

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

No. 488 EDA 2016

WILLIAM H. COSBY, JR.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

**EMERGENCY PETITION FOR A WRIT OF PROHIBITION ANCILLARY TO
APPELLATE JURISDICTION**

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**EMERGENCY PETITION FOR A WRIT OF PROHIBITION ANCILLARY TO
APPELLATE JURISDICTION**

INTRODUCTION

Petitioner William H. Cosby, Jr. seeks a writ of prohibition because the trial court in this case has taken the extraordinary position that it will proceed with hearings and, potentially, trial despite Mr. Cosby's valid and timely appeal to this Court on a matter that will preclude all further proceedings in the case. Because the trial court has no jurisdiction to proceed while this Court resolves this case-dispositive appeal, this Court should issue a writ of prohibition that bars the trial court from proceeding further until the appeal has been decided.

The emergency. The trial court has scheduled a preliminary hearing in this case for March 8, 2016, and has notified Mr. Cosby that it plans to proceed with that hearing despite the pendency of this appeal. Because this appeal concerns Mr. Cosby's right not to be prosecuted and, therefore, not to be subject to these criminal proceedings, Mr. Cosby requests relief on an emergency basis.

Nature of this petition. This is a petition for a writ of prohibition under this Court's jurisdiction to issue such relief ancillary to a pending appeal. 42 Pa. C.S. § 741.¹

Background. On February 12, 2016, Mr. Cosby filed a Notice of Appeal from the trial court's denial of his petition for a writ of habeas corpus, which sought dismissal of the charges on the ground that the Commonwealth was seeking to prosecute Mr. Cosby in breach of its binding commitment that it would not do so, a commitment that induced Mr. Cosby to waive his right against self-incrimination.

¹ The Rules of Appellate Procedure are not clear whether this relief should be sought by application, because this is an appeal, or by petition for review. *Compare* Pa. R. App. P. 1501(a)(3) *with* Pa. R. App. P. 1501(b)(1). Out of an abundance of caution, the sections of this petition conform to the requirements of Rule 1513(e) as well. *See* 42 Pa. C.S. § 708.

As he admitted in his testimony below, the District Attorney of Montgomery County in 2005 made a commitment on behalf of the Commonwealth that Mr. Cosby would never be prosecuted for the allegations made against him by the complainant. He admitted further that he made the commitment with the understanding that Mr. Cosby would then testify in the complainant's civil case because he no longer would be able to invoke the Fifth Amendment. After a two-day hearing in which the former District Attorney unequivocally affirmed that he had made the binding and irrevocable commitment of non-prosecution to induce Mr. Cosby to waive his right against self-incrimination, the trial court denied Mr. Cosby's habeas petition. In doing so, the trial court declined to provide any factual or legal bases for its ruling.

These important issues must be addressed now, because Mr. Cosby's right to be free from prosecution cannot be adequately vindicated after the March 8, 2016 preliminary hearing is held and his prosecution has begun. Indeed, the Commonwealth's argument that its District Attorney's promises are meaningless and unenforceable—even when expressly within the District Attorney's authority, and made to induce waiver of a defendant's constitutional rights—has far-reaching implications for all criminal defendants. Nor can an orderly appeal take place if the trial court simultaneously continues with proceedings below while this appeal is litigated. Accordingly, Mr. Cosby files this petition on an emergency basis to prohibit the trial court from conducting further proceedings until this Court decides whether he has the right to be free from prosecution and relinquishes jurisdiction over the case.

BASIS FOR JURISDICTION

This Court has jurisdiction to issue a writ of prohibition under 42 Pa. C.S. § 741, because the relief sought is ancillary to the pending appeal at No. 488 EDA 2016. *See Mun. Pub., Inc. v. Court of Common Pleas*, 489 A.2d 1286, 1288 (Pa. 1985) (finding jurisdiction to issue a writ of

prohibition to protect appellate jurisdiction over pending appeal). The basis for this Court's underlying jurisdiction as to the appeal is addressed below in Section II.

THE PARTIES AND THE GOVERNMENTAL UNIT THAT MADE THE DETERMINATION

The appellant is William H. Cosby, Jr., the defendant in the underlying action giving rise to the appeal. The respondent is the Commonwealth of Pennsylvania, the plaintiff in that action. The determination at issue was made by the Court of Common Pleas of Montgomery County, a disinterested government unit under Rule 1513(a).

DETERMINATION SOUGHT TO BE REVIEWED

On February 4, 2016, the Court of Common Pleas entered an order denying Mr. Cosby's petition for writ of habeas corpus. (The order is attached hereto as Exhibit A to the concurrently-filed declaration of Joseph Sarles ("Sarles Decl."), and the underlying briefing attached as Exhibits D-G.) On February 12, 2016, Mr. Cosby filed an appeal as of right from the order pursuant to the collateral order and exceptional circumstances doctrines. Sarles Decl., Ex. H. The trial court has made clear it will proceed with the preliminary hearing on March 8, 2016, notwithstanding the pending appeal. On February 24, 2016, the trial court issued an advisory opinion about the scope of this Court's jurisdiction, arguing that Mr. Cosby's appeal "should not be entertained." *See* Sarles Decl., Ex. B.² The same day, the trial court issued a "Decorum Order Governing Preliminary Hearing," which notes that "[t]he terms of this Order apply to the

² The Court presumably filed its opinion pursuant to Appellate Rule 1925(a), which directs the trial court to "forthwith file of record at least a brief opinion of the reasons for the order, or for the rulings or other errors complained of." But the trial court's opinion contains no explanation of its orders and, instead, asks this Court to remand with a direction that it do so. *See* February 24, 2016 Opinion, Sarles Decl., Ex. B, at 9 n.10. The court's opinion asserts that Mr. Cosby's appeal was "dilatatory" (*id.* at 9), but Mr. Cosby filed his appeal eight days after the orders were entered, long before the deadline to do so. In contrast, after it delayed for over a decade in bringing charges in this matter, the Commonwealth now seeks to delay review of the critical question whether its District Attorney's commitment not to prosecute bars further proceedings in this matter.

conduct of the Preliminary Hearing scheduled to begin at 9:30 a.m. on March 8, 2016 in Courtroom A of the Montgomery County Courthouse, Norristown, PA.” *See* Sarles Decl., Ex. C.

Mr. Cosby petitions for a writ of prohibition to prevent the trial court from conducting the preliminary hearing without jurisdiction and irreparably violating the right he seeks to protect on appeal—the right to be free from prosecution.

NATURE OF DETERMINATION

On December 30, 2015, the District Attorney of Montgomery County, Kevin Steele, charged Mr. Cosby with aggravated indecent assault of Andrea Constand. On January 11, 2016, Mr. Cosby petitioned the trial court for a writ of habeas corpus on two grounds, both of which establish his right to be free from prosecution. The trial court held a hearing on February 2-3, 2016.

First, Mr. Cosby argued that the charges violate the Commonwealth’s express and binding commitment not to prosecute him for the matter involving Ms. Constand, given with a mutual understanding of Mr. Cosby’s counsel that Mr. Cosby would then not be able to invoke his constitutional right against self-incrimination in a civil case filed against him by Ms. Constand. During the hearing on Mr. Cosby’s petition for writ of habeas corpus, Bruce Castor, the District Attorney who had made that commitment in 2005, testified to the non-prosecution deal, its purpose, and his intent to induce reliance by Mr. Cosby:

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

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

privilege from him in the Constand sexual assault allegation case.

Q: Ever?

A: Ever, Yes.

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

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

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

Relying on the District Attorney's binding commitment that Mr. Cosby would never be prosecuted, Mr. Cosby, under subpoena, was deposed in Ms. Constand's civil case in 2005, and again in 2006, without invocation of his constitutional rights against self-incrimination. *See, e.g.*, Criminal Complaint at 12 (Sarles Decl., Ex. K). Mr. Cosby's attorney, John Schmitt, testified to this as well:

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

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

...

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

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

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

Second, Mr. Cosby also argued that the charges violate his due process rights given the lengthy, non-investigatory, prejudicial delay in bringing the charges. In the ten years since these allegations were first investigated, Mr. Cosby's attorney, Walter M. Phillips—who negotiated the Commonwealth's commitment not to prosecute with the District Attorney and could give critical testimony requiring dismissal of the charges—has died; his testimony is lost forever. Although the former District Attorney's testimony as to the existence and nature of the Commonwealth's promise of non-prosecution was un-rebutted and sufficient to establish Mr. Cosby's claim, to the extent Mr. Phillips' corroborating testimony would materially affect the outcome of this proceeding, the Commonwealth's undue delay clearly has prejudiced Mr. Cosby.

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

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

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

On February 12, 2016, Mr. Cosby filed a Notice of Appeal pursuant to the exceptional circumstances doctrine, recognized in *Commonwealth v. Ricker*, 120 A.3d 349, 353-54 (Pa. Super. Ct. 2015), and Appellate Rule 313. Despite the filing and pendency of this appeal, the

trial court has made clear that it intends to go forward with the preliminary hearing scheduled for March 8, 2016, and will not defer to the jurisdiction of this Court, by issuing an advisory opinion that this Court has no jurisdiction over the appeal and simultaneously entering an order confirming that the preliminary hearing will proceed on March 8, 2016. *See* Sarles Decl., Exhibits B, C.

Unless this Court issues a writ of prohibition preventing the trial court from conducting the preliminary hearing and further proceedings, the trial court will continue without jurisdiction and will violate the very right Mr. Cosby seeks to protect on appeal—the right to be free from prosecution. Moreover, because the trial court lacks jurisdiction to proceed, any proceeding it conducts will be a nullity.

OBJECTIONS TO TRIAL COURT’S DETERMINATION

I. The Trial Court Does Not Have Jurisdiction over the Case

Pursuant to Rule 1701, exclusive jurisdiction over this case was vested in this Court upon the filing of Mr. Cosby’s notice of appeal, and the trial court therefore has no jurisdiction to proceed further. Rule 1701 provides that, “[e]xcept as otherwise prescribed by these rules, after an appeal is taken . . . , the trial court . . . may no longer proceed further in the matter.” Pa. R. App. P. 1701(a).

On February 12, 2016, Mr. Cosby took an appeal as a matter of right pursuant to the collateral order and exceptional circumstances doctrines as described below. Mr. Cosby believes that resolution of that appeal will result in dismissal of this case. While this Court considers the appeal, the trial court may not proceed with any aspect of this case—including with the preliminary hearing it has scheduled for March 8, 2016. *No* trial court proceedings may take place until this Court returns jurisdiction to the trial court on resolution of the appeal. *See* Pa. R. App. P 1701(a); *R.W.E. v. A.B.K.*, 961 A.2d 161, 169-70 (Pa. Super. Ct. 2008) (en banc) (holding

that, because “a trial court has no jurisdiction to proceed in a matter from the time an appeal is taken until this Court remands the record back to the trial court,” “jurisdiction in this case remained with this Court” and “[t]he trial court thus lacked jurisdiction to enter [the order].”); *Commonwealth v. Pearson*, 685 A.2d 551, 558 (Pa. Super. Ct. 1996) (holding that, because “the trial court was totally divested of jurisdiction by the taking of the appeal” on the judgment’s validity, “the trial court cannot conduct a hearing on [an ineffective assistance of counsel claim] unless and until this Court remands a case with instructions to hold such a hearing.”); *Leasing Serv. Corp. v. Benson*, 464 A.2d 402, 455 (Pa. Super. Ct. 1983) (finding “that the specific provisions of Rule 1701 precluded the lower court from reaching the merits of the Appellant’s claims . . .” and that “the lower court clearly delved into the merits of an issue which directly affected a matter then on appeal before our Court”).

Indeed, any proceedings in the trial court while this appeal is pending will be nullities and could have no further effect in any further proceedings that might be held if this Court later returns jurisdiction to the Court of Common Pleas. *R.W.E.*, 961 A.2d at 170 n.7; *Commonwealth v. Rogers*, 610 A.2d 970, 971 (Pa. Super. Ct. 1992); *Jones v. Trojak*, 586 A.2d 397, 402 (Pa. Super. Ct. 1990), *aff’d*, 634 A.2d 201 (Pa. 1993); *Ingram v. Doovertown Estates, Inc.*, 452 A.2d 884, 886 (Pa. Super. Ct. 1982); *Dwight v. Girard Med. Ctr.*, 623 A.2d 913, 917 (Pa. Commw. Ct. 1993). Mr. Cosby has a right not to be subjected to such null proceedings or to the prospect of having to participate in them a second time after jurisdiction is properly restored.

Although the Commonwealth has moved for Mr. Cosby’s appeal to be quashed, and the trial court has submitted an advisory opinion making similar arguments, that does not give the trial court jurisdiction to proceed. Under Pennsylvania law, a trial court has no jurisdiction to proceed in a case while a motion to quash is pending, even if it “believe[s] that its order denying

appellant's application was an interlocutory order from which no appeal could be taken, and had filed an opinion to that effect." *Gordon v. Gordon*, 439 A.2d 683, 686 (Pa. Super. Ct. 1981). This is because "[i]t is for the appellate court to determine the merits of the appeal, and not the lower court." *Id.* (quoting *Weise v. Goldman*, 323 A.2d 31, 32 (Pa. Super. Ct. 1974)). To prevent frivolous interlocutory appeals from interfering with the orderly handling of a case, Rule 1701(b)(6) was added to the Appellate Rules in 1983 to permit trial courts to proceed where a notice of appeal was taken from "a non-appealable interlocutory order." But, as the Supreme Court has pointed out, "[t]his provision is *only* applicable where there is a determination that the order is a *nonappealable* interlocutory one." *Rosen v. Rosen*, 549 A.2d 561, 564 n.5 (Pa. 1988) (emphasis added). While a trial court is not deprived of jurisdiction where a party takes a frivolous appeal over which there is no jurisdiction, *e.g.*, *First Union Mortg. Corp. v. Frempong*, 744 A.2d 327, 336 (Pa. Super. Ct. 1999), the grounds for appellate jurisdiction here, which are explained in detail below, are by no means frivolous. Indeed, neither the Commonwealth's Motion to Quash nor the trial court's advisory opinion even *argues* the grounds for jurisdiction asserted here are frivolous. In such a situation, the trial court should not proceed. *See, e.g.*, *Commonwealth v. Matis*, 710 A.2d 12, 15, 17 (Pa. 1998) (in case presenting substantial question of jurisdiction, trial court "took no action while the appeal was pending").

Jones v. Trojak is instructive. 586 A.2d at 399. There, the trial court entered an order requiring the parties to a paternity suit to submit to blood tests and one of the parties appealed, but, although the order's appealability was "not free from doubt," this Court ultimately held that it would exercise jurisdiction. *Id.* at 399. The trial court, however, concluded on its own that the order was a nonappealable interlocutory order and went forward with the paternity proceeding anyway. This Court held that the trial court erred in doing so, explaining, "Because the appeal in

this case had vested jurisdiction of this case in the Superior Court, the trial court was without jurisdiction to make a final finding of paternity.” *Id.* at 402. Here, too, the trial court’s orders are appealable, even if interlocutory, and it therefore would be error for the trial court proceedings to go forward, even if the trial court believes otherwise. For the reasons explained below, there is no merit to the Commonwealth’s (or the trial court’s) contention that this Court lacks jurisdiction over the appeal. And, in any event, it is for this Court to decide the Commonwealth’s motion to quash, and the trial court has no jurisdiction to proceed while this Court is doing so.

Nor does the fact that Mr. Cosby bases his appeal on the collateral order and extraordinary circumstances doctrines give the trial court jurisdiction to proceed. The appeal puts the entire case at issue. Although the appeal does not address the merits of the underlying action, the right at issue is *to be free from prosecution*. This Court therefore has jurisdiction over whether the trial court may proceed to hear the charges filed against Mr. Cosby. Thus, on appeal, “the entire case [is] at issue.” *Commonwealth v. Hudson*, 92 A.3d 1235 (Pa. Super. Ct. 2014) (holding that “court was without authority to proceed any further due to the pending appeal” pursuant to Rule 1701(a), because the interlocutory appeal put “the entire case . . . at issue.”); *see also Pittsburgh Baseball, Inc. v. Stadium Auth. of City of Pittsburgh*, 618 A.2d 1248, 1251 (Pa. Commw. Ct. 1992) (granting writ of prohibition pursuant to Pa. R. App. P. 1701(a), and staying further proceedings in the trial court pending resolution of the appeal because the issue on appeal was “interrelated” to issues not on appeal). Because this Court has jurisdiction over whether the trial court may hear the charges filed against Mr. Cosby, the trial court has no jurisdiction to proceed with the case.

Pursuant to Rule 1701, once Mr. Cosby filed his Appeal, jurisdiction over this case was vested exclusively in this Court.

II. This Court Has Jurisdiction Over the Appeal Pursuant to the Collateral Order and Exceptional Circumstances Doctrines

This Court has jurisdiction over this appeal pursuant to the collateral order and exceptional circumstances doctrines. It has appellate jurisdiction pursuant to these doctrines because: (1) this Court is asked to determine whether Mr. Cosby has the right to be free from prosecution; (2) the appeal implicates several rights that are too important to be denied review, including the right to be free from prosecution, the right to due process of law, and the privilege against self-incrimination; and (3) Mr. Cosby’s right to be free from prosecution cannot be adequately vindicated after he has been prosecuted.

Because this Court has jurisdiction to decide the appeal, it also has jurisdiction to issue a writ of prohibition. 42 Pa. C.S. § 741; *Mun. Pub., Inc.*, 489 A.2d at 1288.

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

“Under the collateral order doctrine, an appeal as of right . . . lies from a non-final order meeting the criteria reflected in appellate rule 313(b).” *Commonwealth v. Wright*, 78 A.3d 1070, 1077 (Pa. 2013); Pa. R. App. P. 313(a) (“An appeal may be taken as of right from a collateral order of an administrative agency or lower court.”). Pursuant to Rule 313, a collateral order is “an order separable from and collateral to the main cause of action where the right involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.” Pa. R. App. P. 313(b).

Pennsylvania appellate courts determine whether they have jurisdiction pursuant to the collateral order doctrine through a step-by-step analysis of its three elements: separability, importance, and irreparable loss. *See, e.g., Wright*, 78 A.3d at 1077; *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 426 (Pa. 2006); *Brophy v. Philadelphia Gas Works*, 921 A.2d 80, 87 (Pa. Commw. Ct. 2007).

Each element of the collateral order doctrine is met here.

1. The Order Is Separable from and Collateral to the Main Cause of Action

The separability element 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.” *Wright*, 78 A.3d at 1077 (finding element met because the merits of the defendant’s petition for post-conviction relief were “completely independent” of the issue on appeal, whether the defendant was competent to waive his state post-conviction rights). Although there is no overlap between the merits of the charges and this Appeal, the separability requirement is met even if some overlap occurs. *Pridgen*, 905 A.2d at 433 (noting that “[the Pennsylvania Supreme] Court has adopted a practical analysis recognizing that some potential interrelationship between merits issues and the question sought to be raised in the interlocutory appeal is tolerable”).

Pennsylvania appellate courts have frequently found this element met when the issue on appeal involves an immunity or other right to be free from suit. *See, e.g., Commonwealth v. Sabula*, 46 A.3d 1287, 1291 (Pa. Super. Ct. 2012) (finding element met “because all of the acts and facts pertaining to the non-prosecution agreement have absolutely no relationship to the facts underlying the [criminal] charges”); *Pridgen*, 905 A.2d at 433 (finding element met because “the issue that Appellants seek to raise on appeal concerning the application of [an immunity-like

defense] is both conceptually and factually distinct from the merits”); *Yorty v. PJM Interconnection*, 79 A.3d 655, 660-61 (Pa. Super. Ct. 2013) (finding element met for an immunity issue in a negligence action because “[i]mmunity simply functions as an absolute defense to this cause of action regardless of the elements alleged or proven.”); *Osborne v. Lewis*, 59 A.3d 1109, 1111 n.3 (Pa. Super. Ct. 2012) (finding element met where the immunity-like defense “was factually and legally distinct” from the underlying medical malpractice issues); *Bulebosh v. Flannery*, 91 A.3d 1241, 1242 n.1 (Pa. Super. Ct. 2014) (same); *Hassett v. Dafoe*, 74 A.3d 202, 209 (Pa. Super. Ct. 2013) (finding element met because preemption issue did not implicate the merits of the underlying failure-to-warn claims). Notably, Mr. Castor characterized his commitment not to prosecute Mr. Cosby as equivalent to a grant of transactional immunity. 2/2/2016 Hearing Tr. at 232-36.

Similarly, Pennsylvania appellate courts have often found this element met where the issue on appeal involved the defendant’s privileges, such as the privilege against self-incrimination. *See, e.g., Veloric v. Doe*, 123 A.3d 781, 786 (Pa. Super. Ct. 2015) (finding element met because the “question of whether the Appellants properly invoked their Fifth Amendment constitutional rights against self-incrimination may be addressed without consideration of the merits of the [plaintiffs’] underlying defamation action”); *Commonwealth v. Dennis*, 859 A.2d 1270, 1278 (Pa. 2004) (finding element met because issue of work-product privilege was “clearly separable” from the merits of the petition for post-conviction relief); *Ben v. Schwartz*, 729 A.2d 547, 551-52 (Pa. 1999) (finding element met because issues of governmental, executive, and doctor-patient privileges were separable from the merits of the negligence action); *Commonwealth v. Schultz*, No. 280 MDA 2015, 2016 WL 285506, at *9 (Pa. Super. Ct. Jan. 22, 2016) (finding element met because issue of attorney-client privilege was

separable from the underlying criminal charges); *Commonwealth v. Harris*, 32 A.3d 243, 248 (Pa. 2011) (finding element met because issue of psychologist-client privilege was separable from underlying petition for post-conviction relief).

This Court may determine the issue on appeal without analysis of the merits of the underlying criminal action. Mr. Cosby seeks this Court's determination that he has the right to be free from this prosecution based on the binding commitment that the Commonwealth made in 2005 not to prosecute him, as well as its almost-twelve-year delay in filing charges, which prejudiced Mr. Cosby in providing material evidence related to the Commonwealth's commitment. Those questions involve facts and law that have no relationship to the merits of the criminal charges brought against Mr. Cosby. In other words, this Court can answer whether Mr. Cosby has the right to be free from prosecution without analyzing whether he is innocent or guilty of charges filed against him. For that reason, this element is met.

2. The Rights Involved 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). Here, the rights involved—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.

First, the order implicates the integrity of the judicial system, which is too important to be denied review. In 2005, the Commonwealth promised not to prosecute Mr. Cosby expressly so that he would testify without invoking his privilege against self-incrimination. Now, the Commonwealth has filed charges against Mr. Cosby based on the very testimony given in reliance on the Commonwealth's promise. “Because the integrity of the judicial system demands that the Commonwealth live up to its obligation,” and Mr. Cosby has alleged that the

Commonwealth has failed to do so, the order is too important to be denied review. *Commonwealth v. Ginn*, 587 A.2d 314, 316 (Pa. Super. Ct. 1991) (upholding agreement not to prosecute); *see also Commonwealth v. Hemingway*, 13 A.3d 491, 500-01 (Pa. Super. Ct. 2011) (holding Commonwealth is bound by pre-trial agreements); *Sabula*, 46 A.3d at 1282 (citing *Ginn* and *Hemingway* for the same).

Second, the order involves Mr. Cosby's privilege against self-incrimination, which is too important to be denied review. This Court has recently found that this privilege is "protected under both the United States and Pennsylvania Constitutions, and is so engrained in our nation that it constitutes a right deeply rooted in public policy." *See Veloric*, 123 A.3d at 786 (internal citation omitted).³ This prong has been met repeatedly and consistently where the order involves a defendant's privilege, even privileges far less sacrosanct than the privilege against self-incrimination. *See, e.g., Schultz*, 2016 WL 285506, at *10; *Dennis*, 859 A.2d at 1278; *Ben*, 729 A.2d at 551-52; *Harris*, 32 A.3d at 248; *Commonwealth v. Kennedy*, 876 A.2d 939, 943-44 (Pa. 2005); *In re T.B.*, 75 A.3d 485, 490-91 (Pa. Super. Ct. 2013); *M.M. v. L.M.*, 55 A.3d 1167, 1168 n.1 (Pa. Super. Ct. 2012).

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

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

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

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

Mr. Cosby's right to be free from prosecution cannot be adequately vindicated after he has been prosecuted. A claim will be "irreparably lost" if review is postponed if the issue involved cannot be raised on appeal if the appeal is delayed. *Brophy*, 921 A.2d at 87 (internal citation omitted). Whether the element is met is based on "whether a right is 'adequately vindicable' or 'effectively reviewable.'" *Kane*, 128 A.3d at 345. "This question 'cannot be answered without a judgment about the value interests that would be lost through rigorous application of a final judgment requirement.' For instance, the substantial cost a party would incur in defending a claim may equate to an irreparable loss of a right to avoid the burden entirely." *Id.* (internal citations omitted).

A claim to the right to be free from prosecution is irreparably lost for purposes of the collateral order doctrine even if a successful appeal would result in acquittal, because the substantial time, cost, and effort incurred in the interim cannot be recovered. *Pridgen*, 905 A.2d at 433 (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*, 79 A.3d at 660-61 (citing *Pridgen* for the same); *Osborne*, 59 A.3d at 1111 n.3 (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*, 91 A.3d at 1242 n.1 (citing *Osborne* for the same).

In its motion to quash (which Mr. Cosby will oppose separately), the Commonwealth relies on this Court's decision in *Sabula* to argue that an order failing to enforce a promise of non-prosecution does not meet the third prong of the collateral-order test. The trial court makes a similar argument in its advisory opinion. *See* Sarles Decl., Ex. B. But this case is very different from *Sabula*, and *Sabula* does not control here. *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 this Court specifically noted that the officer "did not speak with the District Attorney and did not obtain the District Attorney's authorization to make the agreement." 46 A.3d at 1289. The putative defendant breached the agreement, and the officer filed charges. *Id.* This Court held that whether the Commonwealth was bound by the officer's agreement presented an issue separable from the merits of the drug charge and was important enough for collateral-order review. With respect to the third prong, the defendant contended only that the bargained-for benefit included 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. This Court found that that was not the bargained-for benefit, but that instead, 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. It added, "such procedural consequences," including inconveniences and inefficiencies like those alleged by the defendant, do not satisfy the third prong of the collateral order test. *Id.* at 1293 (citing *Keefer v. Keefer*, 741 A.2d 808, 813 (Pa. Super. Ct. 1999)).

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. The commitment was not 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.⁴ Thus, being free from “the processes necessary to impose” criminal sanctions—as Mr. Castor testified, having the equivalent of transactional immunity (*see* 2/2/16 Hearing Tr. at 235, 240:12-241:4)—was indeed “the heart of the agreement,” and, under *Sabula*, the collateral order test therefore is met.

This Court has jurisdiction pursuant to the collateral order doctrine to decide the appeal because: (1) this Court is asked to determine whether Mr. Cosby has the right to be free from prosecution, not whether he is innocent or guilty; (2) the appeal implicates several rights that are too important to be denied review, including the right to be free from prosecution, the right to due process, and the privilege against self-incrimination; and (3) Mr. Cosby’s right to be free from prosecution cannot be adequately vindicated after he has been prosecuted. Accordingly, this Court has jurisdiction over Mr. Cosby’s appeal and should issue a writ of prohibition to prevent the trial court from proceeding further without jurisdiction.

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

Independently, this Court also has jurisdiction to decide the appeal pursuant to the exceptional circumstances doctrine applicable to habeas petitions, as recently recognized by this Court in *Commonwealth v. Ricker*, 120 A.3d at 353. “The exceptional circumstances doctrine

⁴ For this reason, it is of no moment that Mr. Cosby’s defenses will “be subject to further review by this Court even before review by appellate Courts,” as the trial court notes in its advisory opinion. Sarles Decl., Ex. B at 5. The right to be free from prosecution in the first place will of course have been substantially lost if prosecution proceeds through trial, even if ultimately enforced in a post-conviction appeal, and upon an acquittal, the critical question of the enforceability of the District Attorney’s commitment will escape review.

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

“Exceptional circumstances exist ‘. . . (1) where an appeal is necessary to prevent a great injustice to the defendant, or (2) where an issue of basic human rights is involved, or (3) where an issue of great public importance is involved.’” *Bolden*, 373 A.2d at 94 (citing *Commonwealth v. Swanson*, 225 A.2d 231, 232 (Pa. 1967); *Commonwealth v. Bruno*, 225 A.2d 241 (Pa. 1967); *Commonwealth v. Byrd*, 219 A.2d 293 (Pa. 1966)); *see Ricker*, 120 A.3d at 353-54.⁵

⁵ The Commonwealth argues in its Motion to Quash (to which Mr. Cosby will respond separately), that the exceptional circumstances doctrine does not apply because Mr. Cosby’s habeas petition somehow “was not a habeas petition at all,” but the Commonwealth cites no authority supporting that argument, and the trial court correctly heard and ruled on the petition as a habeas petition. *See* Pa. Const. art. I, § 14; 42 Pa. C.S. § 6502 (“Any judge of a court of record may issue the writ of habeas corpus to inquire into the cause of detention of any person or for any other lawful purpose”). Moreover, the Commonwealth never argued below that Mr. Cosby’s petition was “not a habeas petition,” and thus has waived that argument in any event. *See* Pa. R.A.P. 302 (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.”). Similarly, in its February 24, 2016 advisory opinion, the trial court argues that Mr. Cosby’s petition for a writ of habeas corpus was “misnomered” and was in fact merely a “motion to dismiss” (Sarles Decl., Ex. B. at 1), but that is contrary to the record below. *See, e.g.* 2/3/16 Hearing Tr. at 79 (The Court: “I’ve allowed under the procedural format of a habeas

According to the Pennsylvania Supreme Court, Pennsylvania “case law permits appeals prior to judgment of sentence when an immediate appeal is necessary to vindicate the right asserted by the defendant.” *Bolden*, 373 A.2d at 94; *see, e.g., Commonwealth v. Leaming*, 275 A.2d 43, 44 (Pa. 1971) (nolle prosequi order appealable where defendant asserted violation of right to a speedy trial); *Commonwealth v. Bunter*, 282 A.2d 705, 707-08 (Pa. 1971) (order dismissing petition to quash indictment appealable due to asserted violation of right to a speedy trial); *Commonwealth v. Kilgallen*, 108 A.3d 780, 783 (Pa. 1954) (superseded on other grounds) (order appealable where defendant asserted infringement of defendant’s right against self-incrimination). In *Ricker*, this Court held that the doctrine conferred jurisdiction to decide an “important constitutional question” raised by a pretrial habeas corpus petition seeking dismissal—the same type of motion filed by Mr. Cosby here. 120 A.3d at 354.

For the reasons discussed above, the rights involved in the 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 those issues are of great public importance.⁶ Accordingly, this Court has jurisdiction to decide the Appeal

corpus to raise an issue of a non-prosecution agreement....”); *see also* February 4, 2016 Order, Sarles Decl., Ex. A (ruling that “the Habeas Corpus Petition seeking dismissal of the charges is hereby DENIED”). As the habeas petition that this Court considered in *Ricker* demonstrates, there is nothing inconsistent about filing a habeas petition and seeking pretrial relief.

⁶ The trial court’s advisory opinion provides no basis for its contrary assertion that Mr. Cosby will not suffer “great injustice” and that the enforceability of a District Attorney’s commitment of non-prosecution made to induce a defendant to give up constitutional rights does “not involve questions of basic human rights” and is not of sufficient “public importance.” *See* Sarles Decl., Ex. B at 8. Constitutional rights such as the right against self-incrimination at issue here are indeed basic human rights, and violation of a defendant’s constitutional rights is a paradigmatic injustice. Likewise, there is great public importance in the question whether a District

pursuant to the exceptional circumstances doctrine, and to issue a writ of prohibition to prevent the trial court from proceeding further.

III. AN EMERGENCY WRIT OF PROHIBITION IS NECESSARY TO PROTECT THIS COURT'S JURISDICTION

The trial court threatens this Court's jurisdiction over the appeal by proceeding with the prosecution against Mr. Cosby before this Court addresses his right to be free from that prosecution. It is well-settled that this Court may issue a writ of prohibition to protect its jurisdiction. "A writ of prohibition is a common law writ whose principal purpose was originally limited to 'prevent[ing] an inferior judicial tribunal from assuming a jurisdiction with which it [was] not legally vested in cases where damage and injustice would otherwise be likely to follow from such action.'" *Mayer v. Garman*, 912 A.2d 762, 766 (Pa. 2006) (quoting *Carpenter Coal & Coke Co. v. Laird*, 61 A.2d 426, 428 (Pa. 1948)); see also *In re Reyes*, 381 A.2d 865, 868 (Pa. 1977) (noting that the purpose of the writ "is to prevent an unlawful assumption of jurisdiction . . .").

"The test for granting the writ is two-part: there must be no adequate remedy at law, and the requested relief must be necessary 'to secure order and regularity in judicial proceedings.'" *Mayer*, 912 A.2d at 766 (citing *Glenn Mills Schools v. Court of Common Pleas of Phila. County*, 520 A.2d 1379, 1381 (Pa. 1987) (quoting *Capital Cities Media, Inc. v. Toole*, 483 A.2d 1339, 1342-43 (Pa. 1984))).

That test is satisfied here. The trial court has elected to proceed with the March 8, 2016 preliminary hearing, despite the pending appeal involving Mr. Cosby's right to be free from prosecution. If the writ is not granted, then proceedings against Mr. Cosby will continue to

Attorney's commitment of non-prosecution on which a defendant relies can be enforced, or whether instead, those commitments are meaningless and cannot be enforced even by defendants who rely on them.

preliminary hearing and potentially beyond, including, possibly, to trial, all while this appeal remains pending. Mr. Cosby will be forced to defend himself against prosecution, and thereby lose the very right he seeks to protect on appeal. There is no adequate remedy at law for violation of that right. *Pridgen*, 905 A.2d at 432 (finding that immunity claim would be irreparably lost if appeal is delayed); *Yorty*, 79 A.3d at 660-61 (same); *Osborne*, 59 A.3d at 1111 n.3 (same); *Bulebosh*, 91 A.3d at 1242 n.1 (same).

The writ is “necessary to secure order and regularity in judicial proceedings” because Mr. Cosby’s right to be free from prosecution is pending on appeal in this Court and, without the writ, the trial court would proceed to violate the very right this Court may protect in that appeal. A writ of prohibition is appropriately issued where, as here, continuance of trial court proceedings will interfere with the fact that jurisdiction has been transferred to this Court, which will decide whether the case should be permitted to proceed. *See, e.g., Pittsburgh Baseball*, 618 A.2d at 1249-51 (granting writ of prohibition and staying trial court proceedings because appeal transferred jurisdiction to Commonwealth Court, which would be deciding appeal).

RELIEF SOUGHT

WHEREFORE, Mr. Cosby requests that this Court enter an order in the nature of a Writ of Prohibition, prohibiting the trial court from proceeding further with this case while it is pending on appeal.

February 25, 2016

Respectfully Submitted,

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