[J-52A-2021 and J-52B-2021] [MO: Dougherty, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant v. BRENDAN PATRICK YOUNG, Appellee	: : : : : : : : : : : :	No. 19 MAP 2021 Appeal from the Order of the Superior Court at No. 2088 MDA 2018 dated November 2, 2020 Quashing the Order of the Centre County Court of Common Pleas, Criminal Division at Nos. CP-14-CR-0001389-2017, CP-14-CR-0000784-2018 & CP-14-CR-0001540-2018 dated November 21, 2018 ARGUED: September 21, 2021
COMMONWEALTH OF PENNSYLVANIA, Appellant v. DANIEL CASEY, Appellee	: : : : : : : : : : : :	No. 20 MAP 2021 Appeal from the Order of the Superior Court at No. 2089 MDA 2018 dated October 28, 2020 Quashing the Order of the Centre County Court of Common Pleas, Criminal Division, at Nos. CP-14-CR-0001377-2017, CP-14-CR-0000781-2018 & CP-14-CR-0001536-2018 dated November 21, 2018 ARGUED: September 21, 2021

CONCURRING AND DISSENTING OPINION

JUSTICE DONOHUE **DECIDED: December 22, 2021**

I join Justice Saylor's astute concurring and dissenting opinion. I agree that the *Always Busy Consulting*[1] exception to the rule announced in *Commonwealth v. Walker*, 185 A.3d 969 (Pa. 2018), does not apply to the case before us and that the Majority's elevation of Pennsylvania Rule of Appellate Procedure 902[2] and its remedial capabilities fails to recognize that this Court deliberately departed from the discretionary nature of Rule 902 remedies when creating the clear rule announced in *Walker*.

I write separately to express my concern that the Commonwealth waived the issue for this Court's consideration by failing to raise it in the Superior Court. As recognized by the Majority, the Superior Court issued a directive to the Commonwealth to show cause why the appeals in these cases should not be quashed for failure to comply with the rule in *Walker*. *See* Majority Op. at 22 n.18. In its response to this directive, the Commonwealth not only failed to advocate for the application of Rule 902 as an ameliorative approach to avoid quashal of these

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[1] *Always Busy Consulting, LLC v. Bradford & Co.*, 247 A.3d 1033 (Pa. 2021).

[2] Pa.R.A.P. 902, entitled "Manner of Taking Appeal," provides in full as follows:

> An appeal permitted by law as of right from a lower court to an appellate court shall be taken by filing a notice of appeal with the clerk of the lower court within the time allowed by Rule 903 (time for appeal). Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but it is subject to such action as the appellate court deems appropriate, which may include, but is not limited to, remand of the matter to the lower court so that the omitted procedural step may be taken.

Pa.R.A.P. 902

appeals, it failed even to mention the rule. *Id.* To the contrary, the Commonwealth raised the potential application of Rule 902 for the first time in this Court. The Majority minimizes the Commonwealth's failure to identify Rule 902 in its response to the rule to show cause, pronouncing that the Commonwealth's generalized request for leave to fix any perceived errors "plainly invoked the remedial, ameliorative and equitable relief measures" afforded by Rule 902. *Id.* Even the most generous reading of the Commonwealth's response cannot support this interpretation. Not so much as an allusion to Rule 902 is discernable in that filing, as nothing in the Commonwealth's argument remotely suggested that it was requesting rule-based relief. If the Commonwealth had been remotely aware of Rule 902 and sought its application, it would have cited to it or to cases applying it in conjunction with its bald request for a reprieve. This is not an insignificant failure by the Commonwealth because its failure to argue the application of Rule 902 deprived the Superior Court panels in these cases of the opportunity to address it, which deprived this Court of the insight of these panels of the Superior Court on the issue.

It is firmly entrenched that for an issue to be reviewable by this Court, it must have been "preserved at all stages in the lower courts." *See, e.g.*, *Commonwealth v. Hays*, 218 A.3d 1260, 1265 (Pa. 2019); *see also* Pa.R.A.P. 302(a). Reduced to their essence, the rules of waiver, whether common law or ruled based, require litigants to raise their claim at the first opportunity. *See, e.g.*, *Campbell v. Com., Dep't of Transp., Bureau of Driver Licensing*, 86 A.3d 344, 349 (Pa. Cmwlth. 2014) ("While a party has a duty to preserve an issue at every stage of a proceeding, he or she also must comply with the general rule to raise an issue at the earliest opportunity."). *Cf.*

Goodheart v. Casey, 565 A.2d 757, 763 (Pa. 1989) ("The case law in this Commonwealth is clear and of long standing; it requires a party seeking recusal or disqualification to raise the objection at the earliest possible moment, or that party will suffer the consequence of being time barred."). *See also* Pa.R.A.P. 302 Note (quoting *Commonwealth v. Piper*, 328 A.2d 845, 847 (Pa. 1974) ("Issues not raised in the court below are waived and cannot be raised for the first time on appeal to this Court.")). Because the Commonwealth did not raise this claim at the first opportunity, it has waived the issue in these cases and no relief can be afforded.

Moreover, it is pertinent to note that Rule 902 has never been applied to the type of defective appeals we addressed in *Walker*. In 1970, this Court in *General Electric Credit Corp. v. Aetna Casualty and Surety Co.*, 263 A.2d 448 (Pa. 1970), designed a three-part test to decide whether quashal was warranted where a single notice of appeal was filed in response to multiple final orders. *Id.* at 453. In 1986, Rule 902 was amended to permit an appellate court to remand a matter to the lower court "so that the omitted procedural step may be taken." Pa.R.A.P. 902. Neither the courts nor litigants, however, turned their focus from the *General Electric* test to the ameliorative effects permitted by Rule 902. Instead, both this Court and our intermediate appellate courts continued to apply the *General Electric* test, with no consideration of Rule 902. *See, e.g.*, *K.H. v. J.R*., 826 A.2d 863, 870 (Pa. 2003); *In the Interest of P.S.*, 158 A.3d 643, 648 (Pa. Super. 2017); *Praskac v. Unemployment Comp. Bd. of Review*, 683 A.2d 329, 332–33 (Pa. Commw. 1996). This approach continued in connection with our decision in *Walker*, as the Commonwealth (without any mention of, or advocacy with respect to, Rule 902) argued for a favorable

application of the *General Electric* test. In rejecting the continued application of the *General Electric* test, which we found to be inconsistent, this Court established a bright-line rule to replace it.[3]

Finally, I agree with the sentiment expressed by Justice Wecht that the application of the majority's holding to the Commonwealth in this appeal is abjectly unfair given that the defendants in this very case were held to the *Walker* standard, with the result that their earlier appeals were quashed. If this Court is determined to set aside this recent precedent, at the very least the decision should be prospective only, so that the parties before us receive equal treatment under the law.

[3] In response, the Majority observes that *Williams* post-dates *General Electric*. Maj. Op. at 25 n.5. The Majority's chronology is correct, but it misses my point that following the amendment of Rule 902, the courts continued to invoke *General Electric* when considering appeals that involved the kind of defect at issue therein. *Williams* addressed a different circumstance; namely, a single notice of appeal taken from a single order. At issue was whether filing the notice of appeal within the thirty-day period served to perfect the appeal, although it was subsequently deemed to be defective. *See Commonwealth v. Williams*, 106 A.3d 583, 586 (Pa. 2014). *Williams* did not involve a single order that resolved issues on more than one docket, as was the case in *Walker* and is the case here.