

FILED
5/3/2016
Supreme Court
Middle District
No. 58 MM 2016

**IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT**

No. _____ MDM 2016

Commonwealth of Pennsylvania, Respondent

v.

William Henry Cosby, Jr., Petitioner

**EMERGENCY APPLICATION FOR STAY PENDING DISPOSITION OF
PETITIONS FOR ALLOWANCE OF APPEAL AND REVIEW**

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 C. 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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EMERGENCY APPLICATION FOR STAY

INTRODUCTION AND REASON FOR EMERGENCY RELIEF

Pursuant to Rules 1702(b) and 3315 of the Rules of Appellate Procedure, Petitioner William H. Cosby, Jr. seeks an emergency stay of trial court proceedings while this Court reviews the Superior Court's orders quashing and declining to exercise jurisdiction over Mr. Cosby's appeal.

In a hearing below, the former District Attorney of Montgomery County testified that in 2005, after thoroughly investigating allegations made against Mr. Cosby and concluding that charges should not be brought, he made a binding and irrevocable commitment that the Commonwealth would never prosecute Mr. Cosby in connection with those allegations, which resulted in Mr. Cosby testifying at a civil deposition without invoking his right against self-incrimination. When a new District Attorney sought to prosecute Mr. Cosby despite his predecessor's non-prosecution commitment, Mr. Cosby filed a petition for a writ of habeas corpus seeking dismissal of the charges, but the trial court denied the petition. When Mr. Cosby sought to appeal, the Superior Court held that it had no jurisdiction and remanded, effectively allowing Mr. Cosby to be prosecuted despite the non-prosecution commitment. The Superior Court's jurisdictional holdings were incorrect, and Mr. Cosby is preparing petitions to this Court for allowance of an appeal or for review of those decisions. By this application, he seeks an order

staying further proceedings while this Court considers his petitions for allowance of appeal and review.

A stay by this Court is necessary to prevent deprivation of Mr. Cosby's rights. After Mr. Cosby filed his appeal to the Superior Court, and over Mr. Cosby's objections, the trial court attempted to proceed with the case, forcing Mr. Cosby to seek a writ of prohibition to prevent the trial court from going forward. The Superior Court entered a temporary stay in response to Mr. Cosby's request for a prohibition writ, but the Superior Court lifted that stay on April 25, 2016, when it held that it lacked jurisdiction to hear Mr. Cosby's case. Less than 24 hours later, the trial court re-scheduled the preliminary hearing for May 24, 2016. If this Court does not stay those proceedings, Mr. Cosby's fundamental due process right not to be prosecuted and not to be subject to the criminal proceedings will be irreparably lost. Mr. Cosby therefore files this application on an emergency basis.

Mr. Cosby's petitions for allowance of appeal or review will seek review only of the Superior Court's holdings that it lacks jurisdiction to hear Mr. Cosby's appeal, and this application seeks a stay only so that this Court may consider and decide those petitions. Mr. Cosby is entitled to a stay because he is likely to prevail on the merits of his appeal and will suffer irreparable injury absent a stay, and because the issuance of a stay will not substantially harm the Commonwealth

and is favored by the public interest. Mr. Cosby has the right to be free from prosecution based on the District Attorney's own testimony that he made an unequivocal and binding promise to Mr. Cosby that the Commonwealth would never prosecute him in connection with the allegations at issue. That right will be irreparably lost if the May 24, 2016 preliminary hearing is allowed to go forward.

The Commonwealth's argument that its District Attorney's admitted promises should not be enforced has far-reaching implications for all of the Commonwealth's citizens. The Commonwealth has not and cannot allege any substantial harm if this case is stayed while this Court decides Mr. Cosby's petitions, particularly because the Commonwealth already has delayed prosecution for more than a decade.

Accordingly, this Court should stay all proceedings in this matter until this Court decides Mr. Cosby's petitions for allowance of appeal and review.

STATEMENT OF FACTS

The Commonwealth's 2005 investigation. In January 2005, complainant Andrea Constand alleged that, in January or March of 2004, she was assaulted by Mr. Cosby. R. 367a.¹ Bruce Castor, the District Attorney of Montgomery County at that time, oversaw the investigation of Ms. Constand's allegations. R. 276a-278a. After investigating, Mr. Castor "decided that there was insufficient credible

¹ Citations are to the Reproduced Record filed in the Superior Court, a copy of which is being lodged with this Court.

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, sought payment by him of money or education expenses, and had 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. 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?

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

R. 492a–493a. 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.

In express reliance on the District Attorney’s commitment, Mr. Cosby then submitted to a deposition in Ms. Constand’s civil action against him, without any invocation of his constitutional rights against self-incrimination. R. 573a; *see also* R. 547a. As Mr. Cosby’s lawyer testified:

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.

R. 547a. 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 unsuccessfully sought once again to be elected District Attorney and campaigned against then-Assistant District Attorney Kevin Steele. R. 54a. Mr. Steele's successful campaign platform included direct attacks on Mr. Cosby and Mr. Castor, and criticized Mr. Castor for not prosecuting Mr. Cosby. R. 204a. 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.

Proceedings in the trial court and the Superior Court. Shortly after the charges were filed, Mr. Cosby filed a petition for a writ of habeas corpus that sought the charges' dismissal. R. 2a. 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. 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, John 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. The next day, the trial court formally denied the petition in a one-sentence order (copy attached as Ex. D) and scheduled a preliminary hearing on the criminal charges for March 8, 2016. R. 223a, 224a. When asked, the trial court declined to issue a decision explaining its order. R. 855a.

On February 12, 2016, Mr. Cosby filed a notice that he was appealing the February 4, 2016 order to the Superior Court (docketed at No. 488 EDA 2016). R. 225a. When Mr. Cosby filed his appeal, he also moved to amend the February 4 order to certify it for permissive appeal under the Interlocutory Appeals Act, 42 Pa. C.S. § 702(b), 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 February 16 order (docketed at No. 23 EDM 2016).

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 application as Ex. E) supporting the Commonwealth's

view that this appeal should be quashed for lack of jurisdiction. 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 the Superior Court for a writ of prohibition to prevent the trial court from conducting further proceedings, and on March 1, 2016, the Superior Court stayed the trial court proceedings pending resolution of the application to quash. The Superior Court then issued a briefing schedule for the merits of the appeal, and, pursuant to that schedule, Mr. Cosby filed his merits brief on April 11, 2016.

On April 25, 2016, in two orders attached to this application as Exs. A and B, the Superior Court granted the Commonwealth's application to quash Mr. Cosby's appeal, denied Mr. Cosby's petition for review of the order declining to certify an appeal under the Interlocutory Appeals Act, and lifted the stay. In a notice that it issued the next day (copy attached as Ex. C), the trial court scheduled the preliminary hearing for May 24, 2016. Mr. Cosby is preparing a petition for allowance of an appeal from the quashal order in No. 488 EDA 2016 and a petition for review of the Superior Court's denial order in No. 23 EDM 2016.

ARGUMENT

Mr. Cosby is entitled to a stay because he is likely to prevail on the merits of his appeal; he will suffer irreparable injury if he is not granted a stay; the issuance

of a stay will not substantially harm the Commonwealth; and the issuance of a stay will not adversely affect the public interest. *Pennsylvania Pub. Util. Comm'n v. Process Gas Consumers Grp.*, 467 A.2d 805, 808-09 (Pa. 1983); *Reading Anthracite Co. v. Rich*, 577 A.2d 881, 884 (Pa. 1990).

I. Mr. Cosby Will Suffer Irreparable Injury if He Is Not Granted a Stay

The trial court has repeatedly resisted meaningful review of its decisions in this matter, refusing to provide an opinion stating the reasons for denying Mr. Cosby's habeas petition (R. 855a), and requiring that a writ of prohibition be filed with the Superior Court to halt proceedings while Mr. Cosby's appeal was being considered. Less than 24 hours after the Superior Court quashed Mr. Cosby's appeal and lifted that stay, the trial court again set this matter for preliminary hearing despite Mr. Cosby's right to petition this Court for allowance of an appeal. Ex. C. If the stay is not granted, the preliminary hearing and further proceedings (potentially even including trial) will move forward before any appeal challenging the breach of the Commonwealth's non-prosecution commitment is heard or resolved. Mr. Cosby will be forced to defend himself against prosecution, and thereby lose the very rights he seeks to protect on appeal.

Not even an acquittal would adequately vindicate Mr. Cosby's rights or cure his irreparable injury. There is no adequate remedy at law for the Commonwealth's violation of the right to be free from prosecution. In other

contexts, both this Court and the Superior Court have held that the substantial time, cost, and effort incurred in defending a case in which a defendant is immune from suit justify immediate appellate review. *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. 2013) (citing *Pridgen* for the same); *Osborne v. Lewis*, 59 A.3d 1109, 1111 n.3 (Pa. Super. 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. 2014) (citing *Osborne* for the same). Here, the loss is much greater than just time, cost, and effort. The Commonwealth made a binding commitment not to prosecute. Allowing that prosecution to take place anyway before there can be any appellate review of the Commonwealth’s breach of its commitment will deprive Mr. Cosby of rights that can never be vindicated—even if he is acquitted.

Mr. Cosby has a constitutional right to meaningful appellate review. PA. CONST., Art. V § 9. The injury that Mr. Cosby would suffer from the trial court continuing to preliminary hearing—and potentially to trial—would be irreparable, because Mr. Cosby’s right to be free from prosecution would be forever lost. Before the prosecution proceeds, Mr. Cosby is entitled to appellate review of the trial court’s decision not to dismiss this case.

II. The Issuance of a Stay Will Not Substantially Harm the Commonwealth

The Commonwealth will suffer no substantial harm from a stay. The only potential harm to the Commonwealth from a stay would be a delay of the preliminary hearing until appellate review. The Commonwealth has never alleged any harm flowing from such a delay. Although it moved to quash Mr. Cosby’s February 19, 2016 appeal to the Superior Court, and opposed Mr. Cosby’s March 4, 2016 Petition for Review of the trial court’s refusal to certify an interlocutory appeal, neither submission alleged any harm in delaying the preliminary hearing and further proceedings.

There could be no basis for any such allegation of harm. More than *eleven years* passed between the Commonwealth’s initial investigation of the alleged event (in January 2005) and the new District Attorney’s decision to breach its commitment and file charges against Mr. Cosby (in December 2015). Indeed, the Commonwealth stipulated that, from 2006 until July 2015, it conducted no

investigation whatsoever. R. 607a. After eleven years, a relatively brief delay to permit review by this Court—and, if Mr. Cosby’s appeal is successful, termination of this case—could not credibly be claimed to cause any harm. The normal course of appellate proceedings in the Commonwealth is for trial court proceedings to cease while appellate proceedings go forward. *See* PA. R. APP. P. 1701. Entry of a stay now, before the preliminary hearing is held and pre-trial proceedings further multiply, would avoid fracturing this case while this Court considers Mr. Cosby’s petition.

III. The Public Interest Favors a Stay

The public interest favors the issuance of a stay because Mr. Cosby has a constitutional due process right to have the Commonwealth comply with its non-prosecution commitment, and “the public interest clearly favors the protection of constitutional rights” *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876, 883-84 (3d Cir. 1997); *see also Miller v. Skumanick*, 605 F. Supp. 2d 634, 647 (M.D. Pa. 2009) (granting TRO in part because “the public interest is on the side of protecting constitutional rights.”). There is a “clear public interest in having persons accused of crime tried fairly, expeditiously, economically, and only once.” *Philadelphia Newspapers, Inc. v. Jerome*, 387 A.2d 425, 432 (Pa. 1978). “The Constitution protects all citizens, not just a few. When any citizen’s constitutional rights are violated, all citizens are affected.” *Fontroy v. Beard*, 2007

WL 1810690, *5 (E.D. Pa., June 20, 2007) (finding that public interest runs in favor of protecting constitutional rights implicated in the case).

Indeed, several constitutional rights are threatened here: pre-trial vindication of a criminal defendant's absolute right to be free from prosecution under a binding commitment by the Commonwealth, the right to due process, the right against self-incrimination, and the Pennsylvania constitutional right to appeal. Without immediate, interlocutory appellate review—and a stay pending that review—these rights will be irreparably violated. *See, e.g., In re Pure Res. S' Holders Litig.*, C.A. No. 19876, 2002 Del. Ch. LEXIS 116, *1 (Del. Ch., Oct. 9, 2002) (noting that, when considering applications for interlocutory review, it must “balanc[e] *the public interest in advancing appellate review of potentially case dispositive issues* while avoiding fragmentation and delay when interlocutory review is unlikely to terminate the litigation or otherwise serve the administration of justice”) (emphasis added and citation and quotation marks omitted).

Mr. Cosby's underlying appeal implicates the public's interest in the integrity of the judicial system and the Commonwealth's compliance with its own promises. *Commonwealth v. Ginn*, 587 A.2d 314, 316–17 (Pa. Super. 1991) (enforcing district attorney's commitment not to prosecute because “the integrity of the judicial system demands that the Commonwealth live up to its obligation”). 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). Moreover, Mr. Cosby’s privilege against self-incrimination 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 v. Doe*, 123 A.3d 781, 786 (Pa. Super. 2015) (internal citation omitted). “It is beyond question that the exercise of a privilege is an important right deeply rooted in public policy.” *Commonwealth v. Dennis*, 859 A.2d 1270, 1278 (Pa. 2004). In addition, permitting the prosecution to proceed now despite the Commonwealth’s prejudicial, undue, decade-long delay in filing charges also violates Mr. Cosby’s constitutional due process rights. *Commonwealth v. Scher*, 803 A.2d 1204, 1215 (Pa. 2002) (holding that an undue, prejudicial delay would violate both Pennsylvania and United States Constitution due process clauses).

Because the appealed order involves the integrity of the judicial system, the right to be free from prosecution, the right to due process, the right against self-incrimination, and the right to meaningful appeal, the public interest favors a stay.

IV. Mr. Cosby Is Likely to Prevail on the Merits

Mr. Cosby is likely to prevail on the merits of his appeal because the Superior Court erred in granting the Commonwealth’s motion to quash the appeal and erred in denying Mr. Cosby’s petition for review. The Superior Court had

jurisdiction to decide the appeal as of right pursuant to both the collateral order and exceptional circumstance doctrines, and, even if it had (unjustifiable) doubts about such jurisdiction, it abused its discretion in failing to grant Mr. Cosby’s petition for review of the trial court’s refusal to certify a permissive appeal, given that an immediate appeal, if successful, will terminate this matter.²

A. The Superior Court Erred in Granting the Commonwealth’s Motion to Quash Mr. Cosby’s Appeal

1. The Superior Court Had Jurisdiction to Decide the Appeal Pursuant to the Collateral Order Doctrine

The collateral order doctrine vests the Superior 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)). A collateral-order appeal may be taken “as of right”; review of a collateral order is not discretionary. PA. R. APP. P. 313(a).

² In deciding whether to grant a stay, likelihood of success on the merits must be considered and weighed relative to the other three criteria. *Reading*, 577 A.2d at 884 (citing *Pennsylvania Pub.*, 457 A.2d at n. 8.). A court, “when confronted with a case in which the other three factors strongly favor interim relief[,] may exercise its discretion to grant a stay if the movant has made a substantial case on the merits.” *Hampton Techs., Inc. v. Dep’t of Gen. Servs.*, 22 A.3d 238, 242 (Pa. 2011) (quoting *Pennsylvania Pub.*, 457 A.2d at 809).

(a) The Order Declining To Enforce the Non-Prosecution Commitment Is Separable from and Collateral to the Main Cause of Action and Involves Rights That Are Too Important To Be Denied Review

In the Superior Court, the Commonwealth did not dispute that the first two prongs of the collateral order rule are met. Nor could it, for the following reasons.

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).

Mr. Cosby seeks a 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 the almost-twelve-year delay in filing charges, which prejudiced Mr. Cosby. Those questions involve facts and law that have no relationship to the merits of the charges brought against Mr. Cosby. *See, e.g., Commonwealth v. Sabula*, 46 A.3d 1287, 1291 (Pa. Super. 2012) (finding separability 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 also 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*, 123 A.3d at 786 (quotation marks omitted); *Dennis*, 859 A.2d at 1278 (“It is beyond question that the exercise of a privilege is an important right deeply rooted in public policy.”); *Ben v. Schwartz*, 729 A.2d 547, 552 (Pa. 1999) (finding that issue of whether certain files are subject to privilege “implicates rights rooted in public policy, and impacts on individuals other than those involved in this particular litigation”); *Harris*, 32 A.3d at 249 (reaffirming *Ben*); *Commonwealth v. Kennedy*, 876 A.2d 939, 943-44 (Pa. 2005) (holding that the appellant’s claims to privilege “meet the importance element of Rule 313”); *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 at a civil deposition without

invoking his privilege against self-incrimination. Now, the Commonwealth has filed charges against Mr. Cosby based in part on the very deposition 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. *Ginn*, 587 A.2d at 316 (upholding agreement not to prosecute); *see also Commonwealth v. Hemingway*, 13 A.3d 491, 500-01 (Pa. Super. 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 also is too important to be denied review. 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 at issue here. *See, e.g., Dennis*, 859 A.2d at 1278; *Ben*, 729 A.2d at 551-52; *Harris*, 32 A.3d at 248; *Kennedy*, 876 A.2d at 943-44; *Commonwealth v. Schultz*, No. 280 MDA2015, 2016 WL 285506, at *10 (Pa. Super. 2016); *In re T.B.*, 75 A.3d 485, 490-91 (Pa. Super. 2013); *M.M. v. L.M.*, 55 A.3d 1167, 1168 n.1 (Pa. Super. 2012). There is no question that Mr. Cosby's privilege not to incriminate himself is at issue in this case. The former District Attorney 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 testified without contradiction that Mr. Cosby would not have testified if there were any doubt about Mr. Castor's commitment of non-prosecution.

Third, the order involves Mr. Cosby's right to due process, which is also too important to be denied review. Breach of a non-prosecution commitment raises serious due process concerns, as does an eleven-year delay in prosecution of charges. *See Dunn*, 247 F.3d at 462 ("due process and equity require" enforcement of prosecutor's commitment); *Scher*, 803 A.2d at 1215 (undue, prejudicial delay is violative of state and federal due process rights.). *Commonwealth ex rel. Kane v. Philip Morris, Inc.*, 128 A.3d 334, 344-45 (Pa. Commw. 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.

(b) Mr. Cosby's Right to Be Free from Prosecution Cannot Be Adequately Vindicated After He Has Been Prosecuted

The Commonwealth's sole argument to the Superior Court in opposition to collateral order review was that Mr. Cosby's right to be free from prosecution can be adequately vindicated by a post-prosecution appeal if Mr. Cosby is convicted. This argument is incorrect. Whether the third collateral-order prong is met

depends 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 right to be free from prosecution would be irreparably lost for purposes of the collateral order doctrine even if he were acquitted, because he still would have been subjected to a prosecution that the Commonwealth has committed not to conduct. The substantial time, cost, and effort incurred in that prosecution cannot be recovered. *Pridgen*, 905 A.2d at 433; *Yorty*, 79 A.3d at 660-61; *Osborne*, 59 A.3d at 1111 n.3; *Bulebosh*, 91 A.3d at 1242 n.1.

The Commonwealth relied below on the Superior Court’s decision in *Sabula* to argue that allowing a criminal prosecution to proceed instead of enforcing a promise of non-prosecution is not an irreparable injury, but this case is very different from *Sabula*. *Sabula* dealt with an alleged agreement by a police officer not to file charges if the putative defendant cooperated in an effort to arrest his drug supplier. The trial court and Superior Court both noted that the officer “did not speak with the District Attorney and did not obtain the District Attorney’s authorization to make the agreement.” 46 A.3d at 1289. The purported agreement

therefore was invalid.³ The putative defendant breached the agreement, and the officer filed charges. *Id.* The defendant contended that the prosecution deprived him of his bargained-for benefit of freedom from “the expense and ordeal of trial,” explaining that he likely 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.” *Id.* at 1292. The Superior Court concluded, however, that such freedom was not the bargained-for benefit, that the consideration the defendant received under his agreement with the officer was only “the avoidance of criminal sanctions,” and that any “incidental consequences of the processes necessary to impose that criminal sanction were not at the heart of the agreement.” *Id.* at 1292-93.

Here, in contrast to *Sabula*, a duly-authorized District Attorney, acting expressly on behalf of the Commonwealth, promised Mr. Cosby would never be prosecuted with respect to Ms. Constand’s allegations.⁴ The commitment was not

³ While non-prosecution agreements by district attorneys are valid, such agreements made only by police officers are not. *Commonwealth v. Stipetich*, 652 A.2d 1294, 1295 (1995).

⁴ It is well-established that a sitting District Attorney (unlike a police officer) is empowered to make a non-prosecution commitment. *Stipetich*, 652 A.2d at 1295 (“district attorneys, in their investigative and prosecutorial roles, have broad discretion over whether charges should be brought in any given case,” and may “consent to a non-prosecution agreement”); *see also Commonwealth v. DiPasquale*, 246 A.2d 430, 432 (Pa. 1968) (“A District Attorney has a *general* and widely recognized power to conduct criminal litigation and prosecutions on behalf

merely that Mr. Cosby would be free from “criminal sanctions” or from “inconveniences and inefficiencies” attendant to prosecution; it was that he never would be prosecuted at all. R. 492a-493a. Thus, being free from “the processes necessary to impose” criminal sanctions—as Mr. Castor testified, having the equivalent of transactional immunity (R. 487a – 488a, 492a - 493a)—was indeed “the heart of the agreement.”

The Superior 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. This Court and the Superior Court have consistently 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.

of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case”) (emphasis in original); *Commonwealth v. Spotz*, 716 A.2d 280 (Pa. 1998) (the determination whether to prosecute is supported by the district attorney’s “inherent, discretionary powers . . .”).

In its February 24, 2016 opinion supporting the Commonwealth’s motion to quash, the trial court argued that post-prosecution review would provide a sufficient remedy apart from dismissal for “the Commonwealth’s potential use of [Mr. Cosby’s] statements given during his depositions” (that is, the deposition testimony Mr. Cosby gave in reliance on the District Attorney’s commitment of non-prosecution). *See* Ex. E, at 5. 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. 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. Other remedies for *other* potential violations of his rights—such as the Commonwealth’s apparent plan to improperly use his deposition testimony against him—will not vindicate Mr. Cosby’s fundamental right not to be prosecuted at all.

2. The Superior Court Had Jurisdiction Pursuant to the Exceptional Circumstances Doctrine That Applies to Habeas Petitions

Independently, the Superior Court also had jurisdiction to decide Mr. Cosby’s appeal pursuant to the exceptional circumstances doctrine applicable to habeas petitions, as recently recognized in *Commonwealth v. Ricker*, 120 A.3d 349, 354 (Pa. Super. 2015), *allow. of appeal granted on non-jurisdictional issues*, No. 588 MAL 2015, --- A.3d ----, 2016 WL 1562068 (Pa., Apr. 18, 2016). In *Ricker*, the Superior 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.

“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). This Court has not had occasion to consider the exceptional circumstances doctrine in recent cases,⁵ but its earlier case law suggests that application of this 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

⁵ If the Court agrees that this case qualifies for appeal under the collateral order rule, it need not reach this alternative basis for jurisdiction at this time.

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 this 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).

For the reasons discussed above as to collateral orders, 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 sections IV.A.1 (a) and (b). Thus, the Superior Court had jurisdiction to decide the appeal pursuant to the exceptional circumstances doctrine.

The Commonwealth argued below that the exceptional circumstances doctrine “is not applicable here” because Mr. Cosby purportedly did not file a valid “habeas petition” that presents exceptional circumstances. Com. App. ¶ 26. But a habeas petition may be filed “by or on behalf of any person restrained of his liberty within this Commonwealth under any pretense whatsoever.” 42 PA. C.S. § 6503(a). Mr. Cosby correctly styled his motion in the trial court as a petition for a writ of habeas corpus, and it certainly qualified as a proper request under Section 6503. Moreover, the Commonwealth did not oppose Mr. Cosby’s petition in the trial court 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”).

The Commonwealth complained below that the “one case” applying this doctrine is the Superior Court’s 2015 decision in *Commonwealth v. Ricker*. Of course, *Ricker* is a recent, on-point decision from the Superior 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. Indeed, this Court very recently granted review of the merits issue in *Ricker*—application of confrontation rights to a preliminary hearing in a criminal matter—without raising any question about jurisdiction. 2016 WL 156068. Other decisions likewise confirm that exceptional circumstances jurisdiction applies here. *See, e.g., Commonwealth v. Swartz*, 579 A.2d 978, 980 (Pa. Super. 1990).

The trial court's advisory opinion on jurisdiction attempted to distinguish *Ricker* by claiming that this case does not raise an important constitutional question. Ex. D, at 8. As discussed above, that opinion failed to recognize the many constitutional rights and issues that are implicated by the trial court's refusal to enforce the Commonwealth's non-prosecution commitment.

The Superior Court had jurisdiction to decide Mr. Cosby's appeal based both on the collateral order and exceptional circumstances doctrines. Accordingly, Mr. Cosby is likely to prevail on the merits and show that Superior Court erred in granting the Commonwealth's motion to quash the appeal.

B. The Superior Court Erred in Denying Mr. Cosby's Petition for Review

Mr. Cosby also is likely to prevail on the merits and show that the Superior Court erred in denying Mr. Cosby's petition for review. The trial court abused its discretion in failing to amend its February 4 Order to certify it for interlocutory appellate review because (1) the order involves controlling questions of law; (2)

there is substantial ground for difference of opinion on the questions of law; and (3) immediate appeal would materially advance the ultimate termination of the matter. *Dennis*, 859 A.2d at 1275; 42 Pa. C.S. § 702(b).

The February 4 Order Involves Controlling Questions of Law. The February 4 Order raises the issue whether the Commonwealth’s commitment not to prosecute—and Mr. Cosby’s reliance on that commitment—require dismissal of the charges the Commonwealth had promised never to bring, a clearly controlling question of law. The Commonwealth’s commitment “is to be analyzed under contract law standards,” *Commonwealth v. Hainesworth*, 82 A.3d 444, 449 (Pa. Super. 2013), and its interpretation and enforceability is a question of law. *McMullen v. Kutz*, 985 A.2d 769, 773 (Pa. 2009). This controlling question presents several legal issues, all of which would terminate this action when resolved in Mr. Cosby’s favor, including whether the District Attorney’s promise bound the Commonwealth not to prosecute Mr. Cosby and whether the Commonwealth is estopped from prosecuting Mr. Cosby given his reliance on the District Attorney’s promise. The February 4 Order also involves a separate controlling and dispositive question of law: whether the Commonwealth violated Mr. Cosby’s due process rights (regardless of whether there was an enforceable promise) by honoring the commitment for more than a decade and then disavowing it to file charges after critical evidence about the commitment—in particular, a

first-hand witness to the District Attorney's commitment and Mr. Cosby's reliance on it—had been lost during the lengthy delay.

There Is Substantial Ground for Differences of Opinion on the Controlling Questions of Law. A substantial ground for difference of opinion exists where there is a “lack of Pennsylvania case law on [an] issue.” *Commonwealth v. Tilley*, 780 A.2d 649, 651 (Pa. 2001) (holding that trial court abused its discretion in refusing to certify an order for interlocutory appeal); *Commonwealth v. Brown*, 26 A.3d 485, 490 (Pa. Super. 2011). As the trial court noted at the hearing below, R. 612a-614a, there is no directly on-point Pennsylvania decision addressing a district attorney's elimination of a defendant's ability to invoke his privilege against self-incrimination at a civil deposition by promising that the Commonwealth will never prosecute that defendant.

In addition, the parties' briefing reflects fundamental differences of opinion as to the controlling legal questions at issue, as do the different opinions expressed by the current District Attorney and his predecessor, Mr. Castor, regarding the binding effect of what Mr. Castor did. Mr. Castor testified that when he committed not to prosecute Mr. Cosby, he “was not acting as Bruce Castor. [He] was acting as the Commonwealth. And on behalf of the Commonwealth, [he] promised that . . . 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. Notably, Mr. Castor characterized his commitment not to prosecute Mr. Cosby as equivalent to a grant of transactional immunity. R. 487a-488a. The current District Attorney, on the other hand, has argued that the Commonwealth cannot commit not to prosecute and that a court order issued pursuant to 42 Pa. C.S. § 5947 is the only means of granting immunity. He also argues that if Mr. Castor did not have the power to do what he was trying to do, then Mr. Cosby may not seek enforcement of the Commonwealth’s commitment not to prosecute. The considerable difference of opinion between the current District Attorney and his predecessor highlights the fundamental differences of opinion as to not only a controlling legal question in this case—the enforceability of Mr. Castor’s commitment not to prosecute—but an issue important to *all* criminal defendants in the Commonwealth, who might rely on a district attorney’s promises.

An Immediate Appeal Would Materially Advance the Ultimate Termination of This Case. If Mr. Cosby is successful on appeal, the case will be terminated. Pennsylvania courts frequently permit appeals under 42 Pa. C.S. § 702(b) when they present such case-dispositive questions. *See, e.g., Lahav ex rei. Lahav v. Main Line Ob/Gyn Assocs., P. C., 727 A.2d 1104, 1105 (Pa. 1999)* (allowing interlocutory appeal from Commonwealth Court order partially denying preliminary objections so it could decide questions of liability of Medical

Professional Liability Catastrophe Loss Fund); *Stone v. York Haven Power Co.*, 749 A.2d 452, 454-55 n.2 (Pa. 2000) (noting that the trial court had denied the appellants' immunity claim and certified that order for immediate appeal under Section 702(b) because the immunity claim could end case); *Hospodar v. Schick*, 885 A.2d 986, 988 (Pa. Super. 2005) (allowing interlocutory appeal from denial of preliminary objections in medical malpractice case raising question whether decision by this Court precluded defendant's liability).

In addition, Pennsylvania courts frequently permit interlocutory appeals on immunity issues, including over trial court refusals to certify. *See, e.g., Cohen v. Philadelphia*, 847 A.2d 778, 779 (Pa. Cmwlth. 2004) (permitting appeal on immunity issue over trial court's refusal to amend); *Philadelphia v. Brown*, 618 A.2d 1236, 1238 (Pa. Cmwlth. 1992) (permitting appeal on governmental immunity issue over trial court's refusal to amend); *Philadelphia v. Glim*, 613 A.2d 613, 615-16 (Pa. Cmwlth. 1992) (same); *see also Stanton v. Lackawanna Energy, Ltd.*, 820 A.2d 1256, 1258 (Pa. Super. 2003) (permitting appeal to determine scope of immunity), *aff'd*, 886 A.2d 667 (Pa. 2005); *York Haven Power Co. v. Stone*, 715 A.2d 1164, 1165 (Pa. Super. 1998) (same), *rev'd on other grounds*, 749 A.2d at 452.

Similarly, Pennsylvania appellate courts frequently permit interlocutory appeals on issues relating to the constitutional and statutory rights of criminal

defendants, including over trial court refusals to certify. *Commonwealth ex rel. Buchanan v. Verbonitz*, 581 A.2d 172, 173 (Pa. 1990) (permitting appeal on habeas corpus petition relating to the constitutional right to confront and cross-examine witnesses against him over trial court's refusal to certify); *Commonwealth v. Boyle*, 532 A.2d 306 (Pa. 1987), *vacated on other grounds*, 625 A.2d 616 (Pa. 1993) (permitting appeal on pre-trial challenge to the trial court's jurisdiction over the criminal prosecution over trial court's refusal to certify); *see also Commonwealth v. Gibbs*, 626 A.2d 133, 135 (Pa. 1993) (permitting appeal on preclusion of death penalty on double jeopardy principles); *Commonwealth v. Clark*, 472 A.2d 617, 618 (Pa. Super. 1984) (permitting appeal on whether a Rule of Criminal Procedure applies to cases of direct criminal contempt).

Because the trial court's order qualifies for permissive interlocutory review by meeting all three requirements of Section 702(b), the Superior Court erred in denying Mr. Cosby's petition for review.

Finally, the petition for review also should have been granted because trial court's one-sentence order does not reflect *any* exercise of discretion by the trial court in denying the certification motion. The order contains no reasoning that would permit meaningful appellate review. This Court has held that a trial court's "[d]iscretion must be exercised on the foundation of reason," and that an "abuse of discretion exists when the trial court has rendered a judgment that is manifestly

unreasonable, arbitrary, or capricious” or “has failed to apply the law” *Harman ex rel. Harman v. Borah*, 756 A.2d 1116, 1123 (Pa. 2000) (internal citations and quotation marks omitted). Here, the record does not reflect that the trial court exercised any discretion either on the underlying decision or as to the motion to amend. *See Boyle*, 532 A.2d at 308 (noting that “[r]eview in such cases is to test the discretion of the trial court in refusing to certify its order for purposes of appeal.”); *In re Deed of Trust of Rose Hill Cemetery Ass’n Dated Jan. 14, 1960*, 590 A.2d 1, 3 (Pa. 1991) (noting that, if “in reaching a conclusion, law is overridden or misapplied, or the judgment exercised is manifestly unreasonable or lacking in reason, discretion must be held to have been abused”). Because there is no evidence that the trial court exercised its discretion, and because, upon examination of the three requirements in Section 702(b), any exercise of discretion by the trial court would have been an abuse of that discretion, the Superior Court should have granted this petition for review.

The issues presented by this case are novel and of extreme importance not only to Mr. Cosby, but to the integrity of the criminal justice system in the Commonwealth. They call for immediate appellate review. The collateral order rule and exceptional circumstances doctrine provide for such review, but if the Superior Court had doubts about that result, it should have exercised its discretion under the Interlocutory Appeals Act to remove any jurisdictional issue and

entertain Mr. Cosby's appeal. The Superior Court provided no reasons why it declined to do so, and its failure to hear Mr. Cosby's appeal was an abuse of its discretion. For these reasons, Mr. Cosby is likely to prevail in showing that the Superior Court erred in denying Mr. Cosby's petition for review.

C. Mr. Cosby Is Also Likely to Prevail on His Underlying Appeal

Mr. Cosby's petitions for allowance of appeal and review will challenge the Superior Court's jurisdictional rulings, and only those rulings need to be considered by this Court at this time. Mr. Cosby notes, however, that once his appeal is heard, he is likely to prevail on the merits of that appeal. The trial court's order allowing the Commonwealth to breach its District Attorney's express commitment not to prosecute Mr. Cosby was entered in error. The evidence below was unequivocal: the former District Attorney of Montgomery County testified that 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. 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 must be enforced where, as here, the defendant detrimentally relies on that assurance in waiving constitutional rights, including his right against self-incrimination.

RELIEF SOUGHT

WHEREFORE, Mr. Cosby requests that this Court stay all proceedings until this Court decides his petitions for allowance of appeal and review.

Respectfully Submitted,

/s/ Carl A. Solano

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:
christstayback@quinnemanuel.com
josephsarles@quinnemanuel.com

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

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

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
E-mail: bmcmonagle@mpmpc.com

Attorneys for Applicant William H. Cosby, Jr.

Dated: May 3, 2016.

Exhibit A

COMMONWEALTH OF PENNSYLVANIA :	IN THE SUPERIOR COURT OF
:	PENNSYLVANIA
:	
v. :	
:	
:	
WILLIAM HENRY COSBY, :	No. 488 EDA 2016
:	(C.P. Montgomery County
Appellant :	No. 46-MD-0003156-2015)

ORDER

The “Commonwealth’s Motion To Quash Appellant’s Pretrial Interlocutory Appeal” is GRANTED. The temporary stay entered on March 1, 2016 is lifted.

The Appellant’s motion for “Corrected Notice Of Appeal” is DISMISSED as moot.

PER CURIAM

Exhibit B

COMMONWEALTH OF PENNSYLVANIA, :	IN THE SUPERIOR COURT OF
Respondent :	PENNSYLVANIA
v. :	
WILLIAM HENRY COSBY, :	No. 23 EDM 2016
Petitioner :	(C.P. Montgomery County
	No. 46-MD-0003156-2015)

ORDER

The "Petition For Review From The Order Of The Court Of Common Pleas Of Montgomery County Refusing To Amend Its Order Pursuant To PA.R.A.P. 1311(b)" is DENIED.

PER CURIAM

Exhibit C



Preliminary Hearing Notice

Mag. Dist. No:	MDJ-38-1-02
MDJ Name:	Honorable Elizabeth A. McHugh
Address:	7804 Montgomery Avenue Station Mews Elkins Park, PA 19027
Telephone:	215-635-1535

Commonwealth of Pennsylvania
v.
William Henry Cosby Jr.

Docket No: MJ-38102-CR-0000131-2015
Case Filed: 12/30/2015
Comp/Cit #: 20152583
OTN: T 741910-1

File Copy

Charge(s)

18 § 3125 §§ A1 (Lead)	Agg. Ind. Assault W/O Consent
18 § 3125 §§ A4	Agg. Ind. Assault - Complainant is Unconscious or Unaware that Penetration is Occur
18 § 3125 §§ A5	Agg. Ind. Assault - Person Impairs Complainant

A Preliminary Hearing has been scheduled for the above captioned case to be held on/at:

Date: Tuesday, May 24, 2016	Place: Montgomery County Courthouse Courtroom A 2 East Airy Street Norristown, PA 19404-0311 215-635-1535
Time: 9:30 AM	

Notice To Defendant

A complaint has been filed charging you with the offense(s) set forth above and on the attached copy of the complaint. If you fail to appear at the time and place above without cause, you will be deemed to have waived your right to be present at any further proceedings before the Magisterial District Judge and the case will proceed in your absence. If any of the charges against you are held for court, a request for a bench warrant against you will be transmitted to the Court of Common Pleas.

At the preliminary hearing you may:

1. Be represented by counsel;
2. Cross-examine witnesses and inspect physical evidence offered against you;
3. Call witnesses on your behalf other than witnesses to testify to your good reputation only, offer evidence on your behalf and testify;
4. Make written notes of the proceeding, or have your counsel do so, or make a stenographic, mechanical, or electronic record of the proceedings.

If the case is held for court and if you fail to appear without cause at any proceeding for which your presence is required, including trial, your absence may be deemed a waiver of your right to be present, and the proceeding, including the trial, may be conducted in your absence.

If you cannot afford to hire an attorney, one may be appointed to represent you. Please contact the office of the Magisterial District Judge for additional information regarding the appointment of an attorney. If you have any questions, please call the above office immediately.

Should you fail to appear for your preliminary hearing, a warrant will be issued for your arrest.

April 26, 2016

Date

Magisterial District Judge Elizabeth A. McHugh



If you are disabled and require a reasonable accommodation to gain access to the Magisterial District Court and its services, please contact the Magisterial District Court at the above address or telephone number. We are unable to provide transportation. You can make case payments online through Pennsylvania's Unified Judicial System web portal. Visit the portal at <http://ujportal.pacourts.us> to make a payment.

File Copy Recipient List

Addressed To: William Henry Cosby Jr. (Defendant)
8210 New Second St.
Elkins Park, PA 19027

Brian J. McMonagle, Esq. (Private)
Mcmonagle Perri ET AL
1845 Walnut St Fl 19
Philadelphia, PA 19103

James J Reape (Additional Officer)
P O Box 311
Norristown, PA 19404-0311

Richard Schaffer (Arresting Officer)
Cheltenham Township Police Dept
8230 Old York Rd
Elkins Park, PA 19027

Michael R Shade (Additional Officer)
P O Box 311
Norristown, PA 19404-0311

Kevin R. Steele, Esq. (District Attorney)
Montgomery CO Da's Office
PO Box 311
Norristown, PA 19404-0311

Exhibit D

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:

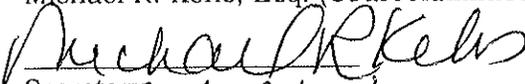
based upon review of all the pleadings and filings, the exhibits admitted at this hearing, and all testimony of witnesses, with a credibility determination being an inherent part of this Court's ruling, the Court finds that there is no basis to grant the relief requested in paragraph 3b of the Defendant's 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)


Secretary *ct. Admin.*

2016 FEB -4 PM 4:00

NOTICE OF ENTRY
2016 FEB -4 PM 4:00

Exhibit E

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.

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 order⁵; (2) an interlocutory order by permission⁶; (3) an interlocutory order by right⁷; 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.

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.

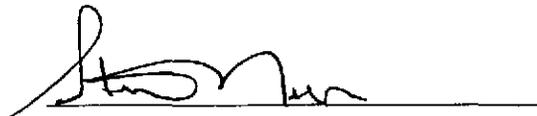
found that the question of whether hearsay evidence alone can be used to establish an *prima facie* case “presents an important constitutional question regarding whether a powerful state governmental entity violates federal and state constitutional principles in allowing a defendant to be restrained 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

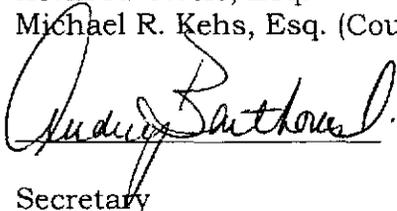
Based on the foregoing, this Court respectfully submits that the Defendant's dilatory attempts to obtain review of its clearly interlocutory orders should not be entertained and these appeals should be quashed.¹⁰

BY THE COURT:



STEVEN T. O'NEILL J.

Copies of this Opinion mailed on 2/24/16 to the following:
Brian J. McMonagle, Esq.
Kevin R. Steele, Esq.
Michael R. Kehs, Esq. (Court Administrator)



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 3d day of May, 2016, I certify that:

Electronic filing. The electronic version of this application 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 applicant.

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

Robert M. Falin, Esq.
MONTGOMERY COUNTY DISTRICT ATTORNEY'S OFFICE
Montgomery County Courthouse
P.O. Box 311
Norristown, PA 19404-0311
Phone: 610-278-3104
E-Mail: rfalin@montcopa.org

Counsel for Appellee Commonwealth of Pennsylvania

/s/ Carl A. Solano

Carl A. Solano
SCHNADER HARRISON SEGAL & LEWIS LLP
1600 Market Street, Suite 3600
Philadelphia, PA 19103
(215) 751-2202