Received 04/11/2016 Superior Court Eastern District

Filed 04/11/2016 Superior Court Eastern District
488 EDA 2016

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 488 EDA 2016

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

WILLIAM H. COSBY, JR.,

Appellant.

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

BRIEF FOR APPELLANT WILLIAM H. COSBY, JR.

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STATEMENT OF JURISDICTION

Appellant William H. Cosby, Jr. appeals from the Montgomery County Court of Common Pleas' February 4, 2016, order denying Mr. Cosby's petition for a writ of habeas corpus. This Court has jurisdiction under 42 PA. C.S. §§ 702(a) & 742, PA. R. APP. P. 313 (collateral orders), and the exceptional circumstances doctrine recognized in *Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. 2015). In addition, this Court may exercise jurisdiction pursuant to PA. R. APP. P. 312, for the reasons set forth in Mr. Cosby's currently-pending petition for review docketed at No. 23 EDM 2016.

The reasons supporting this Court's jurisdiction are set forth more fully in Mr. Cosby's March 4, 2016 answer to the Commonwealth's pending application to quash this appeal.

ORDER IN QUESTION

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	No. MD-3156-15
	:	
v.	:	
	:	
WILLIAM H. COSBY, JR.	:	

ORDER

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**.

BY THE COURT:

STEVEN T. O'NEILL J.

Copies of this Order
mailed on 2/4/16
to the following:
Brian J. McMonagle, Esq.
Kevin R. Steele, Esq.
Honorable Elizabeth A. McHugh
Honorable William J. Furber, Jr., President Judge
Michael R. Kehs, Esq. (Court Administrator)

Michael R. Kehs
~~Secretary~~ Ct. Admin.

2016 FEB -4 PM 4:00

R. 223a.

STATEMENT OF SCOPE AND STANDARD OF REVIEW

Whether the Commonwealth is bound by its commitment not to prosecute Mr. Cosby is a question of law as to which this Court's standard of review is *de novo*, and its scope of review is plenary. *See, e.g.*, *Commonwealth v. Brown*, 52 A.3d 1139, 1162 (Pa. 2012) (*de novo* standard of review when determining whether prosecution and conviction violate federal and state due process rights); *Stonehedge Square Ltd. P'ship v. Movie Merchants, Inc.*, 685 A.2d 1019, 1023–24 (Pa. Super. 1996) (equitable estoppel is a question of law for the court to decide). Whether the Commonwealth's undue, prejudicial pre-charge delay violates federal or state due process guarantees is likewise a question of law, for which this Court's standard of review is *de novo*, and its scope of review is plenary, because the facts on which the legal question is based are undisputed. *Crawford Cent. Sch. Dist. v. Commonwealth*, 888 A.2d 616, 620 (Pa. 2005) ("Since the facts are undisputed, we are left with a question of law").

STATEMENT OF THE QUESTIONS INVOLVED

1. a. Do state and federal due process guarantees require that the Commonwealth abide by its District Attorney's express, irrevocable commitment not to prosecute a defendant?

— Implicitly answered in the negative below.

b. Do principles of estoppel, as well as state and federal due process guarantees, require that the Commonwealth abide by its District Attorney's express, irrevocable commitment not to prosecute a defendant where the defendant detrimentally relied on that commitment by waiving federal and state constitutional rights against self-incrimination?

— Implicitly answered in the negative below.

2. Where the Commonwealth's unjustified delay in filing charges resulted in prejudicial loss of evidence of the District Attorney's express, irrevocable commitment not to prosecute a defendant, is dismissal required under federal and state due process guarantees?

— Implicitly answered in the negative below.

STATEMENT OF THE CASE

FORM OF ACTION AND PROCEDURAL HISTORY

This is a criminal matter on appeal from the trial court's denial of the defendant's petition for a writ of habeas corpus.[1] The Commonwealth began investigating this matter in early 2005. R. 158a–159a. On February 17, 2005, after completing that investigation, the District Attorney for Montgomery County, Bruce Castor, announced that "insufficient, credible, and admissible evidence exists upon which any charge against Mr. Cosby could be sustained beyond a reasonable doubt." R. 177a. At the same time, the District Attorney expressly promised Mr. Cosby that the Commonwealth would *never* prosecute him for these allegations. R. 492a–493a. The District Attorney did so to induce Mr. Cosby to testify in a related civil matter without invocation of his rights against self-incrimination. R. 339a–340a, 492a–493a. Mr. Cosby so testified, and that civil case ultimately settled. *Id.* The 2005 criminal matter remained closed, and the Commonwealth did not pursue it further for over a decade. R. 342a, 607a.

Then, on December 30, 2015, shortly after Mr. Castor lost his bid for re-election as District Attorney—an election in which Mr. Cosby's prosecution had been a key issue (R. 63a–82a, 204a)—the Commonwealth charged Mr. Cosby with aggravated indecent assault based on the exact same allegations it had investigated

[1] All trial court proceedings in this matter were heard before the Honorable Steven T. O'Neill.

in 2005 and had promised never to pursue. R. 1a. On January 11, 2016, Mr. Cosby filed a petition for writ of habeas corpus, arguing the charges should be dismissed. R. 7a. The Commonwealth moved to dismiss the petition as "premature," but the trial court set Mr. Cosby's petition for hearing. R. 112a, 193a. On February 2 and 3, 2016, the trial court conducted a hearing, at which witnesses testified and exhibits were received. R. 253a–495a, 534a–858a. The next day, the trial court formally denied the petition in a one-sentence order and scheduled a preliminary hearing on the criminal charges for March 8, 2016. R. 223a, 224a.

On February 12, 2016, Mr. Cosby filed a notice that he was appealing the February 4 order. R. 225a. On February 19, 2016, the Commonwealth filed an application to quash the appeal, and on February 24, 2016, the trial court issued an advisory opinion ("Op.," appended to this brief as Appendix A) supporting the Commonwealth's view that this appeal should be quashed for lack of jurisdiction. This Court has not yet decided the Commonwealth's motion to quash.[2] Also on February 24, 2016, the trial court affirmed that the preliminary hearing would proceed on March 8, 2016, despite the pending appeal. R. 248a. Mr. Cosby immediately applied to this Court for a writ of prohibition to prevent the trial court from

[2] When Mr. Cosby filed his appeal, he also moved to amend the February 4, 2016 order to certify it for permissive appeal, as an alternative basis for appellate jurisdiction. R. 230a–236a. On February 16, the trial court denied Mr. Cosby's motion to amend (R. 237a), and on March 4, Mr. Cosby filed a petition for review of the trial court's denial of Mr. Cosby's motion. That petition for review remains pending at No. 23 EDM 2016.

conducting further proceedings, and on March 1, 2016, this Court stayed the trial court proceedings pending resolution of this appeal.

STATEMENT OF FACTS

The 2005 allegations. Complainant Andrea Constand—a Canadian citizen residing in Toronto—has alleged that, in January or March of 2004, she was assaulted by Mr. Cosby at his Montgomery County house. R. 367a. Ms. Constand did not report the incident to authorities or anyone else until January 2005, when she first contacted a civil attorney in Philadelphia and, later, called local police in Canada. R. 295a, 328a. Because the event allegedly occurred in Montgomery County, Canadian police referred Ms. Constand's claim to Pennsylvania authorities, and it eventually reached the District Attorney of Montgomery County, who at that time was Bruce Castor. R. 277a–278a.

The Commonwealth's 2005 investigation. Mr. Castor oversaw the investigation of Ms. Constand's allegations. R. 276a. After investigating, Mr. Castor "decided that there was insufficient credible and admissible evidence upon which any charge against Mr. Cosby related to the Constand incident could be proven beyond a reasonable doubt." R. 312a. As Mr. Castor explained in the hearing below, he reached that conclusion for several reasons, including that Ms. Constand gave materially inconsistent statements to the authorities (R. 299a–300a, 303a); that Ms. Constand had waited almost a year before making a complaint and had spoken to a

civil attorney before contacting police (R. 278a–282a, 295a–296a); that Ms. Constand had continued to have "an inordinate number of contacts" with Mr. Cosby after the alleged assault (R. 307a–308a); and that Ms. Constand and her mother had contacted Mr. Cosby by telephone, discussed payment of money or education expenses, and recorded those conversations in possible violation of the Pennsylvania Wiretap Act (R. 303a–310a).

The Commonwealth's commitment never to prosecute, and its inducement of Mr. Cosby's civil testimony. Upon concluding there was insufficient evidence to prosecute Mr. Cosby, the District Attorney considered whether "to leave the case open and hope it got better or definitively close the case and allow the civil court to provide redress to Ms. Constand." R. 312a–313a. The District Attorney chose the latter course, and took steps "to create the atmosphere or the legal conditions such that Mr. Cosby would never be allowed to assert the Fifth Amendment in the civil case." R. 320a. To accomplish that, Mr. Castor, acting as District Attorney, "made the decision as the sovereign that Mr. Cosby would not be prosecuted no matter what. As a matter of law, that then made it so that he could not take the Fifth Amendment . . . ." R. 316a.

Mr. Castor then discussed this decision with Mr. Cosby's criminal lawyer at the time, Walter Phillips. R. 316a–317a.[3] Mr. Castor testified that he "informed Mr. Phillips that Mr. Cosby would never be prosecuted for the allegations made by Ms. Constand," that he "did so for the specific purpose of making sure that Mr. Cosby could not assert the Fifth Amendment in any subsequent civil proceedings as they related to Ms. Constand," and that the commitment was to last "for all time." R. 318a. Mr. Castor confirmed that Mr. Cosby's lawyer understood the arrangement "explicitly":

> Q: . . . You gave the word of the Commonwealth of Pennsylvania in this case to Mr. Phillips 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?

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[3] Mr. Castor testified he did not believe it was necessary to communicate his decision to Ms. Constand's lawyers, but that he nevertheless instructed the First Assistant District Attorney to do so. He testified that he does not recall receiving back a report about any such communication, but assumed that Ms. Constand's lawyers did not object because no one told him anything to the contrary. R. 319a–320a, 437a–447a, 460a–461a. Ms. Constand's lawyers testified that they did not receive any communication from the First Assistant District Attorney about Mr. Castor's decision. R. 672a–675a, 768a–770a.

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

R. 492a–493a.[4] This testimony was unrebutted. Because Mr. Cosby's attorney, Mr. Phillips, died in 2015 (R. 548a), his corroborating testimony was unavailable at the hearing below.

On February 17, 2005, Mr. Castor issued a press release announcing the investigation was closed. *See* R. 176a–177a. Mr. Castor wrote and signed the press release himself, to make clear "that this was the decision of the sovereign, the District Attorney being the Commonwealth of Pennsylvania." R. 323a–324a, 341a. The press release explained the reasons "District Attorney Castor decline[d] to authorize the filing of criminal charges in connection with this matter." *See* R. 327a–334a, 892a–893a. It also contained what Mr. Castor called "a warning to the litigants," that if they continued to litigate in the press, he would "explain my reasoning for why I didn't approve a prosecution of Mr. Cosby"—an explanation that would have "severely hampered" Ms. Constand's civil case. R. 325a, 337a–339a.

The "warning" paragraph of the press release reads:

> Because a civil action with a much lower standard of proof is possible, the District Attorney renders no opinion concerning the credibility of any party involved so as not to contribute to the publicity, and taint prospective jurors. The District Attorney does not intend to

[4] Mr. Castor further testified that his commitment never to prosecute Mr. Cosby for the events alleged by Ms. Constand did not mean Mr. Cosby could never be prosecuted for *other* criminal violations, such as perjury or allegations by others. R. 471a–479a. No such other violations are charged in this case.

> expound publicly on the details of his decision for fear that his opinions and analysis might be given undue weight by jurors in any contemplated civil action. District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise. Much exists in this investigation that could be used (by others) to portray persons on both sides of the issue in a less than flattering light. The District Attorney encourages the parties to resolve their dispute from this point forward with a minimum of rhetoric.

R. 893a. At the hearing below, the Commonwealth argued that this passage reserved a right for the Commonwealth to "reconsider th[e] decision" of whether *to file charges* later (R. 616a–617a, 825a–826a), but the press release's text refers only to reconsidering the decision *not to further speak publicly* about the case. R. 893a. Mr. Castor testified that he was not "referring to the entire decision of whether to prosecute" but rather "to the decision not to comment publicly and taint prospective jurors." R. 468a–470a; *see also* R. 337a ("That was telling [the lawyers] that if they went out in the media and criticized the D.A.'s office for our decision, I was then going to call the press back and explain what I have explained here in court. . . .").

Mr. Cosby's testimony in Ms. Constand's civil action. Three weeks after Mr. Castor issued the press release, Ms. Constand filed a civil suit against Mr. Cosby based on the alleged 2004 event. R. 34a–50a, 339a, 343a. Because the criminal investigation was forever closed, Mr. Castor "directed that the [District Attorney's] office cooperate with Ms. Constand in providing discovery materials without any hassle." R. 342a. Had the investigation remained open, the Com-

monwealth would have been *prohibited* from producing those investigatory materials. *See* 18 Pa. C.S. § 9106(c)(4).

As plaintiff in the civil matter, Ms. Constand noticed Mr. Cosby's deposition, which took place over four days in September 2005 and March 2006. R. 569a. Mr. Cosby did not invoke his privilege against self-incrimination during that deposition. R. 546a–547a. In explaining why, Mr. Cosby's civil attorney, John Schmitt, testified he expressly relied on the District Attorney's "irrevocable commitment to us" that Mr. Cosby would never be prosecuted. R. 544a, 546a. Mr. Schmitt stated:

> A: The agreement that was made was made with Mr. Castor, the District Attorney. That matter was concluded. We had our agreement with him. We had his assurances. The civil case is filed subsequent to that. I don't need to worry about the Fifth Amendment because there is no risk of jeopardy to Mr. Cosby because the District Attorney has agreed irrevocably that there would be no criminal prosecution.
>
> Q: And you relied on that press release as that irrevocable agreement?
>
> A: No. I relied on the combination of the press release signed by Mr. Castor and the assurances that were given to Wally Phillips, the criminal lawyer who I retained, who assured me that it was sufficient to the purpose.

R. 573a; *see also* R. 547a ("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.").

Several months after Mr. Cosby's deposition, the civil case settled on confidential terms. R. 340a, 343a, 547a.

The Commonwealth's renewed effort to prosecute Mr. Cosby. After announcing in 2005 that it would not prosecute Mr. Cosby, the District Attorney's Office conducted no further investigation of the matter for over a decade, including for years after Mr. Castor left the District Attorney's Office in 2008. R. 342a; *see* R. 269a–270a.

Then, in September 2015, over a decade after the investigation had been forever closed, former District Attorney Castor sought once again to be elected District Attorney and campaigned unsuccessfully against then-Assistant District Attorney Kevin Steele. R. 54a. Mr. Steele's campaign platform included direct attacks on Mr. Cosby and Mr. Castor, criticizing Mr. Castor for not prosecuting Mr. Cosby. R. 204a. Around that same time, the media reported that the Montgomery County District Attorney's Office may have re-opened its investigation of Ms. Constand's allegations. R. 347a, 429a–430a. After seeing those reports, Mr. Castor e-mailed then-District Attorney Risa Ferman to remind her that the Commonwealth had committed never to prosecute Mr. Cosby based on Ms. Constand's allegations. R. 347–351a, 894a–895a (copy of e-mail). Ms. Ferman asked Mr. Castor if he had any written documentation of the non-prosecution commitment he had made. R. 357a–358a, 896a. Mr. Castor responded that he was not aware of any document other than his February 2005 press release, but he reiterated that he had made a binding commitment that Mr. Cosby could never be prosecuted for the

events alleged by Ms. Constand. R. 359a–360a, 897a. Neither Ms. Ferman nor anyone else in the District Attorney's Office ever asked to speak further with Mr. Castor about this issue; nor did they express any disagreement with Mr. Castor's statement that he had indeed bound the Commonwealth that Mr. Cosby would never be prosecuted as to those allegations. R. 362a.

Facing public pressure, and in the shadow of the political campaign attacks on Mr. Castor's non-prosecution of Mr. Cosby, *see* R. 51a–82a, the Commonwealth took the position that Mr. Castor's binding commitment of non-prosecution was either unenforceable or never existed. On December 30, 2015, just a few days before Mr. Steele assumed office as District Attorney, the Commonwealth filed charges for aggravated indecent assault against Mr. Cosby based on the exact same incident it had investigated in 2005 and promised would never be prosecuted. R. 1a. Completely repudiating its commitment, the Commonwealth expressly based the charges on Mr. Cosby's civil deposition testimony, which had been intentionally induced by the District Attorney's 2005 promise of non-prosecution. R. 149a–171a.

Mr. Cosby then filed his petition for a writ of habeas corpus. R. 2a. At the hearing below on that petition, Mr. Castor testified under oath and without contradiction that he had indeed made a binding commitment on behalf of the Commonwealth that Mr. Cosby would never be prosecuted as to the alleged event, R.

492a–493a, and had communicated that binding commitment to Mr. Cosby's counsel specifically to induce Mr. Cosby's reliance on it, R. 557a–643a. Mr. Cosby's civil counsel at the time, Mr. Schmitt, likewise testified to his understanding of, and express reliance upon, the binding non-prosecution commitment. *See* R. 540a–605a. No witness from the District Attorney's Office testified.[5]

STATEMENT OF THE ORDER OR DETERMINATION UNDER REVIEW

The order under review is the trial court's February 4, 2016, one-sentence order denying Mr. Cosby's petition for a writ of habeas corpus. R. 223a. The order provides no explanation of the decision, stating only a conclusion that "there is no basis to grant the relief requested." *Id.* It includes no findings of fact or conclusions of law. *See id.* The order repeats, nearly verbatim, a statement by the trial court at the end of the hearing in which the court stated that it was denying habeas relief, again without further explanation. *See* R. 840a; R. 857a (February 4 order intended to be same as what court stated at end of hearing). When asked to make findings and conclusions, the trial court specifically refused.[6]

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[5] The Commonwealth called only Ms. Constand's lawyers as witnesses, and they both testified that they were not parties to the non-prosecution commitment and were not aware of the reason Mr. Cosby did not assert the right against self-incrimination during the civil litigation. Their testimony is consistent with the testimony by Mr. Castor and Mr. Schmitt, who did not claim to have discussed that issue with Ms. Constand's counsel. *See* R. 540a–605a.

[6] The trial court stated (R. 855a.):

> I will not do that. There's nothing under the Rules of Criminal Procedure that require me to do that and I will not do that. I have

The order includes the recital, "with a credibility determination being an inherent part of this Court's ruling." R. 223a. The trial court did not explain what it meant by that recital, and the order made no findings as to credibility. *See id.* The primary witness at the hearing, of course, was former District Attorney Castor, whose testimony evidenced a clear recollection of the relevant facts. That testimony was not contradicted by any witness. During argument below, the trial court specifically rejected any suggestion that Mr. Castor was untruthful or gave perjurious testimony, stating: "I don't think he did that. . . . I don't believe that." R. 833a.

Although Appellate Rule 1925(a) required the trial court "to file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of, or [to] specify in writing the place in the record where such reasons may be found," the only opinion the trial court issued after Mr. Cosby appealed was its advisory opinion contending that this Court lacks appellate jurisdiction. In that opinion (attached as App. A), the trial court requested "a remand to order a concise statement and prepare a substantive opinion." Op. at 9 n.10. However, "[f]or reasons of judicial economy . . . [this Court may] decline to remand to the

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> made my ruling based upon and indicated what I have relied upon in my ruling, and I will not make findings of fact and conclusions of law because I am not required to do so and I do not believe it would in any way advance this case in making those findings at this time.

trial court for preparation of an opinion that describes its rationale" where the trial court has failed to do so. *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 805 (Pa. Super. 2007); *see also Commonwealth v. Hood*, 872 A.2d 175, 178 (Pa. Super. 2005) ("Although we do not approve or sanction the trial court's failure to comply with Rule 1925(a), our review of the record, in particular, the [relevant transcripts], adequately apprise us of the trial court's reasoning in relation to the three issues raised herein. Therefore, we decline to delay this case further by remanding for the preparation of a 1925(a) opinion."); *McConnell v. Berkheimer*, 781 A.2d 206, 209 n.5 (Pa. Super. 2001) ("[O]ur review has not been hampered by the lack of a trial court opinion in light of the brevity of the hearing transcript and the compact size of the certified record. Thus, a remand for a trial court opinion is not warranted in this case.").

No remand is needed here. Appellant has briefed this case without the benefit of any trial court opinion and this appeal presents questions of law on which this Court may rule on the present record. Alternatively, if this Court does grant a remand to allow the trial court to file an untimely Rule 1925(a) opinion, Mr. Cosby requests leave to supplement this brief as appropriate.

STATEMENT OF PLACE OF RAISING OR PRESERVATION OF ISSUES

Mr. Cosby raised the question whether the Commonwealth was required by due process guarantees and estoppel principles to abide by its commitment not to

prosecute him in his petition for a writ of habeas corpus, R. 7a–9a, supporting briefs, R. 10a–20a, 194a–203a, and arguments and presentation of evidence at the hearing on the petition, R. 253a–243a, 534a–858a.

Mr. Cosby raised the question whether this action should be dismissed because of the Commonwealth's unjustified delay in filing charges in his petition for habeas corpus, R. 7a–9a, supporting briefs, R. 11a–13a, 20a–22a, 203a–204a, and throughout the habeas hearing cited above.

SUMMARY OF ARGUMENT

The trial court erred for three independent reasons in refusing to grant Mr. Cosby's petition for a writ of habeas corpus.

First, former District Attorney Castor has provided unrebutted and unequivocal testimony that, in 2005, he intentionally and irrevocably bound the Commonwealth never to prosecute Mr. Cosby in connection with the allegations at issue. District Attorneys are empowered to make such commitments on behalf of the Commonwealth, and those commitments are enforceable pursuant to federal and state due process guarantees, as well as a matter of contract and estoppel.

Second, regardless of whether the District Attorney's commitment never to prosecute is enforceable standing alone, it became enforceable here on due process, contract, and estoppel grounds when Mr. Cosby detrimentally relied on the commitment by waiving his federal and state constitutional rights against self-incrimination.

Third, the Commonwealth began investigating the incident at issue in January 2005, performed no investigation from March 2005 until July 2015, and did not file charges until December 30, 2015. Having broken its own promise of non-prosecution, there was no valid reason for the Commonwealth's delay. In early 2015, a key witness to the District Attorney's promise never to prosecute—Mr. Phillips—passed away. To the extent there are any factual disputes as to the

Commonwealth's promise (and Mr. Cosby submits there are not), the Commonwealth's unjustified delay caused actual prejudice, and the charges must therefore be dismissed pursuant to federal and state due process guarantees.

ARGUMENT

The trial court's order allowing the Commonwealth to breach its District Attorney's express commitment not to prosecute Mr. Cosby should be reversed. The evidence below was unequivocal: the former District Attorney for Montgomery County testified he made that commitment in 2005 with the intent to bind the Commonwealth, and Mr. Cosby's counsel affirmed he understood the District Attorney's commitment to mean Mr. Cosby could never be prosecuted, and relied on it. No witness testified to the contrary.

The enforceability of a district attorney's promise cannot depend on the tides of political elections or public opinion. Indeed, the notoriety of this case heightens the concern courts have expressed when enforcing authorized promises made to criminal defendants: "the integrity of the judicial system demands that the Commonwealth live up to its obligation." *Commonwealth v. Ginn*, 587 A.2d 314, 316–17 (Pa. Super. 1991). A prosecutor's attempt to renege on a promise to a criminal defendant "strikes at public confidence in the fair administration of justice and, in turn, the integrity of our criminal justice system." *Dunn v. Colleran*, 247 F.3d 450, 462 (3d Cir. 2001).

The issues presented here are simple, and the answers are clear: when a district attorney acts for the Commonwealth and assures a criminal defendant that he will never be prosecuted for a particular event, that promise must be enforced. And it certainly be must enforced where, as here, the defendant detrimentally relies on that assurance in waiving constitutional rights.

This Court should reverse the trial court's order with instructions that the charges be dismissed.

I. THE TRIAL COURT ERRED IN REFUSING TO ENFORCE THE COMMONWEALTH'S BINDING COMMITMENT NEVER TO PROSECUTE MR. COSBY

A. District Attorneys Are Empowered to Bind the Commonwealth Never to Prosecute an Individual for a Particular Alleged Incident

"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 case." *Commonwealth v. Stipetich*, 652 A.2d 1294, 1295 (Pa. 1995) "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." *Commonwealth v. DiPasquale*, 246 A.2d 430, 432 (Pa. 1968) (emphasis in original); *Commonwealth v. McElroy*, 665 A.2d 813, 816 (Pa. Super. 1995) (citing *DiPasquale* and describing additional district-attorney powers). The determination

whether to prosecute is supported by the district attorney's "inherent, discretionary powers . . . ." *Commonwealth v. Spotz*, 716 A.2d 280 (Pa. 1998).

District attorneys also have the power to commit the Commonwealth *never* to prosecute. As Mr. Castor testified, making such commitments is a common part of a district attorney's job.[7] In *Stipetich*, the Supreme Court of Pennsylvania expressly noted that, while police officers are *not* authorized to enter into such agreements, they "are certainly free to obtain the district attorney's consent to a non-prosecution agreement." 652 A.2d at 1295. A change in the person occupying the position of District Attorney is of no moment. *See, e.g.*, *Commonwealth v. Burton*, 54 Pa. D. & C.2d 264, 270–71 (C.P. Phila. 1971) (Spaeth, J.) ("What one assistant district attorney has agreed to binds another assistant district attorney."). Where such commitments are made or consented to by a duly-authorized district attorney, they must be enforced. *See Ginn*, 587 A.2d

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[7] Mr. Castor testified that such commitments often arise in connection with inquiries whether a witness may assert a constitutional right not to testify:

> The way it — I had done it in the past was — and the way this comes up a couple of times a year, someone already has a civil case going and a witness is refusing to testify because of the Fifth Amendment. The lawyers and the judge adjourn to the judge's chambers. And if I was D.A. or First Assistant D.A., they would call me and say are you ever going to prosecute this person for this offense? I would say no. The assertion of the Fifth Amendment[] would be denied and it would go forward.

R. 369a–370a; *see* R. 434a-435a. Mr. Castor viewed this application of non-prosecution commitments as "black letter law." R. 435a.

at 316–17 (agreement to dismiss based on result of financial audit); *Dunn*, 247 F.3d at 464; *see also Florida v. Davis*, 188 So.2d 24 (Fla. Dist. Ct. App. 1966) (agreement to dismiss based on result of polygraph test); *Michigan v. Reagan*, 235 N.W.2d 581 (Mich. 1975) (same); *Illinois v. Starks*, 497 N.E.2d 187 (Ill. App. Ct. 1986) (same).

B. District Attorney Castor Bound the Commonwealth Never To Prosecute Mr. Cosby for the Events Alleged by Ms. Constand

The testimony at the hearing was clear and undisputed that Mr. Castor, acting as the Montgomery County District Attorney—therefore exercising the sovereign powers of the Commonwealth—intentionally bound the Commonwealth never to prosecute Mr. Cosby for the events that Ms. Constand claimed occurred in January or March of 2004. His testimony left no room for any conclusion other than that the Commonwealth bound itself not to prosecute Mr. Cosby:

> Q: Okay. So then, to summarize, you've indicated that considering the fact that you were a Minister of Justice and based on your evaluation of the case and what you had hoped to accomplish, you informed Mr. Phillips that Mr. Cosby would never be prosecuted for the allegations made by Ms. Constand; correct?
>
> A: Correct.
>
> Q: And you did so for the specific purpose of making sure that Mr. Cosby could not assert the Fifth Amendment in any subsequent civil proceedings as they related to Ms. Constand?
>
> A: For all time, yes.
>
> Q: And both of those decisions were for all time, you acting as sovereign; is that fair?
>
> A: That is — that's the truth.

R. 318a; *see also* R. 492a–493a.

The trial court made no finding that Mr. Castor's testimony was false, and even if it had, any such finding would be clearly erroneous because there was no contrary evidence on which such a finding could be based. Mr. Castor had no motive to lie, his memory was clear and consistent with Mr. Cosby's civil attorney, and indeed the trial court *disclaimed* any suggestion that Mr. Castor was untruthful or even that the Commonwealth was accusing him of being so. R. 833a. It surely would have been easier—and far less likely to invite public criticism—for Mr. Castor to have disclaimed or minimized his commitment, and to let the prosecution of Mr. Cosby go forward. But Mr. Castor repeatedly insisted that "the truth" was he had made a commitment, and that it bound the Commonwealth. R. 318a.

C. The Trial Court's Refusal to Enforce the Commonwealth's Commitment Not To Prosecute Mr. Cosby Violates Mr. Cosby's Federal and State Due Process Guarantees

As the above authorities demonstrate, once a commitment such as Mr. Castor's has been made, both federal and state due process guarantees require that the Commonwealth abide by it. *See, e.g.*, *Dunn*, 247 F.3d at 462 ("due process and equity require" enforcement). *Commonwealth v. Ginn* is instructive. There, the district attorney agreed to allow an independent accountant to analyze whether the Ginns had diverted certain funds and promised to dismiss the charges if the accountant found no diversion. 587 A.2d at 315. After the auditor found no diver-

sion, the Commonwealth attempted to renege, but this Court held that the Commonwealth "has a duty to live up to the terms of the bargain it made with the Ginns" and therefore "affirm[ed] the trial court's decision to enforce the promise made by the Commonwealth in this case and dismiss the prosecutions." *Id.* at 316–17. As in *Ginn*, the Commonwealth's promise not to prosecute must be enforced here, and the charges must be dismissed.

A district attorney's power to promise immunity—and a defendant's right to enforce such promises—has been recognized by courts sitting in Pennsylvania and throughout the Third Circuit. *See, e.g.*, *United States v. Deerfield Specialty Papers, Inc.*, 501 F. Supp. 796, 802 (E.D. Pa. 1980) ("Whether the pertinent letter memorialized an informal grant of immunity or an agreement not to prosecute, it is axiomatic that either are enforceable"); *United States v. Holtz*, 1993 WL 482953 (E.D. Pa. Nov. 15, 1993) ("Immunity can be granted either formally, by statute, or informally, which is sometimes referred to as non-statutory or 'pocket immunity'"); *United States v. Conley*, 859 F. Supp. 830, 840 n.6 (W.D. Pa. 1994) ("[T]he discretion invested in prosecutors includes the power to enter into informal grants of immunity and agreements not to prosecute"); *United States v. Bowers*, 517 F. Supp. 666, 679 (W.D. Pa. 1981) ("'Pocket' or informal immunity is a decision not to prosecute by the United States Attorney without the formal grant of statutory immunity set forth in 18 U.S.C. §§ 6002 and 6003"). Indeed, this power

has been recognized as judicially enforceable by this Court. *See, e.g., Ginn*, 587 A.2d at 315-17. Decisions elsewhere are in accord. *United States v. De Sena*, 490 F.2d 692, 694 (2d Cir. 1973) (government's promise not to prosecute a witness "was without doubt judicially enforceable."); *California v. Brunner*, 108 Cal. Rptr. 501, 503, 506-07 (Ct. App. 1973) (enforcing prosecutor's promise not to prosecute, which was made in return for testimony); *State v. Parris*, No. OT-14-015, 2014 Ohio App. LEXIS 4728 (Ohio Ct. App., Oct. 31, 2014) (same); *Vermont v. Reed*, 253 A.2d 227 (Vt. 1969) (same); *Davis*, 188 So.2d at 24-28 (enforcing prosecutor's promise not to prosecute, contingent on a successful polygraph exam); *Reagan*, 235 N.W.2d at 582-87 (same); *Starks*, 497 N.E.2d at 187-90 (same).

Relying on *Commonwealth v. Swinehart*, 642 A.2d 504 (Pa. Super. 1994), *aff'd for different reasons*, 664 A.2d 957 (Pa. 1995), the Commonwealth argued below that a district attorney's commitment never to prosecute cannot be enforced because "only use immunity is available" in Pennsylvania. R. 125a–126a, R. 128a; R. 623a. This argument ignores the Pennsylvania Supreme Court's subsequent opinion in *Commonwealth v. Swinehart*, 664 A.2d 957 (Pa. 1995), and is directly contrary to the Pennsylvania Supreme Court's decision in *Stipetich*, which noted that district attorneys are of course free to "consent to a non-prosecution agreement." *Stipetich*, 652 A.2d at 1295.

The Commonwealth's reliance on this Court's decision in *Swinehart* is misplaced. There, the issue was whether a grant of "use and derivative use" immunity under 42 PA. C.S. § 5947 satisfies the Pennsylvania Constitution's expansive right against self-incrimination. This Court observed that "only use immunity is available to a witness" under the statute. *Swinehart*, 642 A.2d at 506–07 (relying on *Commonwealth v. Parker,* 611 A.2d 199, 201 (Pa. 1992) ("[i]n Pennsylvania *the witness immunity statute* provides for only use immunity")). But the fact that Section 5947 provides only for use immunity to compel the testimony of a witness says nothing about whether a district attorney has the power to make a non-prosecution commitment or to generally grant transactional immunity. Indeed, the Commonwealth has cited *no* instance where an authorized non-prosecution agreement or grant of transactional immunity has been held to be invalid or unenforceable because it was too expansive. In affirming this Court's decision in *Swinehart*, the Pennsylvania Supreme Court recognized that transactional immunity has long been used in Pennsylvania law. *See* 664 A.2d at 963-64. And its use is not surprising, since "[p]rosecutors routinely enter into agreements with defendants . . . that exceed their minimum obligations under the law." *See United States v. Liburd*, 607 F.3d 339, 343 (3d Cir. 2010).[8]

[8] The Commonwealth also relied below on *Commonwealth v. Carrera*, 227 A.2d 627 (Pa. 1967). *Carrera* is inapposite because, like *Swinehart* and *Parker*, it dealt only with granting immunity to compel the testimony of a witness.

The witness immunity statute, 42 PA. C.S. § 5947, has no relevance here. It applies only where, in an ongoing proceeding, a witness whose testimony "may be necessary to the public interest" has refused to testify on the basis of his or her privilege against self-incrimination and a grant of immunity is necessary to compel the testimony. *See id.* § 5947(b), (d), (f). The section plainly does not apply here, as the trial court noted. R 642a–643a. The Court could not compel Mr. Cosby to testify in his own criminal prosecution, and there was no other pending case as to which the statute would apply.

Even if the District Attorney had failed to follow proper procedures in making his non-prosecution commitment or in granting immunity, the Commonwealth cannot use its own errors to renege on its commitment. Several courts have expressly rejected such a cynical argument. *See, e.g.*, *Brunner*, 108 Cal. Rptr. at 506 ("It would be anomalous to permit the People, represented by the district attorney, to argue that an earlier agreement entered into by the district attorney was void for lack of compliance with a statute of whose existence the district attorney must have been aware"); *Reed*, 253 A.2d at 232 ("if a prosecutor, in the furtherance of justice, makes an agreement to withhold prosecution, the court may, upon proper showing, even in the absence of statute authority, honor the undertaking"); *see also United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir. 1976) (immunity agreement where "government admittedly did not seek court

approval pursuant to the statutory immunity provisions" was not unlawful simply because prosecutor failed "to seek court approval").

District attorneys' power to decide whether to prosecute, or to promise *never* to prosecute, is an essential and vital part of the criminal justice system. *DiPasquale*, 246 A.2d at 432; *Ginn*, 587 A.2d at 316. As District Attorney, Mr. Castor had these powers and, as he testified unequivocally, he exercised them to bind the Commonwealth never to prosecute Mr. Cosby as to the alleged event. The Commonwealth must abide by its commitment.

D. The Trial Court Also Erred In Refusing to Enforce the Commonwealth's Promise of Non-Prosecution Pursuant to Contract Law

Commitments made by the Commonwealth are enforceable not only on due process grounds, but also as a matter of contract law pursuant to the doctrine of estoppel. *Commonwealth v. Hainesworth*, 82 A.3d 444, 447 (Pa. Super. 2013) (applying contract law principles to plea agreement); *Ginn*, 587 A.2d at 316 (analogizing contract-based plea agreement analysis to agreements not to prosecute). Although it arises in a criminal context, an agreement between the prosecutor and the accused is "contractual in nature and is to be analyzed under contract law standards." *Hainesworth*, 82 A.3d at 449. The determination of the agreement's terms "is made 'based on the totality of the surrounding circumstances,' and '[a]ny

ambiguities in [its terms] will be construed against the [Commonwealth].'" *Id.* at 447 (citing *Commonwealth v. Kroh*, 654 A.2d 1168, 1172 (Pa. Super. 1995)).

Mr. Castor testified that his non-prosecution commitment was not a formal "agreement" because it was not a bilateral deal between him and Mr. Cosby or Mr. Cosby's counsel. R. 316a–317a, 351a, 426a, 479a. But whether there was a formal "agreement" here in a contractual sense is not determinative, because under contract law principles, the doctrine of promissory estoppel may be "invoked in order to avoid injustice . . . [and to make] otherwise unenforceable agreements binding . . . ." *Crouse v. Cyclops Indus.*, 745 A.2d 606, 610 (Pa. 2000). "The doctrine of estoppel is an equitable remedy that may be asserted against the government in this jurisdiction." *Chester Extended Care Ctr. v. Com., Dep't of Pub. Welfare*, 586 A.2d 379, 382 (Pa. 1991). "[T]he elements of estoppel are 1) misleading words, conduct, or silence by the party against whom the estoppel is asserted; 2) unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting the estoppel; and 3) the lack of a duty to inquire on the party asserting the estoppel." *Id.*

Each element of estoppel is met here.

- *First*, the Commonwealth's words support estoppel. Mr. Castor "told [Mr. Phillips] in no uncertain terms, and [Mr. Phillips] understood . . . explicitly," 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." R. 492a–493a. Mr. Castor's words unambiguously demonstrate the Commonwealth's promise never to prosecute Mr. Cosby.

- *Second*, Mr. Cosby's reliance on the Commonwealth's words is clear: Mr. Cosby did in fact testify fully in Ms. Constand's civil action against him (R. 149a–171a, 569a), and his attorney, Mr. Schmitt, who was present at each of the four deposition sessions, provided unrebutted testimony that, but for Mr. Castor's promise, he would not have let Mr. Cosby sit for those depositions. R. 547a; R. 573a.[9]

- *Third*, there was no duty for Mr. Cosby to inquire whether the Commonwealth would honor its commitment never to prosecute him. Mr. Cosby was never given any reason to doubt that the Commonwealth would do so until 2015—long after he had testified in the *Constand* civil case in reliance on the Common-

[9] The Commonwealth suggested below that Mr. Cosby had waived his rights against self-incrimination by agreeing to speak with Montgomery County detectives in January 2005 (R. 594a–595a), but the law is clear that Mr. Cosby remained free to invoke his rights even after making statements to police (*Commonwealth v. Mitchell*, 369 A.2d 846, 848 (Pa. Super. 1977)), and Mr. Schmitt confirmed he understood that at the time. R. 594a–595a. *See also Mitchell*, 369 A.2d at 848 ("waiver of the right to remain silent may be withdrawn, and the right asserted" and "[t]he right not to have one's silence used against one does not depend upon whether the right is asserted at the beginning of interrogation or later on").

wealth's commitment. As soon as the Commonwealth reneged and filed charges against him, Mr. Cosby sought relief through his habeas petition.

Because each element is met, the Commonwealth's commitment never to prosecute Mr. Cosby is enforceable pursuant to the doctrine of estoppel.

E. Because Mr. Cosby Waived His Constitutional Rights in Reliance on the Government's Commitment, The District Attorney's Promise Is Enforceable Under Federal and State Due Process Guarantees

The Commonwealth violated Mr. Cosby's due process rights by reneging on its commitment. But that violation was compounded by Mr. Cosby's reliance on that commitment to waive his constitutional rights against self-incrimination.

Due process not only requires the Commonwealth to be bound by such commitments, but, independently, "[a]n unauthorized promise may be enforced on due process grounds if a defendant's reliance on the promise has constitutional consequences." *Illinois v. Stapinski*, 40 N.E.3d 15, 26–27 (Ill. 2015). Courts both in and outside of the Commonwealth, in both state and federal courts, have so held. *See, e.g.*, *Commonwealth v. Bryan*, 818 A.2d 537, 541–42 (Pa. Super. 2003) (due process and notions of fundamental fairness are implicated "when a promise made to a defendant induces his detrimental reliance in derogation of a constitutional right"); *Dunn*, 247 F.3d at 461–62 ("By entering into a plea agreement, a defendant voluntarily and knowingly surrenders a plethora of constitutional rights in exchange for a commitment by the prosecutor to do or not do certain things. When

the prosecutor breaches that agreement, he or she violates the defendant's due process rights by implicating the consideration and voluntariness upon which that plea was based.").[10]

In particular, a district attorney's express promise never to prosecute is enforceable where the defendant waives the right to counsel or the right against self-incrimination. *See Bryan*, 818 A.2d at 541–42 (noting that "[h]ad incriminating information been obtained against [the defendant] as a result of the unauthorized agreement, he would be entitled to have that evidence suppressed"); *California v. C.S.A.*, 104 Cal. Rptr. 3d 832, 841 (Cal. Ct. App. 2010).

Mr. Castor gave unrebutted and unequivocal testimony that he made the commitment never to prosecute, and communicated to Mr. Phillips that Mr. Cosby's Fifth Amendment rights were no longer available. Mr. Schmitt has provided unrebutted and unequivocal testimony that he understood from Mr. Phillips that Mr. Castor had committed never to prosecute and that Mr. Cosby's Fifth Amend-

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[10] *See also United States v. Pelletier*, 898 F.2d 297, 302 (2d Cir. 1990) ("due process requires that the government adhere to the terms of any plea bargain or immunity agreement it makes"); *Rowe v. Griffin*, 676 F.2d 524, 529 (11th Cir. 1982) ("When such a promise induces a defendant to waive his fifth amendment rights by testifying at the trial of his confederates or to otherwise cooperate with the government to his detriment, due process requires that the prosecutor's promise be fulfilled."); *United States v. Randolph*, 230 F.3d 243 (6th Cir. 2000) ("[I]t is a violation of due process to hold a defendant to an unconscionable agreement in the absence of proof of his *fully informed* consent to the risk that the bargained-away count of the indictment might return, like Hydra's head, the stronger for having been once cut off") (emphasis in original).

ment rights were no longer available. Mr. Schmitt also testified that, but for that agreement, Mr. Cosby would not have sat for deposition and testified fully. This waiver of a constitutional right constitutes detrimental reliance.[11]

The Commonwealth argued below that there was no detrimental reliance because Mr. Cosby did not refuse to answer questions during the Constand deposition concerning allegations by women other than Ms. Constand. But the record makes clear that at the time, there was no jeopardy as to those allegations. Before Ms. Constand had filed her civil action, the Commonwealth had investigated those same allegations, and announced it "could find no instance in Mr. Cosby's past where anyone complained to law enforcement of conduct, which would constitute a criminal offense." R. 177a. *See* R. 310a–312a, 314a. As confirmed by the Commonwealth's own witness, the other allegations discussed in the deposition and those investigated by the Commonwealth were one and the same. R. 775a. Thus, there was no reason for Mr. Cosby to invoke the Fifth Amendment when

[11] Mr. Cosby did not testify at the hearing below, and, in a clear abuse of his constitutional rights, the District Attorney improperly invited the fact-finder—here, the trial court—to draw an adverse inference from Mr. Cosby's invocation of his rights *at the habeas hearing itself*. R. 823a ("[T]he person that could have maybe told you something [about reliance] is sitting in the chair over there. Like, what's -- oh, I relied on something?"). *See, e.g.*, *Commonwealth v. Young*, 383 A.2d 899, 901 (Pa. 1978) ("Beyond question, adverse comment by an assistant district attorney concerning the failure of an accused to testify at trial . . . is constitutionally impermissible"); *Commonwealth v. Redel*, 484 A.2d 171, 174 (Pa. Super. 1984) ("The District Attorney's questions and remarks concerning the appellant's post-arrest silence are nothing but blatant violations of appellant's Fifth Amendment right to remain silent").

asked about the allegations of the other women in 2005 and 2006, because the investigating authorities had already concluded the allegations did not "constitute a criminal offense." R. 177a.

The District Attorney's commitment of non-prosecution is enforceable on due process and estoppel grounds because Mr. Cosby's detrimental reliance on the promise has constitutional consequence. Thus, even if Mr. Castor had tried but failed to make a valid and binding commitment, Mr. Cosby's reliance on that commitment binds the Commonwealth to it and requires dismissal.

II. THE COMMONWEALTH'S DELAY IN FILING CHARGES REQUIRES DISMISSAL BECAUSE IT MATERIALLY PREJUDICED MR. COSBY WITH RESPECT TO PROOF OF THE COMMONWEALTH'S NON-PROSECUTION COMMITMENT

Because the material facts are beyond dispute, this appeal presents no factual issues. However, to the extent the Commonwealth argues the evidence below was insufficient to prove the existence of the commitment, that argument should be rejected and the charges dismissed, because only the Commonwealth's own unjustified and prejudicial pre-indictment delay gave rise to any ability to posit factual questions as to the Commonwealth's commitment never to prosecute.

Pre-indictment delay violates a defendant's federal and state due process rights when "(1) . . . the delay caused him or her actual prejudice, and (2) . . . the Commonwealth's reasons for the delay were improper." *Commonwealth v. Louden*, 803 A.2d 1181, 1184 (Pa. 2002); *Commonwealth v. Scher*, 803 A.2d 1204,

1215 (Pa. 2002) (noting that "analysis is the same pursuant to both due process clauses," and that the United States Supreme Court's two-prong standard under *United States v. Marion*, 404 U.S. 307 (1971), and *United States v. Lovasco*, 431 U.S. 783 (1977), governs). "In order for a defendant to show actual prejudice, he or she must show that he or she was meaningfully impaired in his or her ability to defend against the state's charges to such an extent that the disposition of the criminal proceedings was likely affected." *Louden*, 803 A.2d at 1184. Actual prejudice "is commonly demonstrated by . . . the unavailability of an essential witness." *Scher*, 803 A.2d at 1222.

A. If There Were Any Factual Dispute as to the District Attorney's Promise, The Commonwealth's Delay Materially Prejudiced Mr. Cosby

Despite Mr. Castor's unrebutted and unequivocal testimony to the contrary and the corroborative testimony of Mr. Schmitt, the Commonwealth argued below that there was insufficient evidence to prove that Mr. Castor had promised never to prosecute Mr. Cosby. The trial court noted at the hearing that Mr. Phillips is not available to corroborate Mr. Castor's testimony.[12] But for the Commonwealth's decade-plus delay, Mr. Phillips would have corroborated the existence of the commitment. Accordingly, to the extent the Commonwealth argues the non-

[12] R. 802a–803a ("Mr. Phillips isn't here. Mr. Cosby wasn't in the room. You weren't in the room, Mr. McMonagle. There's no other witness to the promise.").

prosecution commitment was insufficiently proven, Mr. Phillips' unavailability due to the Commonwealth's delay constitutes actual prejudice.

B. There Was No Valid Reason for the Commonwealth's Delay

"[T]o prevail on a due process claim based on pre-arrest delay, . . . the court must . . . determine the validity of the Commonwealth's reasons for the delay." *Scher*, 803 A.2d at 1221. Here, the Commonwealth has provided no justification, and there is no plausible explanation at all, other than abiding by the non-prosecution commitment. Because the Commonwealth has not met its burden to provide valid reasons for its delay, this prong is satisfied. *Commonwealth v. Wright*, 865 A.2d 894, 901–02 (Pa. Super. 2004) (noting "the initial burden upon the accused to establish that the pre-arrest delay caused actual prejudice, *and the subsequent burden upon the Commonwealth to provide a reasonable basis for the extended delay in prosecuting the crime*") (emphasis added); *Commonwealth v. Snyder*, 713 A.2d 596, 605 (Pa. 1998) ("[W]e hold that the decision to prosecute the Appellant after more than eleven years, with no additional evidence and with no ongoing investigation in the last seven years, is so egregious that it cannot withstand even the most deferential standard of review").

Regardless of the Commonwealth's failure of proof, an examination of the relevant circumstances reveals that the Commonwealth's delay was deliberate and improper. Circumstances to be considered include "the deference that courts must

afford to the prosecutor's conclusions that a case is not ripe for prosecution; the limited resources available to law enforcement agencies when conducting a criminal investigation; the prosecutor's motives in delaying indictment; and the degree to which the defendant's own actions contributed to the delay." *Scher*, 803 A.2d at 1221.

First, there is no evidence suggesting Mr. Cosby's actions contributed in any way to the delay. *Second*, there is no evidence that the limited resources available to law enforcement agencies contributed to the decade-plus delay. *Third*, Mr. Castor, the District Attorney who oversaw the investigation in 2005, testified that he determined the case was as "ripe" as it could be when the Commonwealth purposefully and deliberately stopped investigation on February 17, 2005, and there was no investigation whatsoever until over ten years later, in July 2015. R. 341a–342a. *Finally*, the evidence establishes that the Commonwealth's motive in prosecuting after its lengthy delay was improper. The case was closed in 2005 and remained closed for over a decade, even though the District Attorney's Office was aware that Mr. Cosby had given deposition testimony and then settled the civil dispute with Ms. Constand, and that it had the power to subpoena that testimony, but did not.[13] The Commonwealth did not reopen the investigation until after Mr. Castor had left

[13] *See, e.g.*, R. 341a–342a; R. 343a ("Ms. Constand followed through with it as I had hoped and filed a civil suit, put a subpoena on Mr. Cosby to testify, and he did so. . . . The matter was resolved and I was hopeful that I had made Ms. Constand a millionaire.").

office, thus assuring that Mr. Castor was no longer in the position to continue honoring his commitment.[14] Had the Commonwealth honored that commitment, the prosecution would not have happened at all. The decade-plus "delay" created by the Commonwealth's politically-expedient decision to breach its commitment was entirely improper, and, due to recent publicity, has resulted in improper tactical advantage, including in jury selection.

Accordingly, actual prejudice exists, and a reasonable basis for the Commonwealth's decade-plus delay does not. For those reasons alone, the charges must be dismissed. *See, e.g.*, *United States v. Morrison*, 518 F. Supp. 917, 918–19 (S.D.N.Y. 1981) (dismissing based on delay of six months because the Government's delay made locating potential witnesses impossible); *United States v. Santiago*, 987 F. Supp. 2d 465, 484 (S.D.N.Y. 2013) (dismissing count based on delay of five years because the only witness—other than the victim and the defendant—was lost); *Oregon v. Whitlow*, 326 P.3d 607, 612 (Or. Ct. App. 2014) (dismissing based on delay of less than five years because witness as to complainant's credibility was lost).

[14] *See, e.g.*, R. 346a (testimony by Mr. Castor that he was no longer part of the "law enforcement arm" of the Government, and thus, the District Attorney's Office did not consult with him on anything that went on in the *Cosby* case.).

CONCLUSION

This Court should reverse the trial court's order with instructions that all charges against Mr. Cosby be dismissed.

Respectfully Submitted,

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Dated: April 11, 2016.

Appendix A

Trial Court Opinion
Dated February 24, 2016

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	No. MD-3156-15
	:	488 EDA 2016
v.	:	
	:	
WILLIAM H. COSBY, JR.	:	

OPINION

O'Neill, J. **February 24, 2016**

Defendant, William H. Cosby, Jr., appeals from this Court's orders of February 4, 2016, denying his Petition for a Writ of Habeas Corpus seeking dismissal of the charges based on an alleged non-prosecution agreement, and his Motion to Disqualify the Montgomery County District Attorney's Office. For the reasons set forth below, these Orders are interlocutory and, therefore, neither appealable by right as collateral orders, nor based on "exceptional circumstances" and these appeals should be quashed.

I. Facts and Procedural History

On December 30, 2015, the Defendant was charged with three counts of Aggravated Indecent Assault[1] stemming from an incident in his home in Cheltenham, Montgomery County in the winter of 2004. On January 11, 2016, the Defendant filed a document styled as "Petition for Writ of Habeas Corpus and Motion to Disqualify the Montgomery County District Attorney's Office." While artfully misnomered as a "Petition for Writ of Habeas Corpus" this Court treated the filing as containing three distinct motions (1) a motion to dismiss

[1] 18 Pa. C.S.A. §3125.

based on an alleged non-prosecution agreement;[2] (2) a motion to dismiss based on pre-arrest delay;[3] and (3) a motion to disqualify the District Attorney's Office.[4]

By order of January 13, 2016, the Commonwealth was directed to respond and a hearing/argument on the matter was scheduled for February 2, 2016. By order of January 22, 2016, the February 2, 2016 hearing was limited to the issue of an alleged non-prosecution agreement and this Court noted that all other issues raised by the Defendant would be preserved. However, following a conference and agreement of the parties, the Court agreed to hear argument on the Defendant's Motion to Disqualify the District Attorney's Office.

Following two days of hearing and argument on February 2 and 3, 2016, this Court denied the Defendant's Motion to Dismiss based on the alleged non-prosecution agreement and the Defendant's Motion to Disqualify the District Attorney's Office. On February 12, 2016, the Defendant simultaneously filed a Notice of Appeal and a "Motion To Amend the February 4, 2016 Order Denying His Petition for Writ of Habeas Corpus to Certify the Order For Appeal Pursuant to 42 Pa. C.S. 702(b)." By Order of February 16, 2016, this Court denied that Motion. This Court did not order a concise statement pursuant to Pa. R.A.P. 1925(b) on the within Notice of Appeal.

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[2] Defendant's "Memorandum of Law in Support of Petition for Writ of Habeas Corpus and Motion to Disqualify," para. III(B).
[3] Memorandum of Law, para. III(C).
[4] Memorandum of Law, para. III(D).

II. Discussion

a. The Court's Orders of February 4, 2016 are not collateral orders.

In Pennsylvania, an appeal may be taken from (1) a final order or an order designated as a final order[5]; (2) an interlocutory order by permission[6]; (3) an interlocutory order by right[7]; or (4) a collateral order.[8] Pursuant to the Rules of Appellate Procedure, an appeal may be taken as of right from a collateral order. Pa. R.A.P. 313. A collateral order: (1) is separable from and collateral to the main cause of action; (2) involves a right that is too important to be denied review; and (3) presents such a question that if review is postponed until final judgment in the case, the claim will be irreparably lost. Pa.R.A.P. 313(b). Appellate courts "construe the collateral order doctrine narrowly. In adopting a narrow construction, [appellate courts] endeavor to avoid piecemeal determinations and the consequent protraction of litigation." Commonwealth v. Sabula, 46 A.3d 1287, 1291 (Pa. Super. 2012). All three prongs of the test must be met in order for an appeal to lie from a collateral order. Rae v. Pennsylvania Funeral Directors' Association, 977 A.2d 1121, 1125 (Pa. 1999)(citation omitted). Furthermore, each of the distinct issues that a Defendant wishes to raise on an interlocutory appeal must satisfy all three prongs of the collateral order rule. Id. at 1130. Neither of this Court's orders satisfy the collateral order rule, therefore, these appeals should be quashed.

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[5] Pa. R.A.P. 341.
[6] 42 Pa.C.S.A. §702(b); Pa. R.A.P. 1311.
[7] Pa. R.A.P. 311; 42 Pa.C.S.A. § 5105.
[8] Pa. R.A.P. 313.

A lower court's ruling on an alleged agreement not to prosecute has specifically been found not to be appealable as a collateral order. Sabula, 46 A.3d 1287. In Sabula, the Defendant appealed from the trial court's denial of his pre-trial motion to compel a pre-arrest agreement not to prosecute. As to the first prong of the test, the Court found that a determination of "whether the non-prosecution agreement is enforceable against the Commonwealth can be made 'independent from an analysis of the merits of the underlying dispute.'" Id. at 1291(citation omitted). Likewise, the Court found that the second prong of the test was satisfied because "requiring the Commonwealth to adhere to its agreements 'implicates fundamental fairness, due process concerns and general, moral obligations' as recognized in our case law and applicable beyond the present parties and litigation.'" Id. at 1292. As to the third prong however, while the Court concluded that the rights implicated by the appeal were too important to be denied review, the Court ultimately found that the claim would not be lost if review was postponed. Id. Accordingly, the Court found that the third prong of the test was not satisfied and the appeal was quashed. Id. In so concluding, the Court reiterated: "[t]o satisfy this element, an issue must actually be lost if review is postponed. Orders that make a trial inconvenient for one party or introduce potential inefficiencies, including post-trial appeals of orders and subsequent retrials, are not considered as irreparably lost." Id. at 1293 (citing Keefer v. Keefer, 741 A.2d 808, 812 (Pa. Super. 1999)).

Instantly, the same analysis should be applied. Even assuming *arguendo* that the Defendant can satisfy the first two prongs of the collateral order rule, the Defendant's rights will not be irreparably lost, and, therefore, this Court's denial of the Defendant's claim is not appealable as a collateral order. Additionally, insofar as the Defendant's claim is based on the Commonwealth's potential use of the statements given during his depositions, which he purportedly gave in reliance on the alleged agreement not to prosecute, the Defendant may still challenge the admissibility of these statements in a pretrial motion to suppress. He may also challenge the Commonwealth's showing of a *prima facie* case following his preliminary hearing. Therefore, not only will his claims not be lost, they will also be subject to further review by this Court even before review by appellate Courts if he is ultimately convicted. Furthermore, the issue will be mooted in the event of an acquittal.

Similarly, with regard to the Order denying the motion to disqualify the District Attorney's Office, even assuming that the first two prongs are met, that order is not a collateral order as the claim will not be irreparably lost. There is no reported appellate authority in the Commonwealth allowing an interlocutory appeal from an order denying a motion to disqualify a prosecutor. However, the Pennsylvania Supreme Court has found that disqualification orders are not collateral orders. Commonwealth v. Johnson, 705 A.2d 830 (Pa. 1998) (holding that order disqualifying defense counsel was not immediately appealable as review would not be lost). As with the Order denying the Defendant's request

to dismiss the charges, this issue is reviewable in the event of a conviction and mooted in the event of an acquittal. Therefore, neither of the Court's February 4, 2016 Orders are appealable as collateral orders and the appeals should be quashed.

b. "Exceptional circumstances" do not exist.

Insofar as the "exceptional circumstances" doctrine remains viable, it is not applicable to the instance case. Generally, in the absence of "exceptional circumstances," an immediate appeal will not lie from an order denying a pretrial petition for *habeas corpus* as such order is interlocutory. Commonwealth v. Bernhardt, 519 A.2d 417, 420 (citations omitted). Pennsylvania Courts have stated that exceptional circumstances exist where (1) an appeal is necessary to prevent a great injustice to the Defendant, or (2) an issue of basic human rights is involved, or (3) an issue of great public importance is involved. Commonwealth v. Byrd, 219 A.2d 293, 295 (Pa. 1966) (finding no exceptional circumstances and quashing appeal from pretrial order requiring Defendant to undergo neuropsychiatric examination subject to limitation that he could not be compelled to answer questions); Commonwealth v. Swanson, 255 A.2d 231, 232 (Pa. 1967) (quashing appeal from pre-trial order denying change of venue because order was interlocutory); Commonwealth v. Bolden, 472 Pa. 602, 611 (Pa. 1977) (holding "that denial of a pretrial application to dismiss an indictment on the ground that the scheduled trial will violate the defendant's right not to be placed twice in

jeopardy may be appealed before the new trial is held")[9] *abrogated on other grounds by* Commonwealth v. Perry, 411 A.2d 786 (Pa. Super. 1979); Commonwealth v. Lindsley, 366 A.2d 310 (Pa. Super. 1977)) (quashing appeal from denial of habeas corpus petition where "neither exceptional circumstances, statutory authorization, nor a jurisdictional challenge" present to justify appeal); Commonwealth v. Swartz, 579 A.2d 978 (Pa. Super. 1990)) (finding right to a speedy trial to be a basic human right, but that an order denying motion to dismiss for speedy trial violation not immediately appealable where trial court conducts hearing before dismissing the motion).

Most recently, the Superior Court found that "exceptional circumstances" supported an interlocutory appeal from a denial of a pre-trial *habeas corpus* petition where the issue was not only capable of evading review, but also presented an important constitutional question. Commonwealth v. Ricker, 120 A.3d 349, 354 (Pa. Super. 2015). In Ricker, the Defendant was bound over for trial based solely on hearsay evidence, apparently under the 2011 amendments to Pa. R.Crim.P. 542(E). Id. at 352. The Defendant filed a pre-trial writ of *habeas corpus*, asserting that it was improper to find a *prima facie* case against him based solely on hearsay. Id. The trial court denied the petition without a hearing or argument. Id. The Defendant appealed. Id. The Superior Court

[9] The precise circumstances in Bolden are now contained in the note to Rule 313 as an example of a collateral order. "Examples of collateral orders include orders denying pre-trial motions to dismiss based on double jeopardy in which the court does not find the motion frivolous, Commonwealth v. Brady, 510 Pa. 336, 508 A.2d 286, 289-91 (1986) (allowing an immediate appeal from denial of double jeopardy claim under collateral order doctrine where trial court does not make a finding of frivolousness). Pa.R.A.P. 313, note.

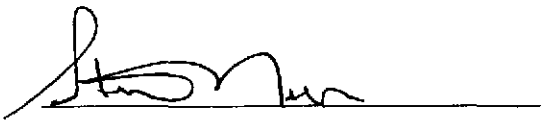
found that the question of whether hearsay evidence alone can be used to establish an *prima facie* case "presents an important constitutional question regarding whether a powerful state governmental entity violates federal and state constitutional principles in allowing a defendant to be restrained of his liberty and bound over for trial based solely on hearsay evidence." Id. at 354. The Court held that "*under the precise facts herein*, we have jurisdiction to consider the merits of Appellant's substantive claims." Id. at 354 (emphasis added).

Instantly, neither of the Defendant's issues rises to a constitutional level that would create "exceptional circumstances." An immediate appeal is not necessary to prevent a great injustice to the Defendant. The Defendant still has multiple avenues of review once, and if, a *prima facie* case is established. The Defendant's issues do not involve questions of basic human rights and are not issues of great public importance. These are unique issues, applicable to only this particular Defendant with little chance of being replicated.

III. Conclusion

Based on the foregoing, this Court respectfully submits that the Defendant's dilatory attempts to obtain review of its clearly interlocutory orders should not be entertained and these appeals should be quashed.[10]

BY THE COURT:



STEVEN T. O'NEILL J.

Copies of this Opinion mailed on 2/24/16 to the following:
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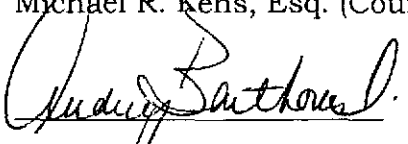

Secretary

[10] If the Superior Court finds that it does have jurisdiction to address the merits of the Defendant's appeals, this Court respectfully requests a remand to order a concise statement and prepare a substantive opinion.

CERTIFICATIONS

This 11th day of April, 2016, I certify that:

Electronic filing. The electronic version of this brief that is filed through the Court's PACFILE web portal is an accurate and complete representation of the paper version of that document that is being filed by appellant.

Word count. This brief contains 9,253 words, not counting the order in question, as counted by the undersigned's Microsoft Word word processing software, and it therefore complies with the word limit set forth in Rule 2135(a)(1) of the Rules of Appellate Procedure.

Service. I served a true and correct copy of this brief through the Court's PACFILE system upon the following counsel:

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