends discussed in this Comment) that the current use of waiver in Pennsylvania is violating individuals’ right to appeal. In accordance with this, the Pennsylvania Supreme Court should construe appellate courts’ power to waive litigants’ claims narrowly so as to prevent the serious constitutional problems that arise when appellate courts implement overly formalistic and meaningless procedural requirements.116

ii. Supreme Court Should Restrict Sua Sponte Waiver and Tighten Conditions Evoking Waiver

I would encourage the Appellate Rules Committee to suggest concrete reform in the area of appellate waiver and would recommend that the Supreme Court of Pennsylvania adopt the Committee’s suggestions.

Eliminate Sua Sponte Waiver

Members of the Pennsylvania Supreme Court have suggested that the Superior Court should be cautious about finding claims waived sua sponte.117 In Commonwealth v. Hamlett, for example, although the majority found that sua sponte harmless error review does not deprive appellants of due process rights, the court also acknowledged that “sua sponte review is extraordinary and

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116 In certain instances, the Supreme Court has held that, because a state’s procedural rule is overly formalistic or inconsistently applied, it is inadequate to bar review. See Staub v. City of Baxley, 355 U.S. 313, 320 (1958) (holding that a requirement that one must point to the specific part of the ordinance that he or she is challenging, rather than just referring to the ordinance when making a constitutional challenge to the ordinance was inadequate to bar review because it was overly formalistic, meaningless, and inconsistently applied by the state’s own courts).

117 See, e.g., Commonwealth v. Wolflø, 233 A.3d 784, 788, 790 (2020) (reversing the Superior Court’s sua sponte waiver of appellant’s Article I, Section 8 claim because the Commonwealth failed to challenge the invocation of Article I, Section 8 before the Superior Court). Although the procedural posture of this case was unusual in that the defendant had prevailed at the trial court level, this still demonstrates potential skepticism on the part of the Supreme Court about the Superior Court’s frequent use of sua sponte review.
should be disfavored.” And, in dissent, Justice Wecht argued vehemently that *sua sponte* review is inappropriate. In so arguing, he explained that “[r]aising and addressing issues *sua sponte* ‘disturbs the process of orderly judicial decision-making by depriving the court of the benefit of counsel’s advocacy, and depriving the litigants the opportunity to brief and argue the issues.’ . . . *S*ua sponte decision-making may implicate due process concerns, to the extent that it deprives litigants of notice and an opportunity to be heard on potentially dispositive matters.”

I would encourage the Pennsylvania Supreme Court, at its next opportunity, to issue a detailed, precedential opinion making it clear that *sua sponte* findings of waiver should not be made on appeal, except perhaps in cases in which a litigant’s procedural default is particularly egregious (i.e., if a litigant entirely fails to raise the claim in the appellate brief).

**Tighten Conditions Evoking Waiver**

I would also suggest that certain procedural requirements be eliminated or that non-egregious, inadvertent procedural defaults be disciplined in methods less drastic than waiver (i.e., waivers for issues like failure to include claim in questions presented when the argument is raised in the arguments section of a brief could perhaps result in scolding the litigant’s lawyer rather than in waiver, entirely preventing the litigant from arguing the claim on appeal). It seems that the appellate courts in New Jersey and Delaware have chosen few, specific grounds on which to find waiver if a litigant has not complied with procedural requirements. For instance, New Jersey and Delaware courts found litigants’ claims waived when the litigants failed to raise claims in their appellate briefs. Such a ground is reasonable and clearly

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119 Id. at 503 (Wecht, J., dissenting) (quoting Johnson v. Lansdale Borough, 146 A.3d 686, 709 (2016)).
120 See Wood v. Milyard, 566 U.S. 463, 473 (2012) (“[R]estraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore would not have anticipated in developing their arguments on appeal.”); Tory A. Weigand, *Raise or Lose: Appellate Discretion and Principled Decision-Making*, 17 Suffolk J. Trial & App. Advoc. 179, 250 (arguing that *sua sponte* waiver violates litigants’ due process: “[d]ue process concerns are, in fact, implicated where an appellate court decides an issue not raised or briefed, as the parties have been deprived of notice and an opportunity to be heard. This includes not just the substantive underlying legal issue, but the decision to find or not find waiver.”); E. King Poor & James E. Goldschmidt, *But No One Argued That Sua Sponte Decisions on Appeal*, DRI FOR DEF., Oct. 2015, at 62, 65 (“In addition to increasing the twin risks of error and perceptions of bias, *sua sponte* decisions may in certain cases violate due process.”).
merits waiver. The Supreme Court should keep such requirements but seriously consider removing grounds for waiver that do not meaningfully interfere with successful appellate review.

Reform Rule 1925(b)

The Supreme Court of Pennsylvania Appellate Court Procedural Rules Committee and the Supreme Court of Pennsylvania should work to seriously reform Rule 1925. Members of the Supreme Court of Pennsylvania have recently indicated that they may be skeptical of the Superior Court’s excessive findings of waiver, particularly those based on Rule 1925(b). For example, in Commonwealth v. Rogers, the Supreme Court of Pennsylvania vacated the Superior Court’s finding that the defendant had waived his weight-of-the-evidence claim by filing an insufficient Rule 1925(b) statement. In finding that “the intermediate court should have considered the claim on its merits,” the Supreme Court explained that “the weight-of-the-evidence claim was readily understandable from context..... [T]he brevity of Appellant’s weight-of-the-evidence claim ... represents a good-faith attempt to comply with Rule 1925’s concision requirement, ... it did not prevent meaningful appellate review.”

The Pennsylvania Supreme Court held similarly in Commonwealth v. Laboy. Conversely, however, the Pennsylvania Supreme Court recently vacated the Superior Court’s finding that the Commonwealth had preserved an inevitable discovery claim in its Rule 1925(b) statement. The Superior Court held that although the Commonwealth did not raise that claim specifically in its Rule 1925(b) statement, it was preserved because it was a “subsidiary issue” to another claim that the Commonwealth did raise (a claim of adequate probable

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122 See Commonwealth v. Laboy, 936 A.2d 1058, 1060 (2007) (“[W]e agree with Appellant that the Superior Court should have afforded the requested sufficiency review. ... [T]he common pleas court readily apprehended Appellant’s claim and addressed it in substantial detail. ... Appellant’s Rule 1925(b) statement did not set forth a specific contention that Appellant’s physical location at the time of drug sales was not shown to have been an effective one for a drug lookout. Nevertheless, that contention is comprised of a single statement in Appellant’s Superior Court brief, does not appear to be highly material to the outcome of the appellate review [as the Commonwealth was not required to prove that Appellant was effective in serving as a drug lookout], and is fully amenable to review by the Superior Court as a component of the overall sufficiency claim without commentary from the trial court.”).
cause). The Supreme Court disagreed, stating that the two issues were distinct and that, because the inevitable discovery claim was not specifically raised in the 1925(b) statement, it was waived. In dissent, Justice Mundy cited Rogers and Laboy for the proposition that appellate courts should look “beyond the face of a 1925(b) statement in determining if an appellant has waived an issue.” She argued that:

The failure of the Court to set out specific objective standards for when it will look beyond the face of a 1925(b) statement creates unpredictability in the appellate process. An appellant will be unable to determine if they complied with the rule until the appellate court makes its determination, by which time it will be too late for the appellant to correct any omissions. Further, the apparent arbitrariness of the Court’s decision of whether...to look beyond the face of a Rule 1925(b) statement breeds a sense of unfairness...if the Court is willing to look beyond the face of a 1925(b) statement in some instances, we should do so in every case.

Rule 1925(b) is ripe for reform, both in its language and in its application. And this concept is not novel. In hopes of mitigating waiver traps, Rule 1925 was amended in 2007 and again in 2019. Nonetheless, even after the

124 Id. at 165.
125 Id. at 174.
126 Id. at 176 (Mundy, J., dissenting).
127 Id. at 178 (Mundy, J., dissenting).
128 The 2007 amendments were “designed to make it clear that the requirements of the rule are mandatory and will result in waiver if not strictly followed” but also to “amplify and standardize those situations where the interests of justice require some flexibility in the application of the rule.” See Appellate Court Procedural Rules Committee, Proposed Amendments to Pennsylvania Rule of Appellate Procedure 1925, 1, 10 (2006). These amendments extended the time period for drafting the 1925(b) statement from fourteen days to at least twenty-one days, with the trial court permitted to enlarge the time period or to allow the filing of a supplemental statement upon good cause shown. 210 Pa.R.A.P. 1925(b). Further, the 2007 amendments laid out explicit grounds on which the appellate court may waive a litigants’ claim for failure to procedurally comply with Rule 1925(b) in hopes of aiding “counsel in complying with the concise-yet-sufficiently detailed requirement.” See Appellate Court Procedural Rules Committee, Proposed Amendments to Pennsylvania Rule of Appellate Procedure 1925, 1, 4 (2006). Part (c) of the Amended Rule 1925 provides the appellate court the ability to choose to remand instead of waiving or quashing claims in certain circumstances despite procedural defaults. 210 Pa.R.A.P. 1925(c).
Finally, the 2007 amendments attempted to “address the concerns of the bar raised by cases in which courts found waiver: (a) because the statement was too vague; or (b) because the Statement
implementation of the 2007 amendments, Rule 1925(b) continues to present great danger for litigants’ claims. As mentioned in Part II of this Comment, over 16% of the claims waived in Pennsylvania during the time period I analyzed (which was well after the 2007 amendments were implemented) were waived due to Rule 1925(b) related procedural defaults.

In 2016, the Appellate Rules Committee again proposed specific amendments to 1925(b) to address “potential and actual waiver concerns.”\textsuperscript{129} The Committee proposed three amendments to Rule 1925(b), which they then amended slightly in 2017. The modified suggestions are as follows: (1) The Committee proposed to amend Rule 1925(b) so that “in cases where a party has been ordered to file a statement of errors complained of on appeal (‘Statement’) but cannot do so accurately because a transcript has not been prepared despite the party’s timely and proper request for its preparation, that party can secure an extension to file the Statement until the transcript is entered on the docket by filing a single request for an extension.” (2) The Committee proposed removing the requirement in Rule 1925(b) to serve the Statement on the trial judge and to both (a) permit the trial judge to direct that the Statement be served on the trial judge and (b) state that failure to effectuate such service will not result in waiver. (3) Finally, the Committee proposed changing the standard for waiver in Rule 1925(b), so that waiver would not occur unless a deficiency in a Rule 1925(b) Statement “interferes with or effectively precludes appellate review.”\textsuperscript{130} Each of the proposed amendments aimed to address significant waiver-related concerns.\textsuperscript{131}

was so repetitive and voluminous that it did not enable the judge to focus on the issues likely to be raised on appeal.” See Supreme Court of Pennsylvania Appellate Court Procedural Rules Committee, Second Publication of Notice of Proposed Rulemaking: Proposed Amendments to Pa.R.A.P. 905, 1922, and 1925 (2017). ([T]he Statement should be viewed as an initial winnowing . . . when appellate courts have been critical of sparse or vague Statements, they have not criticized the number of issues raised but the paucity of useful information contained in the Statement. Neither the number of issues raised nor the length of the Statement alone is enough to find that a Statement is vague or non-concise enough to constitute waiver.).

\textsuperscript{129} Supreme Court of Pennsylvania Appellate Court Procedural Rules Committee, Notice of Proposed Rulemaking: Proposed Amendments to Pa.R.A.P. 905, 1922, and 1925 (Sept. 2016) (“Because various aspects of the rule present potential and actual waiver concerns, the Committee proposes to amend Pa.R.A.P 1925”).

\textsuperscript{130} Id.

\textsuperscript{131} Id. “The first waiver concern relates to difficulties experienced in filing a timely and accurate Statement when the trial transcript is not yet available. . . . Currently, the practice in absence of a transcript varies widely. . . . The Committee proposes to modify current practice by amending . . .
Pursuant to these proposed amendments, Rule 1925(b) was again amended in June 2019 (which falls just after the time period I studied). The June 2019 amendments adopted the Committee’s first suggestion but not the Committee’s second or third suggestions. The modified Rule 1925(b) asserts that if a party “has ordered but not received a transcript necessary to develop a Statement, that party may request an extension of the deadline.”

However, Rule 1925(b) still requires service on the trial judge (though the revised 1925(b) states that the judge’s order must tell the appellant the place the appellant can serve the statement in person and the address to which the appellant can mail the Statement). Further, Rule 1925(b) does not include language stating that waiver will only occur if a deficiency in a Statement “interferes with or effectively precludes appellate review.”

Rather, the Rule continues to assert a bright-line waiver rule: “Issues not included in the Statement and/or not raised in accordance with the provisions of this paragraph (b)(4) are waived.”

Because the time period of cases I analyzed falls prior to the implementation of the 2019 amendments, I cannot speak conclusively to whether the 2019 amendments have mitigated the frequent findings of waiver resulting from Rule 1925(b). However, none of the twenty-six Rule 1925(b) waiver cases in my study resulted from transcript-related issues. Rather, the vast majority of the waiver cases resulted from failure to raise issues in the 1925(b) statement, filing an untimely 1925(b) statement, or

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failure to be sufficiently specific in the 1925(b) statement. Further, when searching on Westlaw for the number of cases mentioning “waiver” and “1925,” in the six months prior to implementation of the 2019 amendments, there were 1,027 results. In the six months after the amendments were implemented, there were 939 search results. Thus, while the amendments may have made some progress in mitigating appellate waiver, there is still significant room for further change.

I suggest that the third change advocated for in the 2017 proposed amendments, that claims should not be waived unless a Rule 1925(b) deficiency “interferes with or effectively precludes appellate review,” be adopted by the Supreme Court of Pennsylvania. If a procedural default does not preclude or interfere with meaningful appellate review, I see little harm in allowing litigants’ claims to be heard. If this change is implemented and if Pennsylvania judges are generally more cautious with their use of appellate waiver doctrine, the amount of Rule 1925(b) related waiver in Pennsylvania could decrease substantially.

iii. Superior Court Should be More Cautious About Finding Claims Waived

The Superior Court of Pennsylvania should generally be more cautious about finding that litigants have waived their arguments. I would encourage the Superior Court to consider the impact that its frequent use of waiver doctrine is having on litigants and the possibility that the excessive use of waiver directly infringes upon litigants’ guaranteed right to appellate review. The Superior Court of Pennsylvania should make a concerted effort to avoid waiving litigants’ claims when a waiver-related argument has not been raised by the litigants.

135 See, e.g., Commonwealth v. Williams, 204 A.3d 489, 495 (2019) (“Clearly, the PCRA had to guess what issues Appellant intended to raise on appeal. As such, the Rule 1925(b) statement was insufficient for meaningful review by this Court.”); Sabia Landscape, Inc. v. Long, No. 852 EDA 2018, 2019 WL 1897123, at *4 (Pa. Super. Ct. Apr. 29, 2019) (“Appellant has waived its third and fourth issues. Appellant did not raise its third and fourth issues in its Pennsylvania Rule of Appellate Procedure 1925(b) statement.”).

iv. Courts and Public Interest Organizations Should Work to Provide Clarity

Finally, I would suggest that the Pennsylvania courts and public interest organizations work together to provide a specific and accessible resource to lawyers and pro se litigants that outlines exactly what procedural requirements litigants must meet in order to preserve their claims at each stage of the litigation process. Although various law-firm websites provide advice to litigants on how to avoid waiver, it would be useful for litigants to have one reliable resource that compiled all of Pennsylvania’s issue preservation requirements in one central location. If the rule is going to continue to be that litigants in Pennsylvania must meet robust procedural requirements to preserve their claims for appeal, it should at least be clear to litigants up front exactly what those requirements are.

C. Broader Implications

Broadly speaking, this Comment aims to illustrate how important close empirical study of state-to-state procedure can be. The right to appeal, despite its widespread presence across the U.S., seems to hold different meanings in different states. This Comment is limited in scope—it does not attempt to explain why judges sitting on the Superior Court of Pennsylvania might be more willing to find that litigants have waived their claims than judges sitting on appellate benches in other states. Nor does this Comment purport to uncover why Pennsylvania’s formal waiver rules remain so stringent or why rules like 1925(b) may have been enacted in the first place. However, my research does demonstrate that the ways in which waiver doctrine is applied vary significantly from state to state. And this information may not have come to light without careful empirical study of the ways waiver doctrine is employed in Pennsylvania, Delaware, and New Jersey.

In other words, the implication of this Comment’s findings is not only that Pennsylvania’s waiver doctrine needs reform, but also that ideas (and even Constitutional rights) that we consider to be uniform across the country might, in reality, be quite fragmented. Taking time to scrutinize how state practices differ from one another with respect to their treatment of guaranteed rights can help to ensure that constitutional promises are more than just empty words.
CONCLUSION

All too frequently, Pennsylvania litigants are suffering an irreversible loss of their constitutionally guaranteed right to an appeal. This right, fundamental to American conceptions of justice and due process, means quite different things in different states. Not only do the states differ greatly in the amount of precision they formally require from appellants on appeal, but they also differ in how stringently they apply their formal issue preservation rules and how leniently they exercise their discretion to hear claims that were not perfectly preserved. Empirical research demonstrates that Pennsylvania courts are finding litigants’ claims waived far more frequently than the courts of other states. As a result of Pennsylvania’s strict formal issue preservation doctrine and the Superior Court’s strict application of that doctrine, Pennsylvania appellants are automatically at great risk of inadvertently waiving their claims through procedural mishaps each time they seek to appeal. The implications of this are harsh. Such a trend is chipping away at Pennsylvania’s guaranteed right to appeal. To deliver on Pennsylvania’s constitutional guarantees, the Supreme Court of Pennsylvania should dial back the procedural issue preservation requirements currently placed on Pennsylvania litigants, the Superior Court should be more sparing about the claims it chooses to find waived, and the Pennsylvania courts—perhaps alongside public interest organizations—should make clearer the circumstances in which appellate waiver is and is not appropriate.