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IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent,	:	No. 58 MM 2016
v.	:	
WILLIAM H. COSBY, JR., Petitioner.	:	

COMMONWEALTH'S ANSWER TO *EMERGENCY APPLICATION FOR STAY PENDING DISPOSITION OF PETITIONS FOR ALLOWANCE OF APPEAL AND REVIEW*

Respondent, the Commonwealth of Pennsylvania, by the Montgomery County District Attorney's Office, requests that this Court deny the *Emergency Application for Stay Pending Disposition of Petitions for Allowance of Appeal and Review* filed by petitioner William H. Cosby, Jr. ("defendant").

I. INTRODUCTION

This criminal defendant asks this Court to issue a stay preventing the lower court from going forward with an already much-delayed preliminary hearing, while he seeks pretrial review of a claim. Specifically, he alleges a breach of a purported non-prosecution agreement, even though the Commonwealth

argued that it never existed, and the trial court denied the claim holding that a credibility determination was an essential part of its ruling.

Defendant nevertheless insists that his criminal case should be put on hold for months, perhaps years, for pretrial review. He first asserts that such review is justified under the collateral order doctrine. But this claim, if necessary, must be raised at the conclusion of trial. Defendant is not in a "now or never" situation, as required for a collateral order appeal. Nor do exceptional circumstances otherwise justify immediate review. He may raise his issues on direct appeal following a judgment of sentence, just like other criminal defendants. He is not entitled to preferential treatment, even though he has a well-funded, multi-firm team of attorneys.

Defendant also contends that a stay is justified because the trial court's refusal to certify his appeal was egregious. Facts are stubborn things, however. And when a trial judge finds them against a litigant, there's not much, if anything, that litigant can do on appeal. But that hasn't discouraged defendant from seeking interlocutory review of a claim resolved against him on credibility

grounds. He wants this Court to delay his preliminary hearing and review his claim that there was supposedly a non-prosecution agreement, and to do it now. He insists such pretrial intervention is justified because there is allegedly a controlling question of law about which there is substantial disagreement (and the trial court's decision otherwise, according to him, was egregious). But defendant's claim—more than anything else—was about facts. It came down to whether the trial court believed his evidence. It did not. And it said so. Defendant's assertion that there is a "controlling question of law" ignores this very hard and inconvenient truth.

Because defendant's appeal is an improper attempt to seek review of an unappealable interlocutory order, the Commonwealth respectfully requests that this Court deny his request for a stay.

II. FACTUAL AND PROCEDURAL BACKGROUND

In December 2015, a criminal complaint was filed against defendant. It charged him with sexual crime stemming from an incident that had occurred in 2005. A preliminary hearing was scheduled for January 14, 2016. Defendant later obtained a continuance. It was re-scheduled for February 2, 2016.

Before the preliminary hearing could take place, however, defendant filed a self-styled *habeas corpus* petition. In it, he raised three claims: (1) he is allegedly immune from prosecution because a former district attorney, Bruce L. Castor, Esquire, entered into a "non-prosecution agreement" with him in 2005; (2) the charges against him should be dismissed because of pre-arrest delay; and (3) current District Attorney Kevin R. Steele and his entire office should be disqualified based on his campaign statements.

The Honorable Steven T. O'Neill, of the Court of Common Pleas, Montgomery County, Pennsylvania, scheduled a hearing and for February 2, 2016.[1] In doing so, he continued the scheduled February 2nd preliminary hearing.

Judge O'Neill subsequently issued an order restricting the February 2nd hearing to defendant's claim involving the purported non-prosecution agreement.

The hearing took two days. The first day, Mr. Castor, who was the district attorney in 2005, testified for the defense. He

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[1] The Commonwealth unsuccessfully objected under *Commonwealth v. Cosgrove*, 680 A.2d 823, 826 (Pa. 1996) (holding that a criminal defendant may not challenge the authority of the Commonwealth to prosecute him until after formal arraignment).

specifically denied that there was an agreement, explaining that there was no "*quid pro quo*" (N.T. 2/2/16, 99). Instead, he testified that he decided that did not want to go forward with what he believed would be a difficult criminal prosecution, even though he believed the victim (*id.* at 63, 113, 115). He said he still "wanted some measure of justice," however (*id.* at 63). He thus made what he called "a final determination as the sovereign" not to prosecute defendant (*id.*). He testified that he told defendant's criminal defense attorney at the time, Walter Phillips, Esquire, that he believed that his decision and press release announcing that no charges would be filed would strip defendant of his Fifth Amendment rights in any future civil lawsuit (*id.* at 64-65). Castor testified that Phillips agreed with this "legal assessment" (*id.* at 65).[2]

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[2] Castor unveiled this version of events for the first time at the hearing. It was not only different from what he had repeatedly said in the past, but also legally confused and baseless. Though a district attorney may enter into a contractual agreement not to prosecute a defendant, he may not *unilaterally* confer what amounts to transactional immunity. "Our Supreme Court has determined that under Pennsylvania law only use immunity is available to a witness." *Commonwealth v. Swinehart*, 642 A.2d 504, 506 (Pa. Super. 1994), *aff'd*, 664 A.2d 957 (Pa. 1995). Use immunity is available only through a court order. *Commonwealth v. Parker*, 611 A.2d 199, 200 n.1 (Pa. 1992). Of course, there was no

Castor insisted that he did this to benefit the victim in her then-unfiled civil action against defendant and that he did so with the agreement of the victim's civil attorneys (*id.* at 98).

Castor was extensively cross-examined by the Commonwealth (*id.* at 111-239). His testimony was inconsistent with, among other things, the 2005 press release that stated his decision was open to reconsideration, his statements to journalists over the years, and his September 2015 emails to then-District Attorney Risa Vetri Ferman in which he described in detail the purported arrangement.[3]

The second day, the defense concluded its case by presenting John Schmitt, Esquire, a civil attorney who had represented defendant in various matters since 1983 (N.T. 2/3/16, 7). He testified that he never spoke with Castor, but Phillips had told him that Castor had made "an irrevocable commitment" not to prosecute

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court order here. Further, a defective attempt to confer immunity does not strip an individual of his or her Fifth Amendment rights. *See United States v. Doe*, 465 U.S. 605, 616-617 (1984)(holding that a government promise of immunity without court order does not strip an individual of his Fifth Amendment rights).

[3] Ms. Ferman is now a judge of the Court of Common Pleas, Montgomery County, Pennsylvania.

defendant (*id.* at 11). Schmitt testified that, but for this alleged commitment, he would not have allowed defendant to sit for the civil deposition (*id.* at 14).

Schmitt's testimony about the alleged "irrevocable commitment" was dubious. His failure to obtain such an important agreement in writing, or even to make it a part of the record at any time during the civil lawsuit, is remarkable given his experience and past practice (*id.* at 16-17, 25-26, 33-34). If there really had been any such agreement, surely he would have taken such basic steps to protect his client's interests. Further, as part of the settlement of the civil suit, he had negotiated a confidentiality agreement that precluded the victim from contacting the police—something that would have been unnecessary if there really were an "irrevocable commitment" (*id.* at 47-48).

Schmitt's testimony that he would have advised defendant to invoke his Fifth Amendment rights at the depositions but for the "irrevocable commitment" was also dubious. Defendant frequently spoke about the incident without invoking his right to remain silent. Schmitt had permitted defendant to be interviewed by detectives during the criminal investigation, and at no time did he

invoke his Fifth Amendment rights (*id.* at 18). That worked out well for him, since no charges were filed at that time. During the criminal investigation, Schmitt also negotiated an agreement for defendant to give an interview about the case to the *National Enquirer*, and defendant did so after the investigation was concluded (*id.* at 33, 176). Finally, at the civil depositions, defendant maintained his innocence, as he did in the police interview. Significantly, he did not invoke his Fifth Amendment rights when questioned about *other* potential victims, who clearly would not have been covered by any arrangement with Castor (*id.* at 58-59).

At the close of defendant's case, the Commonwealth sought to dismiss the petition, arguing that even considering the evidence in the light most favorable to defendant, he had failed to establish a claim for relief. Judge O'Neill deferred ruling.

The Commonwealth thereafter presented Dolores Troiani, Esquire, and Bebe Kivitz, Esquire, the two civil attorneys who had represented the victim in 2005. They testified that Castor never mentioned any understanding with Phillips that defendant could not invoke his Fifth Amendment rights in a civil lawsuit, and

neither defendant nor his several civil attorneys ever mentioned this supposed arrangement at any time throughout the civil litigation (*id.* at 184, 236-237). Troiani also testified that if defendant had invoked his Fifth Amendment rights at the deposition, it would have *benefited* their civil case (*id.* at 176). Specifically, it could have resulted in an adverse-inference instruction at trial, and "the only testimony in our case would have been [the victim's] version of the facts" (*id.*).

During closing statements, the Commonwealth's primary arguments were factual: (1) the supposed "sovereign edict" never existed, but instead was revisionist history manufactured a decade later; and (2) even if Castor shared his purported "sovereign edict" theory with defense counsel in 2005, defendant did not actually rely on it when he decided to testify at the deposition. The Commonwealth specifically requested that Judge O'Neill render a credibility determination on those issues (*id.* at 289).

After a recess, Judge O'Neill denied defendant's "non-prosecution agreement" claim, explaining that "a credibility determination" was "an inherent part" of its ruling (*id.* at 307; *Order*, dated Feb. 4, 2016 (O'Neill, J.)).

On February 12, 2016, defendant filed a motion asking Judge O'Neill to amend his order to include the certification language specified in 42 Pa. C.S. § 702(b) ("Interlocutory appeals by permission"). Judge O'Neill later denied the motion. Defendant filed a petition for review.

Defendant also filed a notice of appeal under Pa.R.A.P. 313 ("Collateral Orders"), in the Pennsylvania Superior Court. The Commonwealth filed a motion to quash the appeal as interlocutory. Defendant sought, and the Superior Court granted, a writ of prohibition pending the disposition of the Commonwealth's motion to quash.

On April 25, 2015, the Superior Court granted the Commonwealth's motion to quash and denied defendant's petition for review.

Defendant's preliminary hearing is now scheduled for May 24, 2016.

III. DISCUSSION

Defendant wants this Court to delay his preliminary hearing, which he has already successfully delayed for months. He seeks such delay even though a common pleas judge has already

prematurely intervened, held a hearing, and denied the pre-trial claim; and even though the trial judge and the Superior Court have concluded that his attempted pre-trial appeal is interlocutory and improper. He is not entitled to more delay. As an initial matter, his stay request is procedurally defective. He is making it for the very first time in this Court. In any event, he cannot demonstrate an entitlement to a stay. His appeal is unlikely to succeed, he will not suffer irreparable injury by having a preliminary hearing, and the continued delay of his criminal prosecution will substantially harm the Commonwealth and public interest.

A. Defendant's stay request is procedurally defective.

Defendant's request for a stay is procedurally defective. A stay request must generally be brought first to the government unit responsible for the order. *See, e.g.*, Pa.R.A.P. 1732(a); Pa.R.A.P. 1781(a); *see also* Pa.R.A.P. 3315, *Note* ("After a party has applied for a stay, *etc.*, in the trial court and a further application has been acted on by the Superior Court ... a further application may be made under this rule to the Supreme Court").

In this case, however, defendant has never sought a stay, much less asked any court to apply the factors delineated under

Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 467 A.2d 805, 808-809 (Pa. 1983), as he does now. He neither asked the trial court for a stay, nor sought one from the Superior Court. Instead, he asked the Superior Court to grant him a writ of prohibition, which is a different legal remedy, founded in the original jurisdiction of that court. 42 Pa.C.S. § 741. Because defendant seeks a stay for the first time in this Court, despite having repeated opportunities to do so in the courts below, his request is procedurally defective and should be summarily dismissed. *Cf. Pennsylvania State Association of Jury Commissoners v. Commonwealth*, 64 A.3d 611, n.12 (Pa. 2013) (noting that appellant's stay petition contained a "fatal procedural defect" because the appellant had not sought such relief in the intermediate lower court).

B. In any event, defendant cannot demonstrate that he is entitled to a stay.

A grant of a stay is warranted if: (1) the petitioner makes a strong showing that he is likely to prevail on the merits; (2) he has shown that without the requested relief, he will suffer irreparable injury; (3) the issuance of a stay will not substantially harm other

interested parties in the proceeding; and (4) the issuance of a stay will not adversely affect the public interest. *Pennsylvania Public Utility Commission*, 467 A.2d at 808-809 (adopting standard from *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958)).

1. Defendant is unlikely to prevail on the merits.

Defendant has not succeeded with these arguments before the trial judge or the Superior Court, and he remains unlikely to prevail now. "Without ... a substantial indication of probable success, there would be no justification for the court's intrusion into the ordinary processes of ... judicial review." *Virginia Petroleum Jobbers Association*, 259 F.2d at 925.

a. Defendant's appeal fails under the collateral order doctrine.

Defendant first contends that the order denying his claim is a "collateral order" under Pa. R.A.P. 313. That rule permits a "narrow exception to the general rule that only final orders are appealable." *Commonwealth v. Wells*, 719 A.2d 729, 730 (Pa. 1998). It is construed "narrowly" to avoid "piecemeal determinations and the consequent protraction of litigation." *Commonwealth v. Sabula*, 46

A.3d 1287, 1291 (Pa. Super. 2012) (quoting *Rae v. Funeral Directors Association*, 977 A.2d 1121, 1129 (Pa. 2009)).

Under the collateral order doctrine, an immediate appeal of an otherwise unappealable interlocutory order is permissible if it meets the following three requirements: (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) (citations omitted). "All three prongs of Rule 313(b) must be met before an order may be subject to a collateral order appeal; otherwise, the appellate court lacks jurisdiction over the appeal." *Id.*

Importantly, the third prong "requires that the matter must effectively be unreviewable on appeal from final judgment." *Wells*, 719 A.2d 730. In even stronger language, this Court has explained that a collateral order appeal is permissible only if "denial of immediate review would render impossible any review whatsoever of [the] individual's claim." *Commonwealth v. Myers*, 322 A.2d 131, 133 (Pa. 1974) (quoting *United States v. Ryan*, 402 U.S. 530, 533

(1971)).

Assuming *arguendo* that defendant could meet the first two prongs of the test, his "non-prosecution agreement" claim does not meet the third prong of the collateral order doctrine. His claim will not be irreparably lost if postponed until after final judgment.

Sabula is instructive. There, the appellant alleged that the police had promised him that he would not be prosecuted for his crimes in exchange for his cooperation in another investigation. When the trial court denied the claim prior to trial, the appellant appealed to the Superior Court, relying on the collateral order doctrine. He argued that an immediate appeal was justified because "the bargained for benefit, in the form of the Commonwealth's promise not to prosecute, included being free from the expense and ordeal of trial not merely being free from conviction." *Id.*, 46 A.3d at 1292.

The Superior Court quashed the appeal, however. It rejected the appellant's theory that he met the third prong because his supposed "bargained for benefit" included "being free from the expense and ordeal of trial":

> To 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. An interest or issue must actually ***disappear*** due to the processes of trial.

Sabula, 46 A.3d at 1293 (emphasis added) (citations omitted).

The *Sabula* court ultimately concluded that this was not the case with regard to a claim involving an alleged "non-prosecution agreement":

> Instantly, in light of the foregoing, we conclude the issue raised by the trial court's denial of Appellant's pre-trial motion to enforce a nonprosecution agreement will not be irreparably lost if not reviewed as a collateral order. Here, any right Appellant has in the avoidance of criminal sanctions by virtue of his compliance with a nonprosecution agreement with the Commonwealth would be mooted in the event of an acquittal and would, in the event of conviction, be reviewable in an appeal from a final judgment of sentence.

Sabula, 46 A.3d at 1293.

Defendant's case is indistinguishable from *Sabula*. His claim that he entered into a "non-prosecution agreement" with the former district attorney would be rendered moot by an acquittal or, if he is convicted, reviewed by the Superior Court in an appeal following final judgment. It is also worth noting that, unlike *Sabula*, and despite defendant's continued repeated assertions to the contrary

on appeal, his claim does not involve an agreement at all; as mentioned previously, Castor specifically denied the existence of any *quid pro quo* (N.T. 2/2/16, 99).

Defendant, in a superficially mesmerizing paragraph, attempts to distinguish *Sabula*. He argues that his agreement is different than the one in that case; he says that his agreement was supposedly "that he would never be prosecuted at all" (*Emergency Application* at 23). This is no different than *Sabula*. The defendant there bargained for the Commonwealth's "promise not to prosecute." *Id.*, 46 A.3d at 1292. Defendant's attempted distinction is illusory.

The Commonwealth respectfully submits that whether defendant's non-prosecution claim will be irreparably lost is not a complicated issue requiring strained interpretations of cases involving immunity provisions in federal aviation statutes or tariff agreements (*Emergency Application* at 23, citing cases). This instead is an issue that is squarely—and easily—resolved by *Sabula*.

b. Defendant's appeal fails under the exceptional circumstances doctrine.

Defendant relies on *Commonwealth v. Bolden,* 373 A.2d 90 (Pa. 1977), and a handful of other decades-old cases in arguing his appeal should be heard based on the "exceptional circumstances" doctrine.[4] His reliance on those cases is misplaced. The "exceptional circumstances" doctrine—to the extent it even remains viable today in light of the adoption of Pa. R.A.P. 313—does not confer jurisdiction to hear defendant's premature appeal.

As an initial matter, the Commonwealth would be remiss is it failed to point out that in almost half of these case relied upon by defendant to advance his claim that "exceptional circumstances" warrant appellate jurisdiction, the court actually held that "exceptional circumstances" did ***not*** exist to warrant an appeal from an interlocutory order. *See, e.g., Swanson,* 225 A.2d at 232-233 (quashing appeal from an interlocutory order denying defendant's

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[4] Specifically, defendant cites *Bolden, supra, Commonwealth v. Bruno,* 225 A.2d 241 (Pa. 1967), *Commonwealth v. Byrd,* 219 A.2d 293 (1966), *Commonwealth v. Leaming,* 275 A.2d 43 (Pa. 1971), *Commonwealth v. Bunter* 282 A.2d 705 (Pa 1971), *Commonwealth v. Kilgallen,* 103 A.2d 183 (Pa. 1954), and *Commonwealth v. Swanson,* 225 A.2d 231 (Pa. 1967).

request for change of venue due to pre-trial publicity where no exceptional facts or circumstances existed to depart from the general rule that an appeal only lies from a final order); *Byrd,* 219 A.2d at 295 (quashing appeal from interlocutory order requiring defendant to submit to a neuropsychiatric examination where the appeal did not fall within the exceptional circumstances doctrine); *Bruno,* 225 A.2d at 242-243 (quashing appeal from an interlocutory order committing defendant to a mental health facility where appeal did not fall within the exceptional circumstances doctrine). These cases, consequently, fail to advance defendant's quest to have this Court exercise appellate jurisdiction.[5]

Moreover, in the decades since those cases were decided, this Court adopted Pa. R.A.P. 313 ("Collateral Orders"). *See Smitley v.*

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[5] While the Court in *Bolden* did find that "exceptional circumstances" existed to warrant an appeal from an interlocutory order, that decision was a plurality. *Commonwealth v. Brady,* 508 A.2d 286, 288 (Pa. 1986) (noting that *Bolden* is a "nondecisional opinion") (citing *Commonwealth v. Haefner,* 373 A.2d 1094, 1095 (Pa. 1977)). "It is axiomatic that a plurality opinion ... is without precedential authority, which means that no lower court is bound by its reasoning." *CRY, Inc., v. Mill Service, Inc.,* 640 A.2d 372, 276 n.3 (Pa. 1994). Thus, *Bolden,* too, fails to advance defendant's position.

Holiday Rambler Corp., 707 A.2d 520, 524 (Pa. Super. 1998) (noting that Rule 313 was adopted in 1992). By enacting this rule, this Court codified the then-existing caselaw regarding collateral orders. Pa. R.A.P. 313, *Note; see Smitley, supra* at 524-545.

Indeed, as the *Note* to Rule 313 makes clear, the precise scenario set forth in *Bolden*—denying a pre-trial motion to dismiss based on double jeopardy grounds—is now considered a collateral order appeal. *See* Pa. R.A.P. 313, *Note* (citing *Commonwealth v. Brady,* 508 A.2d 286, 289-291 (Pa. 1986), for the proposition that the Court would "allow[] an immediate appeal from denial of double jeopardy claim under collateral order doctrine where trial court makes a finding that motion is not frivolous"). Thus, even if the *Bolden* decision were precedential, Rule 313 now subsumes its holding, to the extent that it allowed for an appeal based on an "exceptional circumstance." Arguably, the same holds true for the remaining decades-old cases cited by defendant in his attempt to have this Court exercise appellate jurisdiction based on the "exceptional circumstances" doctrine. Each of these cases were decided long before the criminal procedural rules formally

recognized the collateral order doctrine as an alternative bases for appellate jurisdiction.

In any event, to the extent that the exceptional circumstances doctrine continues to remains viable despite the enactment of Rule 313, defendant has unearthed but a single case invoking this doctrine in the more than two decades since Rule 313's adoption: *Commonwealth v. Ricker,* 120 A.3d 349, 354 (Pa. Super. 2015).

Ricker, however, is readily distinguishable from this case. There, the Superior Court found that "exceptional circumstances" supported an interlocutory appeal from a pre-trial habeas corpus petition because, *inter alia,* the issue was capable of evading review. *Id.* at 354. To be sure, the Court found that if the defendant was acquitted or convicted, the issue of whether hearsay evidence alone may establish a *prima facie* case at a preliminary hearing would become moot. *See id.* at 353 (noting that "it is well-settled that errors at a preliminary hearing regarding the sufficiency of the evidence are considered harmless if the defendant is found guilty at trial") (quoting *Commonwealth v. Sanchez,* 82 A.3d 943, 984 (Pa. 2013). Simply put, the defendant in *Ricker* was in a "now or never" situation. This defendant is not. If he is ultimately convicted, he

may raise his challenge to the purported non-prosecution agreement following his conviction. *Ricker,* accordingly, has no application here.

One final note. Defendant cites *Commonwealth v. Schultz,* 2016 Pa. Super. LEXIS 30 (Pa. Super. Jan. 22, 2016), for the proposition that the "exceptional circumstances" doctrine is independent of the collateral order doctrine. *Schultz,* however, says no such thing. That case involved a collateral order appeal. The Superior Court's discussion regarding its jurisdiction to hear the appeal focused on whether the defendant satisfied the three prerequisites to appeal from a collateral order. In conducting its analysis on the final prong—the "irreparably lost" requirement—the Court referenced *Ricker,* noting that the issue sought to be advanced by the defendant there, like in *Schultz,* was capable of evading review if delayed until after trial. *Id.*, 2016 Pa. Super. LEXIS, at *32 (citing *Ricker,* 120 A.3d at 353). Yet the Superior Court made no mention of "exceptional circumstances" whatsoever—let alone state that any such doctrine was separate and distinct from the collateral order doctrine—other than to simply

mention that the *Ricker* court found that "exceptional circumstances" warranted the exercise of jurisdiction. *Id.*

c. Defendant's petition for review fails under Pa.R.A.P. 1311 (Official Note).

Defendant lastly asserts that he is likely to succeed with his petition for review. He argues that the trial court's decision not to amend its order to include the language specified in 42 Pa.C.S. § 702(b) was so egregious that this Court must intervene. Specifically, he believes that his claim involving the purported non-prosecution agreement involves a controlling question of law about which there is substantial disagreement.

An interlocutory appeal by permission may be allowed when a trial court certifies in an order that the appeal "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." 42 Pa.C.S. § 702(b). If the trial court refuses to include such language in an order, a party may file a petition for review. Importantly, the party must demonstrate that the trial court's refusal to certify the appeal is "so egregious as to justify prerogative

appellate correction of the exercise of discretion by the lower tribunal." Pa.R.A.P. 1311 (Official Note).

That defendant cannot do. There is no "controlling question of law" in this case. 42 Pa. C.S. § 702(b). A question of law is subject to a *de novo* standard of review, and the scope of review is plenary. *Commonwealth v. Crawley*, 924 A.2d 612, 614 (Pa. 2007). In contrast, factual findings are due deference as long as they have record support, and credibility determinations are binding on appeal. *Commonwealth v. Myers*, 722 A.2d 649, 651-652 (Pa. 1998).

Here, the trial court denied defendant's claim based on credibility. As mentioned above, the Commonwealth's primary arguments were factual: (1) the supposed "sovereign edict" never existed, but instead was revisionist history manufactured a decade later; and that (2) even if Castor shared his purported "sovereign edict" theory with defense counsel in 2005, defendant did not actually rely on it when he decided to testify at the deposition. The Commonwealth specifically asked the trial court for a credibility determination of these issues (N.T. 2/3/16, 289). The trial court, in denying the claim, explained that "a credibility determination" was "an inherent part" of its ruling (N.T. 2/3/16, 307; *Order*, dated Feb.

4, 2016 (O'Neill, J.)). The trial court thus resolved at least one—if not both—of those factual issues against defendant. As such, there is no "***controlling*** question of law." 42 Pa. C.S. § 702(b) (emphasis added). The trial court's decision not to certify the appeal, therefore, is not so egregious as to justify immediate correction from this Court. There would be little to review, after all, on appeal. *See Myers*, 722 A.2d at 651-652 (restricting scope of appellate review of fact-findings and credibility determinations). Defendant, accordingly, cannot show that his petition for review has a substantial likelihood of success.

2. Defendant will not suffer irreparable injury.

Defendant's proffered "irreparable" injury is "the substantial time, cost, and effort" in defending his case (*Emergency Pet*ition at 11). This is garden-variety complaint is insufficient.

The key word is ***irreparable***. "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough." *Virginia Petroleum Jobbers Association*, 259 F.2d at 925. If there is a possibility of adequate corrective action "will be available at a later date, in the ordinary course of litigation, weighs heavily against a

claim of irreparable harm." *Id.*

Defendant faces no irreparable harm by the denial of a stay. As discussed previously in relation to the collateral order doctrine, his claim may be reviewed further in the ordinary course of litigation; specifically, he may raise a suppression-variant of it during pretrial motions and seek appellate review if convicted after trial. Further, he obtained an undeserved windfall by obtaining pre-trial motions review prior to his formal arraignment. *See Cosgrove*, 680 A.2d at 826 (holding that a criminal defendant may not challenge the authority of the Commonwealth to prosecute him until after formal arraignment). He should have already had his preliminary hearing by now, prior to any review of his pre-trial claim. He will not be irreparably harmed by some limited progress of his criminal case in the lower court—*i.e.*, his preliminary hearing—while he pursues his attempts to have this Court review his claim. Permitting some incremental progress with the underlying criminal proceeding is critical. No doubt this is but the first of several interlocutory appeals by this defendant. If he experiences further success with this obstructionary tactic, he could likely delay his criminal trial for years to come. Put simply,

there is no irreparable harm to defendant by allowing his preliminary hearing to go forward.[6]

3. A stay will substantially harm the interests of the Commonwealth and the public.

This Court has explained that the public "has an overriding interest in the prompt trial of the criminally accused." *Commonwealth v. Brady*, 508 A.2d 286, 291 (Pa. 1986) (quoting *Commonwealth v. Mayfield*, 364 A.2d 1345, 1349 (Pa. 1976)). "From the point of view of the public, a speedy trial is necessary to preserve the means of proving the charge, to maximize the deterrent effect of prosecution and conviction; and to avoid, in some cases, an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses." *Brady*, 508 A.2d at 291 (citing *ABA Project on Minimum Standards for Criminal Justice*, Standard 12-1.1 Commentary (2d ed. 1980)). These interests are compelling here.

Defendant blames the Commonwealth for the delay in this

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[6] Defendant mixes apples with oranges when he relies on cases involving immunity provisions stemming from federal aviation statutes other clearly distinguishable situations (*Emergency Petition* at 11). There is no immunity here, much less any remotely similar statutory provisions.

prosecution since the 2004 crime, asserting that a supposedly brief further delay to permit his current appeals cannot possibly cause any harm. But it is ***defendant*** who has used his fame and fortune to conceal evidence against him for years, including aggressive litigation tactics designed to silence victims. *See, e.g.*, N.T. 3/2/16, 207-222. Indeed, even now, the victim in this case, her mother, and her personal attorneys face civil lawsuits based, in part, on their cooperation with law enforcement. Defendant's brazen scorched earth approach to criminal defense has indeed caused the wheels of justice to move slowly here. But just because he and his legion of attorneys have had past success in delaying the case does not mean that this Court should permit them to continue to do so. It is time for this long-evaded criminal prosecution to proceed.

Defendant has also failed to cite one criminal case in this Commonwealth in which this Court has intervened following the Superior Court's quashal of an accused's pre-trial interlocutory appeal. This rich, celebrity defendant is not entitled to unprecedented special treatment. To do so risks encouraging a flood of similar trial-delaying appeals by other criminal defendants: no one likes to face trial and practically every one (especially those that

are guilty) have incentive to delay. If such extraordinary treatment is given to this high-profile case, it will no doubt inspire many others—facing the unpleasant prospect of a trial, a jury of their peers, and possible conviction—to do the same. That's not in the interest of the public, and it is certainly not in the interest of this Court.

In conclusion, this criminal defendant has yet to be tried, convicted, and sentenced. In fact, remarkably, he has not even had a preliminary hearing, thanks to inventive lawyering that apparently seems intent on keeping his case from a jury for as long as possible. Under these circumstances, the Superior Court properly quashed defendant's appeal and denied his petition for review to "avoid piecemeal determinations and the consequent protraction of litigation." *Sabula*, 46 A.3d at 1291 (quoting *Rae*, 977 A.2d at 1129). Further delay is therefore unjustified.

WHEREFORE, the Commonwealth respectfully requests that the Court deny defendant's request for a stay and permit the case to proceed to a preliminary hearing.

RESPECTFULLY SUBMITTED:

KEVIN R. STEELE
DISTRICT ATTORNEY