IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellee,

v.

PATRICK M. CALVO,
Defendant-Appellant.

SUPREME COURT NO. 2010-SCC-0019-CRM
SUPERIOR COURT NO. 08-0105

ORDER DENYING PETITION FOR REHEARING

Cite as: 2014 MP 10

Decided September 4, 2014

G. Anthony Long and Bruce Berline, Saipan, MP, for Defendant-Appellant Patrick M. Calvo
Teresita J. Sablan, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellee Commonwealth of the Northern Mariana Islands

BEFORE: DAVID A. WISEMAN, Justice Pro Tem; JOSEPH N. CAMACHO, Justice Pro Tem; TIMOTHY H. BELLAS, Justice Pro Tem.

WISEMAN, J.P.T.:

¶ 1 Defendant-Appellant Patrick M. Calvo ("Calvo") asks us to till terrain we left unplowed in *Commonwealth v. Calvo*, 2014 MP 7. Specifically, he requests that we rehear a jury-trial issue that was deemed waived. To prevail on this petition, Calvo "must demonstrate how the Court ignore[d] or incorrectly construe[d] legal issues or factual matters in the resolution of that case." *Sablan v. Elameto*, 2013 MP 9 ¶ 1 (internal quotation omitted). In so doing, Calvo "must state with particularity each point of law or fact . . . the Court has overlooked or misapprehended." NMI SUP. CT. R. 40(a)(2). For the reasons below, we conclude that Calvo's petition for rehearing does not offer a point of law or fact that we overlooked or misapprehended. Therefore, we DENY his petition for rehearing.

I. Factual and Procedural Background

¶ 2 Following accusations of sexual misconduct towards his daughter, Calvo was charged with four counts: (1) second-degree sexual assault, 6 CMC § 1302(a)(1); (2) second-degree sexual abuse of a minor, 6 CMC § 1307(a)(3); (3) third-degree sexual abuse of a minor, 6 CMC § 1308(a)(1); and (4) disturbing the peace, 6 CMC § 3101(a).

¶ 3 Before trial, Calvo filed a motion requesting that a jury decide all four charges, not just the two felony charges triggering the right to a jury trial because they were "punishable by more than five years imprisonment or by more than $2,000, or both." 7 CMC § 3101(a). The court denied the motion, reasoning that 7 CMC § 3101(a) did not allow jury trials for charges involving a punishment of five years or less, a fine of $2,000 or less, or both.

¶ 4 On appeal, Calvo claimed the court's ruling was an abuse of discretion because the court failed to realize it had discretion to grant a jury trial on the lesser charges. Calvo made this argument twice. In his opening brief, Calvo planted the claim in a footnote that read,

> On this basis [i.e. that neither the Covenant nor § 3101(a) allegedly barred a jury trial for lesser felonies], denying Calvo a jury trial on count 3 and 4 was an abuse of discretion as the trial court possessed the discretion to grant a jury trial on those charges.

Calvo Opening Br. at 17 n.3. Later, during his reply brief, Calvo fertilized the claim with legal authority and analysis. We rejected this raise-first-develop-later approach, deeming the claim waived.

¶ 5 Calvo requests that we rehear that decision.

II. Discussion

¶ 6 Calvo argues that we should have considered his abuse-of-discretion claim for two reasons. First, Calvo suggests that Commonwealth precedent does not make failure to cite legal authority in an opening brief fatal to a legal argument. Instead, precedent only makes it fatal for an appellant not to cite legal authority in both its opening and reply briefs. As a result, an appellant does not waive an issue when it

perfunctorily raises the issue in its opening brief so long as it adds legal authority and analysis in its reply brief. Second, even if that is not so, Calvo maintains that waiver should not apply if, as here, the opposing party contested the claim in its response brief and the court addressed the claim during oral argument.

¶ 7 Appellate courts ordinarily "refuse to disturb judgments on the basis of claims not adequately briefed on appeal." *United States v. West*, 392 F.3d 450, 459 (D.C. Cir. 2004) (internal quotation omitted); *accord Commonwealth v. Minto*, 2011 MP 14 ¶ 46 n.8.[1] In the Commonwealth, this policy flows from NMI Supreme Court Rules 28(a)(9)(A) and 28(b), which require that each parties' initial brief must contain the party's "contentions and the reasons for them, with citations to the authorities and parts of the record on which the [party] relies . . . ." NMI SUP. CT. R. 28(a)(9)(A). This requirement reflects a fundamental feature of our adversarial system: "[T]hat appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them." *NASA v. Nelson*, 131 S. Ct. 746, 756 n.10 (2011) (internal quotation omitted). This feature "distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). It also serves a prudential purpose: Rulings on undeveloped or poorly developed issues run the risk of "being improvident or ill-advised." *McBride v. Merrell Dow and Pharm., Inc.*, 800 F.2d 1208, 1211 (D.C. Cir. 1986).

¶ 8 For these reasons, we have repeatedly held that a party waives any issue it has not sufficiently developed.[2] An issue is not sufficiently developed unless the party's initial brief provides legal authority or public policy, and applies the facts of the case to the asserted authority in a non-conclusory manner. In *Matsunaga v. Cushnie*, 2012 MP 18, for example, three issues were deemed waived. The first waiver involved an issue where the party stated the issue, quoted the relevant appellate rule, and then offered a conclusion. *Id.* ¶ 14. Because the party failed to supply legal analysis, the argument was deemed waived. *Id.* The second waiver involved an issue where, again, the party stated the issue, quoted relevant legal authority, provided analysis on an unrelated point, and then offered a conclusion. *Id.* ¶ 15. Because the analysis did not address the issue at hand, it was deemed waived. *Id.* The final waiver involved an issue where the party did not set forth the elements of the rule governing the issue and, as before, failed to apply the facts to the rule. *Id.* ¶ 25. Because the party did not provide adequate legal analysis, the issue, like those before it, was deemed waived *Id.*

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[1] Although we normally waive insufficiently developed arguments, we may lift this prohibition when the case offers "a valuable opportunity to 'guide future courts and litigants faced with similar issues.'" *In re Estate of Camacho*, 2012 MP 8 ¶ 12 n.7 (quoting *Malite v. Superior Court*, 2007 MP 3 ¶ 11).

[2] *In re Estate of Camacho*, 2012 MP 8 ¶ 12 n.7 (lack of legal authority); *Commonwealth v. Minto*, 2011 MP 14 ¶ 46 n.8 (lack of legal authority and analysis); *Guerrero v. Dep't of Public Lands*, 2011 MP 3 ¶ 24 (lack of legal authority or public policy); *In re Malite*, 2010 MP 20 ¶ 37 n.27 (lack of argument); *Fitial v. Kyung Duk*, 2001 MP ¶ 18 (lack of legal authority); *Roberto v. De Leon Guerrero*, 4 NMI 295, 297-98 (1995) (lack of legal authority); *In re Blankenship*, 3 NMI 209, 216 (1992) (lack of analysis).

¶ 9 Here, Calvo buried the abuse-of-discretion issue in a single-sentence footnote as an aside to his main argument that the Commonwealth's limitation on jury trials is unconstitutional. Then Calvo mined the footnote's content for the foundation of his reply-brief argument. This sequence is textbook waiver because Calvo failed to provide authority and reasoning in his opening brief.[3]

¶ 10 Less standard is Calvo's suggestion that we carve out an exception to the waiver rule for when the opposing party addresses the claim in its response brief and the Court asks questions about the claim during oral argument. We decline to adopt the proposed exception for three reasons.

¶ 11 First, waiver is focused on what the party ostensibly raising the issue failed to do, not the extent to which a responding party addressed the issue. *See Matsunaga*, 2012 MP 18 ¶¶ 12-15, 25 (reviewing whether the raising party had adequately developed the issue rather than whether the opposing party had cured the inadequate development by responding to the issue). Focusing on the adequacy of the argument as originally raised serves a key purpose: It increases the likelihood that the court will hear each side's best arguments by encouraging each party to use their best arguments from the start. *See McBride*, 800 F.2d at 1211 (expressing reluctance to decide issues that have been poorly developed because the decision runs the risk of "being improvident or ill-advised").

¶ 12 Second, Calvo's proposed exception is unfair because it would reward appellants who did not develop their argument and harm appellees who must respond to the appellant's failure. For example, if an appellee speaks up because it does not want the Court to hear a claim without any written opposition, the appellee risks that its brief will resurrect a claim that would have been deemed waived. Meanwhile, if an appellee stays silent, the appellee risks that the Court will reach a claim where the appellant had the first, the last, and the only written word.

¶ 13 Third, even if we adopted Calvo's exception (which we do not), Calvo overstates the extent to which the Commonwealth addressed his claim. The Commonwealth's response brief never addresses Calvo's claim as finally formed in his reply brief: Instead, it merely argued that Calvo waived the issue.[4] Similarly, at oral argument, the Commonwealth never discussed if the trial court abused its discretion.

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[3] Calvo's delayed development also runs afoul of the principles behind another rule: NMI Supreme Court Rule 32(a)(7), which facilitates judicial economy by capping the number of pages a party has to raise and develop the arguments set forth in an opening brief. This limitation encourages parties to raise and develop their most important arguments. Here, Calvo filed an enlarged brief (the brief was nineteen pages more than normally allowed). If Calvo did not believe his abuse-of-discretion claim was more important than the nearly dozen other issues he actually developed in his enlarged brief, we see no reason to divert judicial resources away from cases yet to be heard so that he can get a mulligan. *See Commonwealth v. Guerrero*, 2014 MP 4 ¶ 11 ("[T]ime consumed relitigating one case subtracts from the time available to litigate others.") (internal quotation omitted).

[4] *Compare* Commonwealth Resp. Br. at 13 (arguing that Calvo did not meet the threshold requirements for a jury trial) *with* Calvo Reply Br. at 5 (arguing that the threshold requirements did not have to be met).

Instead, the Commonwealth repeatedly argued Calvo waived the issue and that the policy implications of Calvo's claim were poor.[5]

¶ 14 Accordingly, because we decline to adopt Calvo's exception, and the opening brief raised the abuse-of-discretion claim in a perfunctory manner, the claim is again deemed waived. *Cf. United States v. Hardman*, 297 F.3d 1116, 1131 (10th Cir. 2002) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived."); *City of Emeryville v. Robinson*, 621 F.3d 1251, 1262 n.10 (9th Cir. 2010) (similar); *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 607 (4th Cir. 2009) (similar).

III. Conclusion

¶ 15 For the reasons above, we conclude that our opinion fully addressed the issue raised by Calvo. This Court has not overlooked or misapprehended a point of law or fact. Accordingly, the petition for rehearing is DENIED.

SO ORDERED this 4th day of SEPTEMBER, 2014.

/s/
DAVID A. WISEMAN
Justice Pro Tem

/s/
JOSEPH N. CAMACHO
Justice Pro Tem

/s/
TIMOTHY H. BELLAS
Justice Pro Tem

[5] Oral Argument at 10:26:28-53, *Commonwealth v. Calvo*, 2010-SCC-0019-CRM (NMI Sup. Ct. June 3, 2014) (arguing Calvo waived the claim); *id.* at 10:31:43-10:34:22 (reiterating the claim was waived, addressing the policy implications of the claim, but not discussing the core of the claim: Whether the trial court abused its discretion).