

**IN THE SUPERIOR COURT OF PENNSYLVANIA  
EASTERN DISTRICT**

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**No. 488 EDA 2016**

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**COMMONWEALTH OF PENNSYLVANIA,**

*Appellee,*

v.

**WILLIAM H. COSBY, JR.,**

*Appellant.*

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**On Appeal from the February 4, 2016 Order by the Court of Common Pleas of Montgomery County, No. CP-46-MD-0003156-2015, Denying Appellant's Petition for a Writ of Habeas Corpus**

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**APPELLANT WILLIAM H. COSBY, JR.'S ANSWER  
TO APPELLEE COMMONWEALTH'S APPLICATION TO QUASH APPEAL**

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Carl A. Solano (Pa. I.D. No. 23986)  
Bruce P. Merenstein (Pa. I.D. No.  
82609)  
SCHNADER HARRISON SEGAL &  
LEWIS LLP  
1600 Market Street, Suite 3600  
Philadelphia, Pennsylvania 19103  
(215) 751-2202; Fax: (215) 972-7363  
Email: csolano@schnader.com  
bmerenstein@schnader.com

Christopher Tayback  
Joseph Sarles  
(pro hac vice)  
QUINN EMANUEL URQUHART &  
SULLIVAN, LLP  
865 South Figueroa Street, 10th Floor  
Los Angeles, California 90017-2543  
(213) 443-3000; Fax (213) 443-3100  
Email: christayback@quinnemanuel.com  
josephsarles@quinnemanuel.com

Brian J. McMonagle (Pa. I.D. No.  
42394)  
MCMONAGLE, PERRI, MCHUGH, &  
MISCHAK P.C.  
1845 Walnut Street, 19th Floor  
Philadelphia, PA 19103  
(215) 981-0999; Fax 215-981-0977

Monique Pressley  
(pro hac vice)  
THE PRESSLEY FIRM, PLLC  
1629 K Street NW, Suite 300  
Washington, DC 20036  
(202) 973-0181; Fax (240) 235-3388  
Email: mdpressley@thepressleyfirm.com

*Counsel for William H. Cosby, Jr.*

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**APPELLANT WILLIAM H. COSBY, JR.’S ANSWER  
TO APPELLEE COMMONWEALTH’S APPLICATION TO QUASH  
APPEAL**

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**I. INTRODUCTION**

The Commonwealth’s application to quash this appeal should be denied because this Court has jurisdiction pursuant both to the collateral order doctrine embodied in Appellate Rule 313 and the exceptional circumstances doctrine that was recently recognized and applied in *Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. Ct. 2015). In addition, this Court may exercise jurisdiction upon granting Mr. Cosby’s pending petition for review of the trial court’s denial of a motion to amend its order to authorize a permissive appeal pursuant to Appellate Rule 1311; that petition is being filed with this answer, but has not yet been docketed.<sup>1</sup>

The Commonwealth concedes that the first two factors necessary for collateral order jurisdiction under Rule 313 are met, but contends the third—whether the right will be “irreparably lost”—is not. The Commonwealth ignores the many contexts in which the collateral order rule has been applied to permit interlocutory appeals in cases involving immunities and other rights similar to those at issue here. Instead, the Commonwealth argues that *Commonwealth v.*

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<sup>1</sup> Mr. Cosby previously filed an emergency petition for writ of prohibition, as a result of which this Court stayed all proceedings below pending resolution of the Commonwealth’s application to quash.

*Sabula*, 46 A.3d 1287 (Pa. Super. Ct. 2012), should be extended to prevent appellate review of the enforceability of a sitting District Attorney's commitment never to prosecute, made for the express purpose of removing a defendant's constitutional protection against self-incrimination. *Sabula* has no application to this situation, and this Court should not extend *Sabula* to create inconsistent appellate treatment among immunities and related rights.

The Commonwealth addresses the exceptional circumstances doctrine in a single paragraph of its motion, arguing *solely* that the doctrine does not apply because Mr. Cosby did not really file a "habeas petition" and that there are "no exceptional circumstances here." (Com. App. ¶ 26). This Court should disregard the Commonwealth's cursory argument. *Cf. Commonwealth v. Galvin*, 985 A.2d 783, 798 n.16 (Pa. 2009) (finding an issue waived for purposes of appellate review because party had "fail[ed] to develop this argument in any meaningful fashion in his brief . . ."). Exceptional circumstances are plainly present here. As this Court held in *Sabula*, the rights implicated by the Commonwealth's commitment not to prosecute a defendant are "too important to be denied review" because "requiring the Commonwealth to adhere to its agreements implicates fundamental fairness concerns, due process concerns and general, moral obligations as recognized in our case law and applicable beyond the present parties and litigation." 46 A.3d at 1292 (quotation marks omitted).

Finally, Mr. Cosby has also petitioned this Court to review the trial court's denial of Mr. Cosby's motion to amend the trial court's order to certify it for a permissive appeal pursuant to Rule 1311. For all the reasons set forth in that petition for review, this Court should exercise jurisdiction, which would moot any need to consider the issues raised in the Commonwealth's application to quash.

## **II. BACKGROUND**

On December 30, 2015, the District Attorney of Montgomery County charged Mr. Cosby with aggravated indecent assault of Andrea Constand. *See* Declaration of Joseph Sarles, filed concurrently ("Sarles Decl."), Ex. I. On January 11, 2016, Mr. Cosby petitioned the trial court for a writ of habeas corpus on two grounds, both of which establish his right to be free from prosecution. Sarles Decl., Ex. C. The trial court held a hearing on February 2-3, 2016.

*First*, Mr. Cosby argued that the charges violate the Commonwealth's express and binding commitment not to prosecute him for the matter involving Ms. Constand, which was a commitment given with the mutual understanding of Mr. Cosby's counsel that Mr. Cosby would then be unable to invoke his constitutional right against self-incrimination in a civil case filed against him by Ms. Constand. During the hearing on Mr. Cosby's petition for a writ of habeas corpus, Bruce Castor, the former District Attorney who had made that commitment in 2005,



testified to the non-prosecution promise, its purpose, and his intent to induce reliance by Mr. Cosby:

Q: . . . You gave the word of the Commonwealth of Pennsylvania in this case to Mr. Phillips [Mr. Cosby's now-deceased attorney] that you would not prosecute his client for the allegations involved in the Constand matter; am I correct?

A: I was not acting as Bruce Castor. I was acting as the Commonwealth. And on behalf of the Commonwealth, I promised that we would not – that the Commonwealth, the sovereign, would not prosecute Cosby for the Constand matter in order to forever strip his Fifth Amendment privilege from him in the Constand sexual assault allegation case.

Q: Ever?

A: Ever, Yes.

Q: And you told that to Mr. Phillips; correct?

A: I told it to him in no uncertain terms, and he understood it explicitly.

2/2/16 Hearing Tr. at 240:12-241:4 (Sarles Decl., Ex. G). This testimony was un-rebutted. Because Mr. Cosby's attorney at the time—Walter M. Phillips—died in 2015 (*See, e.g.*, 2/3/16 Hearing Tr. at 15:13-14) (Sarles Decl., Ex. H), his corroborating testimony is unavailable.

Relying on the District Attorney's binding commitment that Mr. Cosby would never be prosecuted, Mr. Cosby, under subpoena, was deposed in Ms. Constand's civil case in 2005, and again in 2006, without invocation of his

constitutional rights against self-incrimination. *See, e.g.*, Criminal Complaint at 12 (Sarles Decl., Ex. I). Mr. Cosby's attorney, John Schmitt, testified to this as well:

Q: And did – at the time that decision was made, did you have an understanding as to whether the criminal investigation could be continued, could be re-opened?

A: I had an understanding it could not be. I spoke to Mr. Phillips who indicated that, although the District Attorney had determined there wasn't sufficient evidence to charge Mr. Cosby, that he did anticipate that there would be a civil litigation. And he wanted to ensure that Mr. Cosby could be compelled to testify in a civil litigation. And, therefore, his decision was – it was an irrevocable commitment to us that he was not going to prosecute.

...

Q: If you had known that the criminal investigation in Montgomery County could be re-opened, how would it have affected your representation, if at all?

A: We certainly wouldn't have let him sit for a deposition.

2/3/16 Hearing Tr., at 10:22-14:10 (Sarles Decl., Ex. H).

*Second*, Mr. Cosby also argued that the charges violate his due process rights given the lengthy, non-investigatory, prejudicial delay in bringing the charges. In the ten years since these allegations were first investigated, Mr. Cosby's attorney, Walter M. Phillips—who negotiated the Commonwealth's commitment not to prosecute with the District Attorney and could have given

additional testimony requiring dismissal of the charges—has died; his testimony is lost forever. Although the former District Attorney’s testimony as to the existence and nature of the Commonwealth’s promise of non-prosecution was un-rebutted and sufficient to establish Mr. Cosby’s claim, to the extent Mr. Phillips’ corroborating testimony would materially affect the outcome of this proceeding, the Commonwealth’s undue delay clearly has prejudiced Mr. Cosby.

The parties briefed these issues and, after two days of testimony and argument, the trial court denied Mr. Cosby’s petition in a one-sentence order stating:

AND NOW, this 4 day of February, 2016, it is hereby ORDERED as follows: based upon review of all the pleadings and filings, the exhibits admitted at this hearing, and all testimony of witnesses, with a credibility determination being an inherent part of this Court’s ruling, the Court finds that there is no basis to grant the relief requested in paragraph 3b of the Defendant’s Petition for a Writ Habeas Corpus and, therefore, the Habeas Corpus Petition seeking dismissal of the charges is hereby DENIED.

*See* Sarles Decl., Ex. A. The same day, the trial court denied Mr. Cosby’s request for findings of fact and conclusions of law supporting this order. (2/3/15 Hearing Tr. at 321-22), and set the preliminary hearing for March 8, 2016 (*id.* at 323-24).

On February 12, 2016, Mr. Cosby filed a Notice of Appeal pursuant to the exceptional circumstances doctrine, recognized in *Commonwealth v. Ricker*, 120

A.3d 349, 353-54 (Pa. Super. Ct. 2015), and Appellate Rule 313. The Commonwealth applies to quash that appeal.<sup>2</sup>

### III. ANSWER

#### A. **This Court Has Jurisdiction Over the Appeal Pursuant to the Collateral Order Doctrine**

The collateral order doctrine vests this Court with jurisdiction to decide an interlocutory order when three prongs are met: “(1) the order must be separable from, and collateral to, the main cause of action; (2) the right involved must be too important to be denied review; and (3) the question presented must be such that if review is postponed until after final judgment, the claim will be irreparably lost.” *Commonwealth v. Harris*, 32 A.3d 243, 248 (Pa. 2011) (citing Pa. R. App. P. 313(b)).

##### 1. The Order is Separable from and Collateral to the Main Cause of Action, and the Rights are Too Important to be Denied Review

The Commonwealth and the trial court do not dispute that the first two prongs of the collateral order rule are met. Nor could they, for the following reasons.

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<sup>2</sup> In its application to quash, the Commonwealth argues that appeal of the trial court’s disqualification order is “premature” at this stage. Com. App. ¶ 25. Mr. Cosby does not oppose the Commonwealth’s argument on that jurisdictional issue as to the disqualification order and therefore is not pursuing that issue in this appeal, but otherwise reserves all rights.

The first prong is met because this appeal would decide whether Mr. Cosby has the right to be free from prosecution, not whether he is innocent or guilty. “The first prerequisite, separability, is met where review of the order in question does not implicate the merits of the underlying dispute.” *Commonwealth v. Wright*, 78 A.3d 1070, 1077 (Pa. 2013) (finding element met because the merits of the defendant’s petition for post-conviction relief were “completely independent” of the issue on appeal, whether the defendant was competent to waive his state post-conviction rights).

Mr. Cosby seeks this Court’s determination that he has the right to be free from this prosecution based on the binding commitment that the Commonwealth made in 2005 never to prosecute him, as well as its almost-twelve-year delay in filing charges, which prejudiced Mr. Cosby in providing material evidence related to the Commonwealth’s commitment. Those questions involve facts and law that have no relationship to the merits of the charges brought against Mr. Cosby. *See, e.g., Sabula*, 46 A.3d at 1291 (finding element met “because all of the acts and facts pertaining to the non-prosecution agreement have absolutely no relationship to the facts underlying the [criminal] charges”).

The second prong is met because the rights involved—the right to be free from prosecution, the right to due process, and the right against self-incrimination—are too important to be denied review. “The second prong of the

collateral order test mandates that the order must involve rights deeply rooted in public policy going beyond the particular litigation at hand.” *Veloric v. Doe*, 123 A.3d 781, 786 (Pa. Super. Ct. 2015) (quotation marks omitted); *Sabula*, 46 A.3d at 1292 (concluding “the rights implicated by Appellant’s appeal are too important to be denied review” because “requiring the Commonwealth to adhere to its agreements implicates fundamental fairness concerns, due process concerns and general moral obligations”) (quotation marks omitted).

*First*, the order implicates the integrity of the judicial system, which is too important to be denied review. In 2005, the Commonwealth promised not to prosecute Mr. Cosby expressly so that he would testify without invoking his privilege against self-incrimination. Now, the Commonwealth has filed charges against Mr. Cosby based on the very testimony given in reliance on the Commonwealth’s promise. “Because the integrity of the judicial system demands that the Commonwealth live up to its obligation,” and Mr. Cosby has alleged that the Commonwealth has failed to do so, the order is too important to be denied review. *Commonwealth v. Ginn*, 587 A.2d 314, 316 (Pa. Super. Ct. 1991) (upholding agreement not to prosecute); *see also Commonwealth v. Hemingway*, 13 A.3d 491, 500-01 (Pa. Super. Ct. 2011) (holding Commonwealth is bound by pre-trial agreements); *Sabula*, 46 A.3d at 1292 (citing *Ginn* and *Hemingway* for the same).

*Second*, the order involves Mr. Cosby’s privilege against self-incrimination, which is too important to be denied review. This Court has recently found that this privilege is “protected under both the United States and Pennsylvania Constitutions, and is so engrained in our nation that it constitutes a right deeply rooted in public policy.” *See Veloric*, 123 A.3d at 786 (internal citation omitted).<sup>3</sup> This prong consistently has been found met where the order involves a defendant’s privilege, even privileges less sacrosanct than the privilege against self-incrimination. *See, e.g., Commonwealth v. Schultz*, No. 280 MDA2015, 2016 WL 285506, at \*10 (Pa. Super. Ct. 2016); *Commonwealth v. Dennis*, 859 A.2d 1270, 1278 (Pa. 2004); *Ben v. Schwartz*, 729 A.2d 547, 551-52 (Pa. 1999); *Commonwealth v. Harris*, 32 A.3d 243, 248 (Pa. 2011); *Commonwealth v. Kennedy*, 876 A.2d 939, 943-44 (Pa. 2005); *In re T.B.*, 75 A.3d 485, 490-91 (Pa. Super. Ct. 2013); *M.M. v. L.M.*, 55 A.3d 1167, 1168 n.1 (Pa. Super. Ct. 2012). There is no question that Mr. Cosby’s privilege not to incriminate himself is at issue in this case. Mr. Castor testified that he pledged not to prosecute Mr. Cosby for the purpose of preventing Mr. Cosby from invoking his privilege at a deposition in Ms. Constand’s civil case, and it is undisputed that Mr. Cosby then did testify at the deposition without invoking his privilege. Mr. Cosby’s counsel

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<sup>3</sup> Although the Court in *Veloric* held that a self-incrimination right is sufficiently important to satisfy the collateral order test, it ultimately held that plaintiff in that case was not asserting a true self-incrimination claim that would qualify for collateral-order treatment. 123 A.2d at 787-91.

testified without contradiction that Mr. Cosby would not have testified if there were any doubt about Mr. Castor's commitment of non-prosecution. *See* 2/3/16 Hearing Tr., at 10:22-14:10 (Sarles Decl., Ex. H) (Q: "If you had known that the criminal investigation in Montgomery County could be re-opened, how would it have affected your representation, if at all?" A: "We certainly wouldn't have let him sit for a deposition.").

*Third*, the order involves Mr. Cosby's right to due process, which is also too important to be denied review. *Commonwealth ex rel. Kane v. Philip Morris, Inc.*, 128 A.3d 334, 344-45 (Pa. Commw. Ct. 2015) ("Generally, the implication of due process concerns is too important to be denied review.").

Because the appealed order involves the right to be free from prosecution, the right to due process, the right against self-incrimination, and the integrity of the judicial system, the importance element is met.

2. Mr. Cosby's Right to Be Free from Prosecution Cannot be Adequately Vindicated After He Has Been Prosecuted

Contrary to the Commonwealth's sole argument in opposition to collateral order review, Mr. Cosby's right to be free from prosecution cannot be adequately vindicated after he has been prosecuted. Whether the element is met is based on "whether a right is 'adequately vindicable' or 'effectively reviewable.'" *Kane*, 128 A.3d at 345. "This question 'cannot be answered without a judgment about the value interests that would be lost through rigorous application of a final judgment



requirement.’ For instance, the substantial cost a party would incur in defending a claim may equate to an irreparable loss of a right to avoid the burden entirely.” *Id.* (internal citations omitted).

Mr. Cosby’s claim to his right to be free from prosecution is irreparably lost for purposes of the collateral order doctrine even if he is acquitted, because he still would have been subjected to a prosecution that the Commonwealth has committed not to conduct. In addition, the substantial time, cost, and effort incurred in that prosecution cannot be recovered. *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 433 (Pa. 2006) (finding that immunity claim would be irreparably lost if appeal is delayed because “the substantial cost that Appellants will incur in defending this complex litigation at a trial on the merits comprises a sufficient loss to support allowing interlocutory appellate review as of right, in light of the clear federal policy to contain such costs in the public interest”); *Yorty v. PJM Interconnection*, 79 A.3d 655, 660-61 (Pa. Super. Ct. 2013) (citing *Pridgen* for the same); *Osborne v. Lewis*, 59 A.3d 1109, 1111 n.3 (Pa. Super. Ct. 2012) (finding that “the substantial cost that Appellants would incur in defending this complex malpractice case at a trial on the merits would be irreparably lost if review were postponed until final judgment” because the relevant statute was “intended to impose immunity from suit, not just immunity from liability . . . .”); *Bulebosh v.*

*Flannery*, 91 A.3d 1241, 1242 n.1 (Pa. Super. Ct. 2014) (citing *Osborne* for the same).

The Commonwealth and the trial court contend that the third prong is not met, relying exclusively on *Sabula*. The Commonwealth argues that, as in *Sabula*, Mr. Cosby’s claim “would be rendered moot by an acquittal or, if he is convicted, reviewed by this Court in an appeal following final judgment.” (Com. App. ¶ 24.) But the Commonwealth ignores the dispositive distinctions between this case and *Sabula*. First, in *Sabula*, the alleged cooperation agreement was made between the defendant, Mr. Sabula, and a police officer who was not authorized to enter into such agreements. *Id.* at 1289. The trial court and this Court specifically noted that the officer “did not speak with the District Attorney and did not obtain the District Attorney’s authorization to make the agreement.” *Id.* at 1291. Here, in contrast to *Sabula*, the commitment was made not by an unauthorized police officer but by the sitting District Attorney, who under well-established law is empowered to enter into such agreements. See, e.g., *Commonwealth v. Bernstein*, 515 A.2d 54, 57-58 (Pa. Super. Ct. 1986) (“A prosecutor’s decision not to prosecute an individual, and his ability to make such a promise to an individual, is an essential and vital part of our criminal justice system.”).<sup>4</sup>

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<sup>4</sup> See also *Commonwealth v. Stipetich*, 652 A.2d 1294, 1295 (Pa. 1995) (“It is well established that district attorneys, in their investigative and prosecutorial roles, have broad discretion over whether charges should be brought in any given

*Second*, Mr. Sabula contended only that the bargained-for benefit that he lost as a result of the government’s purported breach of its agreement with him was freedom from “the expense and ordeal of trial,” arguing that he would “be incarcerated, have to expend sizable sums of money for legal representation, and, in all likelihood, remain in jail while the issue proceeds through the appellate courts.” *Sabula*, 46 A.3d at 1292. But the Court rejected this argument, holding that freedom from such “incidental consequences of the processes necessary to impose [a] criminal sanction were not at the heart of the agreement” and that the only bargained-for benefit was “the avoidance of criminal sanctions.” *Id.* at 1292-93. The Court added that “procedural consequences” like those alleged by Mr. Sabula do not satisfy the third prong of the collateral order test. *Id.* at 1293.

Here, the Commonwealth’s commitment was not merely that Mr. Cosby would be free from “criminal sanctions”; it was that he never would be prosecuted with respect to Ms. Constand’s allegations *at all*. Unlike *Sabula*, then, being free from “the processes necessary to impose” criminal sanctions was indeed “the heart of the agreement.” This was confirmed at the February 2, 2016 hearing, when former District Attorney Castor testified that he wanted to forever remove any

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case. A District Attorney has a general and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case.”) (quotation marks omitted); *Ginn*, 587 A.2d at 316 (upholding non-prosecution agreement entered by defendant and the district attorney).

possibility of criminal prosecution and thereby to remove Mr. Cosby’s Fifth Amendment protections (which, of course, could only exist if there was a continuing threat of prosecution<sup>5</sup>). *See* 2/2/16 Hearing Tr. at 240:12-241:4. This testimony was un-rebutted. Moreover, Mr. Castor specifically referred to his non-prosecution pledge as the equivalent of a grant of transactional immunity. As he stated, “I wanted there to be the equivalent of transactional immunity, which by default lays solely with the sovereign . . . .” *Id.* at 235:25 to 236:2. Thus, Mr. Cosby’s claim to his right to be free prosecution and the Commonwealth’s interest in removing from Mr. Cosby the ability to assert the Fifth Amendment—which was “the heart of the agreement”—would, in contrast to *Sabula*, “actually disappear due to the processes of trial.” *Sabula*, 46 A.3d at 1293 (citing *Keefer v. Keefer*, 741 A.2d 808, 813 (Pa. Super. Ct. 1999)). Thus, under *Sabula*, the collateral order test is met.

Moreover, this Court’s holding in *Sabula* hinged on the limited nature of the particular agreement at issue in that case and, if it were read more broadly, would create an effective split of authority on the right to seek interlocutory appeal of immunity issues and similar rights. In *Sabula*, this Court did not hold that the collateral order doctrine is inapplicable whenever a non-prosecution commitment

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<sup>5</sup> *See, e.g., Commonwealth v. Long*, 625 A.2d 630, 637 (Pa. 1993) (stating that, to deny the privilege against self-incrimination, it must be “*perfectly clear*” that the person “cannot possibly incriminate himself.”) (emphasis in original).

provides immunity. Indeed, such a holding would be inconsistent with holdings of both the Supreme Court and this Court, which have recognized that immunities and similar rights are uniquely qualified for interlocutory review under the collateral order doctrine. *See, e.g., Pridgen*, 905 A.2d at 432 (finding that immunity-like claim appealable under the collateral order doctrine); *Yorty*, 79 A.3d at 660-61 (citing *Pridgen* for the same); *Osborne*, 59 A.3d at 1111 n.3 (finding immunity-like claim appealable under the collateral order doctrine); *Bulebosh*, 91 A.3d at 1242 n.1 (citing *Osborne* for the same). The right at issue here calls for similar protection.

In its February 24, 2016 opinion supporting the Commonwealth’s motion to quash, the trial court not only relied on *Sabula*, but also asserted that there are other remedies for “the Commonwealth’s potential use of the statements given during his depositions” (which were given in reliance on the District Attorney’s commitment of non-prosecution), such as review later by the lower court, and by this Court post-conviction. *See* Trial Ct. Op. at 5 (Sarles Decl., Ex. B). But the admissibility of testimony was not at issue in Mr. Cosby’s Petition for Writ of Habeas Corpus, and it is not at issue here. Unlike an error on the admissibility of testimony, Mr. Cosby’s claim to his right to be free from prosecution will be irreparably lost *even if he is acquitted*, because the prosecution would have already occurred. What is at issue here is Mr. Cosby’s right to be free from prosecution;

other remedies for *other* potential violations of his rights—such as the Commonwealth’s apparent plan to improperly use his deposition testimony against him—are not determinative at this stage.

**B. This Court Has Jurisdiction Pursuant to the Exceptional Circumstances Doctrine That Applies to Habeas Petitions**

Independently, this Court also has jurisdiction to decide the appeal pursuant to the exceptional circumstances doctrine applicable to habeas petitions, as recently recognized by this Court in *Ricker*, 120 A.3d at 354. “The exceptional circumstances doctrine follows the principle ‘that a finding of finality must be the result of a practical rather than a technical construction.’ The exceptional circumstances doctrine requires that an appeal be permitted when immediate resolution of the controversy is necessary to protect the defendant’s rights.” *Commonwealth v. Bolden*, 373 A.2d 90, 94 (Pa. 1977) (internal citation omitted). The doctrine is separate from, and independent of, the collateral order doctrine. *See Schultz*, 2016 WL 285506, at \*11 (noting that in *Ricker*, the Court had exercised jurisdiction by virtue of exceptional circumstances, and had not discussed the collateral order doctrine). The scope of the exceptional circumstances doctrine in habeas cases is broader than that of the collateral order rule, since the collateral order rule is the codification of only *one* exceptional circumstance. *Bolden*, 373 A.2d at 94 (referring to the collateral order doctrine as

“one important exception” encompassed within the exceptional circumstances doctrine).

“Exceptional circumstances exist ‘. . . (1) where an appeal is necessary to prevent a great injustice to the defendant, or (2) where an issue of basic human rights is involved, or (3) where an issue of great public importance is involved.’” *Bolden*, 373 A.2d at 94 (citing *Commonwealth v. Swanson*, 225 A.2d 231, 232 (Pa. 1967); *Commonwealth v. Bruno*, 225 A.2d 241 (Pa. 1967); *Commonwealth v. Byrd*, 219 A.2d 293 (Pa. 1966)); see *Ricker*, 120 A.3d at 353-54.

According to the Pennsylvania Supreme Court, Pennsylvania “case law permits appeals prior to judgment of sentence when an immediate appeal is necessary to vindicate the right asserted by the defendant.” *Bolden*, 373 A.2d at 94; see, e.g., *Commonwealth v. Leaming*, 275 A.2d 43, 44 (Pa. 1971) (nolle prosequi order appealable where defendant asserted violation of right to a speedy trial); *Commonwealth v. Bunter*, 282 A.2d 705, 707-08 (Pa. 1971) (order dismissing petition to quash indictment appealable due to asserted violation of right to a speedy trial); *Commonwealth v. Kilgallen*, 108 A.3d 780, 783 (Pa. 1954) (superseded on other grounds) (order appealable where defendant asserted infringement of defendant’s right against self-incrimination). In *Ricker*, this Court held that the doctrine conferred jurisdiction to decide an “important constitutional

question” raised by a pretrial habeas corpus petition seeing dismissal—the same type of motion filed by Mr. Cosby here. 120 A.3d at 354.

For the reasons discussed above as to collateral order, the rights involved in this appeal—the right to be free from prosecution, the right to due process, and the privilege against self-incrimination—are too important to be denied review and these rights cannot be adequately vindicated after Mr. Cosby has been prosecuted. Absent an immediate appeal, Mr. Cosby will suffer great injustice because these rights will be lost, multiple issues of his basic human rights are involved, and the issues are of great public importance. *See supra* at 7-16. Thus, this Court has jurisdiction to decide the Appeal pursuant to the exceptional circumstances doctrine.

The Commonwealth addresses the exceptional circumstances doctrine in a single paragraph of its motion, arguing *solely* that the doctrine “is not applicable here” because Mr. Cosby purportedly did not file a “habeas petition” and that there are “no exceptional circumstances here.” (Com. App. ¶ 26). Mr. Cosby styled his motion as a petition for a writ of habeas corpus, and the Commonwealth did not oppose the motion on the ground that it did not qualify as a proper habeas request. The Commonwealth therefore waived that issue. *See* Pa. R.A.P. 302(a) (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”). And, as noted above, the Commonwealth’s argument regarding the



exceptional circumstances doctrine in this Court is so cursory that it should be disregarded. *Cf. Galvin*, 985 A.2d at 798 n.16 (party “fail[ed] to develop this argument in any meaningful fashion in his brief . . .”).

The Commonwealth expresses doubt that the exceptional circumstances doctrine “even exists” (Com’s App. ¶ 26.), and claims the “one case” applying this doctrine is this Court’s 2015 decision in *Commonwealth v. Ricker*. Of course, *Ricker* is a recent, on-point decision from this Court which cites several other decisions that have applied the exceptional circumstances doctrine and it therefore stands as a sound basis for the doctrine’s existence. Other decisions confirm this conclusion. For example, the Commonwealth itself relies on *Commonwealth v. Swartz*, 579 A.2d 978, 980 (Pa. Super. Ct. 1990)) (*see* Com. App. ¶ 15), in which this Court stated that “[a]n appeal before final judgment will be permitted, however, in exceptional circumstances,” which “exist (1) where an appeal is necessary to prevent a great injustice to the defendant, or (2) where an issue of basic human rights is involved, or (3) where an issue of great public importance is involved.” *Id.* In *Swartz*, this Court held that the failure of the trial court to schedule a hearing established exceptional circumstances that caused the Court not to quash the appeal. *Id.* Under these and numerous other authorities, there can be no doubt that the doctrine exists and that the exceptional circumstances doctrine applies here.

The Commonwealth also argues that the exceptional circumstances doctrine does not apply because Mr. Cosby’s habeas petition somehow “was not a habeas petition at all.” (Com. App. ¶ 26.) As noted above, the Commonwealth cites no authority supporting that argument, which it makes for the first time on appeal, and the trial court correctly heard and ruled on the petition as a habeas petition.<sup>6</sup> The Judicial Code provides that “[a]ny judge of a court of record may issue the writ of habeas corpus to inquire into the cause of detention of any person or for any other lawful purpose,” 42 Pa. C.S. § 6502(a), and Mr. Cosby’s petition fit well within that provision. *See also* Pa. Const., Art. I § 14. As the habeas petition that this Court considered in *Ricker* demonstrates, there is nothing inconsistent about filing a habeas petition and seeking pretrial relief. *See generally Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. Ct. 2015).

The trial court distinguishes *Ricker* by opining that here, “neither of the Defendant’s issues rises to a constitutional level that would create ‘exceptional circumstances,’” whereas in *Ricker*, this Court was presented with an important constitutional question. (Trial Ct. Op. at 8, Sarles Decl., Ex. B) In *Commonwealth*

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<sup>6</sup> In its February 24, 2016 opinion, the trial court argues that Mr. Cosby’s petition for a writ of habeas corpus was “misnomered” and was in fact merely a “motion to dismiss,” but that is contrary to the record below. *See, e.g.* 2/3/16 Hearing Tr. at 79, Sarles Decl., Ex. H (The Court: “I’ve allowed under the procedural format of a habeas corpus to raise an issue of a non-prosecution agreement....”); *see also* February 4, 2016 Order, Sarles Decl., Ex. A (ruling that “the Habeas Corpus Petition seeking dismissal of the charges is hereby DENIED”).

*v. Ricker*, this Court held that it had jurisdiction to decide an appeal from the denial of a habeas petition under the exceptional circumstances doctrine. 120 A.3d at 353-54. The issue on appeal was the propriety of finding a *prima facie* case at a preliminary hearing based on hearsay evidence alone. This Court found that, “[n]ot only is Appellant’s claim capable of evading review, it presents an important constitutional question regarding whether a powerful state governmental entity violates federal and state constitutional principles in allowing a defendant to be restrained of his liberty and bound over for trial based solely on hearsay evidence.” *Id.* at 354. For those reasons, this Court found that it had jurisdiction to consider the merits of the appellant’s substantive claims. *Id.*

Similarly, this Court has jurisdiction to decide Mr. Cosby’s appeal. Mr. Cosby’s claim to his right to be free from prosecution would not survive the processes of trial, because, regardless of whether he is acquitted or convicted, he will have been prosecuted in violation of the agreement. Moreover, as this Court has previously observed, including in *Sabula*, the Commonwealth’s failures to comply with commitments to criminal defendants do indeed present important constitutional questions because “requiring the Commonwealth to adhere to its agreements implicates ‘fundamental fairness concerns, due process concerns and general, moral obligations’ as recognized in our case law and applicable beyond the present parties and litigation.” 46 A.3d at 1292. Accordingly, this Court held

that “the rights implicated by [Mr. Sabula’s appeal from an order denying a motion to compel enforcement of a non-prosecution agreement] are **too important to be denied review.**” *Id.* (emphasis added). Thus, because the Commonwealth’s failure to “live up to its obligation” implicates “the integrity of the judicial system,” there are exceptional circumstances that establish this Court’s jurisdiction over this case. *Ginn*, 587 A.2d at 316 (upholding agreement not to prosecute); *see also Hemingway*, 13 A.3d at 500-01 (holding Commonwealth is bound by pre-trial agreements); *Sabula*, 46 A.3d at 1282 (citing *Ginn* and *Hemingway* for the same).

**C. This Court Also May Assert Jurisdiction Pursuant to Mr. Cosby’s Petition for Review**

This Court also may exercise jurisdiction over this case upon granting Mr. Cosby’s petition for review. After the trial court entered its February 4, 2016, order denying Mr. Cosby’s petition for a writ of habeas corpus, Mr. Cosby, in an abundance of caution, moved to amend that order to include the language required by 42 Pa. C.S. § 702(b), to ensure that he could pursue an interlocutory appeal of any issue that this Court might conclude is not immediately appealable under Rule 313 or the exceptional circumstances doctrine. On February 16, 2016, just one business day after Mr. Cosby filed that motion, the trial court denied it in a one-sentence order.

In his petition for review, Mr. Cosby demonstrates that the trial court’s February 4, 2016 order denying his petition for a writ of habeas corpus involves

multiple, independent controlling questions of law, there is substantial ground for difference of opinion on those questions, and, if Mr. Cosby is successful, an immediate appeal will terminate this matter. Thus, when the trial court denied Mr. Cosby's motion to amend its order to certify it for interlocutory appeal, it abused its discretion, and this Court may assert jurisdiction over this case upon granting Mr. Cosby's petition for review.

#### IV. CONCLUSION

For these reasons, the Court should deny the Commonwealth's Motion to Quash.

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Respectfully Submitted,

/s/ Carl A. Solano

Carl A. Solano (Pa. I.D. No. 23986)  
Bruce P. Merenstein (Pa. I.D. No. 82609)  
SCHNADER HARRISON SEGAL & LEWIS LLP  
1600 Market Street, Suite 3600  
Philadelphia, Pennsylvania 19103  
215-751-2202; Fax: 215-972-7363  
Email: csolano@schnader.com  
bmerenstein@schnader.com

Brian J. McMonagle  
MCMONAGLE, PERRI, MCHUGH, &  
MISCHAK P.C.  
1845 Walnut Street, 19th Floor  
Philadelphia, PA 19103  
(215) 981-0999; Fax 215-981-0977

Christopher Tayback  
Joseph Sarles  
*(pro hac vice)*  
QUINN EMANUEL URQUHART &  
SULLIVAN, LLP  
865 South Figueroa Street, 10th Floor  
Los Angeles, California 90017-2543  
(213) 443-3000; Fax (213) 443-3100  
Email: christayback@quinnemanuel.com  
josephsarles@quinnemanuel.com

Monique Pressley  
*(pro hac vice)*  
THE PRESSLEY FIRM, PLLC  
1629 K Street NW, Suite 300  
Washington, DC 20036  
(202) 973-0181; Fax (240)235-3388  
Email: mdpressley@thepressleyfirm.com

***Attorneys for William H. Cosby, Jr.***