

**In The  
Supreme Court of Pennsylvania**

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No. \_\_\_\_\_ 2016

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**COMMONWEALTH OF PENNSYLVANIA,**  
*Respondent,*

v.  
WILLIAM HENRY COSBY,

*Petitioner.*

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**PETITION FOR REVIEW**

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On Petition for Review of the April 25, 2016 Order of the Superior Court of Pennsylvania, No. 23 EDM 2016, Denying Petitioner's Petition for Review of the February 16, 2016 Order of the Court of Common Pleas of Montgomery County, No. CP-46-MD-0003156-2015, Refusing to Amend Its Order Pursuant Rule 1311(b) of the Rules of Appellate Procedure

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## **Petition for Review**

William H. Cosby, Jr. petitions for review of the Superior Court's April 25, 2016 order denying Mr. Cosby's petition for review of the trial court's failure to amend its February 4, 2016 order denying his petition for writ of habeas corpus to certify that order for interlocutory appeal. The petition should have been granted because the February 4 order clearly presents controlling, dispositive questions of law over which there are substantial grounds for disagreement.

The February 4 order relates to a 2005 decision by the District Attorney of Montgomery County, in which he expressly committed to Mr. Cosby that the Commonwealth would never prosecute him for certain conduct that the District Attorney had investigated. The District Attorney made this commitment on behalf of the Commonwealth specifically to induce Mr. Cosby to testify in a related civil matter without invocation of his rights against self-incrimination. After Mr. Cosby gave that civil testimony, the case settled on confidential terms. Over ten years later, a new District Attorney filed charges against Mr. Cosby based on the very same allegations that the Commonwealth had committed never to prosecute, and based on the civil testimony that the Commonwealth's commitment had induced.

In his petition for habeas relief to the trial court, Mr. Cosby argued that the District Attorney is bound by the Commonwealth's commitment never to prosecute and that he was prejudiced by the Commonwealth's ten-year delay

before it elected to renege on this commitment. The trial court denied the petition without explanation, Mr. Cosby moved to amend that order to certify it for interlocutory appeal, and the trial court denied that motion. Mr. Cosby then petitioned the Superior Court for review of the trial court's denial of that motion, and the Superior Court denied the petition. The Superior Court's denial was an abuse of discretion, and this Court therefore should grant this petition for review of that order.

**BASIS FOR JURISDICTION**

This Court has jurisdiction under 42 PA. CONS. STAT. §§ 702(a), 724, & 5105(c); the Note to PA. R. APP. P. 1311 (Petition for Permission to Appeal); and PA. R. APP. P. 1311, 1501(a)(4) & (b)(3)(a).

**PERSON SEEKING REVIEW**

The party seeking review is William H. Cosby, Jr., the defendant in the underlying action.

**GOVERNMENTAL UNIT THAT MADE THE DETERMINATION SOUGHT TO BE REVIEWED**

The determination at issue was made by the Superior Court of Pennsylvania, a disinterested government unit under PA. R. APP. P. 1513(a).

## DETERMINATION SOUGHT TO BE REVIEWED

### **I. DATE AND IDENTITY OF DETERMINATION**

On February 4, 2016, the trial court entered an order denying Mr. Cosby's petition for a writ of habeas corpus. On February 12, 2016, Mr. Cosby moved to amend the February 4 Order to include the language required by 42 PA. CONS. STAT. § 702(b) to pursue an interlocutory appeal. On the next business day, February 16, 2016, the trial court issued a one-sentence denial of that motion. On March 4, 2016, pursuant to PA. R. APP. P. 1311(b), Mr. Cosby petitioned the Superior Court for review of that denial, and on April 25, 2016, the Superior Court denied that petition (a copy of which is attached as Ex. A), stating:

“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.”

### **II. NATURE OF DETERMINATION**

*The Commonwealth's 2005 investigation.* In January 2005, a complainant named Andrea Constand alleged that, in January or March of 2004, she was assaulted by Mr. Cosby at his residence in Montgomery County. R. 367a.<sup>1</sup> Bruce Castor, the District Attorney of Montgomery County at that time, oversaw the investigation of Ms. Constand's allegations. R. 276a–278a. After investigating,

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<sup>1</sup> Citations are to the Reproduced Record filed in the Superior Court, a copy of which is being lodged with this Court along with a petition for allowance of appeal that is being filed today from a quashal order entered by the Superior Court at No. 488 EDA 2016.

Mr. Castor “decided that there was insufficient credible and admissible evidence upon which any charge against Mr. Cosby related to the Constand incident could be proven beyond a reasonable doubt.” R. 312a. As Mr. Castor explained in the hearing below, he reached that conclusion for several reasons, including that Ms. Constand gave materially inconsistent statements to the authorities (R. 299a–300a, 303a); that Ms. Constand had waited almost a year before making a complaint and had spoken to a civil attorney before contacting police (R. 278a–282a, 295a–296a); that Ms. Constand had continued to have “an inordinate number of contacts” with Mr. Cosby after the alleged assault (R. 307a–308a); and that Ms. Constand and her mother had contacted Mr. Cosby by telephone, 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 un rebutted. 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 from the civil case 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 promising 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 permanently 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. *See, e.g.*, R. 63a–66a; 68a–74a; *see also* 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. B) 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. On February 12, 2016, Mr. Cosby moved to amend the February 4 order to certify it for permissive appeal under the Interlocutory Appeals Act, 42 PA. CONS. STAT. § 702(b), as an alternative basis for appellate jurisdiction. R. 230a–236a. On February 16, the trial court entered an order (copy attached as Ex. C) that denied Mr. Cosby’s motion to amend, R. 237a, and on March 4, Mr. Cosby filed a petition for review of that February 16 order (docketed at No. 23 EDM 2016). On April 25, 2016, the Superior Court issued an order (copy attached as Ex. A) that denied Mr. Cosby’s petition for review without explanation, and by this petition Mr. Cosby seeks review of the Superior Court’s denial order. Also on April 25, 2016, the Superior Court entered an order quashing Mr. Cosby’s direct appeal (No. 488 EDA 2016), and today Mr. Cosby also is filing a petition for allowance of an appeal from that quashed decision. Mr. Cosby requests that this Court consider

these two petitions together because they both relate to Mr. Cosby's effort to obtain appellate review of the trial court's denial of his habeas petition and to the Superior Court's failure to exercise jurisdiction with respect to that denial.<sup>2</sup>

**OBJECTIONS TO THE SUPERIOR COURT'S DENIAL OF REVIEW OF THE TRIAL COURT'S FAILURE TO AMEND ITS ORDER**

The Superior Court abused its discretion when it denied Mr. Cosby's petition for review to correct the trial court's abuse of 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. *Commonwealth v. Dennis*, 859 A.2d 1270, 1275 (Pa. 2004); 42 PA. CONS. STAT § 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 Mr. Cosby—and Mr. Cosby's reliance on that commitment—require dismissal of the charges the Commonwealth had promised never to bring, a clearly

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<sup>2</sup> In a notice dated April 26, 2016, the trial court scheduled a preliminary hearing in Mr. Cosby's criminal case for May 24, 2016. Therefore, to protect his appellate rights, Mr. Cosby filed a May 3, 2016 emergency application with this Court to stay the trial court proceedings pending the outcome of these petitions. That emergency application is docketed at No. 58 MM 2016 and currently is pending.

controlling question of law. The controlling questions of law presented for review are:

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

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

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

The criminal proceedings filed against Mr. Cosby would have to be terminated if any of these questions are decided in Mr. Cosby's favor.

Whether the Commonwealth's prosecution would violate Mr. Cosby's federal and state due process rights is a controlling, dispositive question of law. *Commonwealth v. Brown*, 52 A.3d 1139, 1162 (Pa. 2012) (holding that whether prosecution and conviction of the defendant violated his federal and state due

process rights was “a pure question of law”). “It is well established that district attorneys, in their investigative and prosecutorial roles, have broad discretion over whether charges should be brought in any given case.” *Commonwealth v. Stipetich*, 652 A.2d 1294, 1295 (Pa. 1995). Once a commitment such as Mr. Castor’s has been made, both federal and state due process guarantees require that the Commonwealth abide by it. *See Commonwealth v. Ginn*, 587 A.2d 314, 316–17 (Pa. Super. 1991) (agreement to dismiss based on result of financial audit); *Dunn v. Colleran*, 247 F.3d 450, 462 (3d Cir. 2001) (“due process and equity require” enforcement).

*Commonwealth v. Ginn* is instructive. There, the district attorney agreed to allow an independent accountant to analyze whether the Ginns had diverted certain funds and promised to dismiss the charges if the accountant found no diversion. 587 A.2d at 315. After the auditor found no diversion, the Commonwealth attempted to renege, but the Superior Court enforced the agreement as a matter of law because the Commonwealth “has a duty to live up to the terms of the bargain it made with the Ginns.” *Id.* at 316–17.

Commitments made by the Commonwealth are enforceable not only on due process grounds, but also as a matter of contract law pursuant to the doctrine of estoppel. *Commonwealth v. Hainesworth*, 82 A.3d 444, 447 (Pa. Super. 2013). Whether the Commonwealth is bound by its commitment not to prosecute pursuant

to the doctrine of estoppel likewise is a dispositive, controlling question of law. *Stonehedge Square Ltd. P'ship v. Movie Merchants, Inc.*, 685 A.2d 1019, 1023–24 (Pa. Super. 1996) (equitable estoppel is a question of law for the court to decide), *aff'd*, 715 A.2d 1082 (Pa. 1998). The doctrine of promissory estoppel may be “invoked in order to avoid injustice . . . [and to make] otherwise unenforceable agreements binding . . . .” *Crouse v. Cyclops Indus.*, 745 A.2d 606, 610 (Pa. 2000). “The doctrine of estoppel is an equitable remedy that may be asserted against the government in this jurisdiction.” *Chester Extended Care Ctr. v. Com., Dep't of Pub. Welfare*, 586 A.2d 379, 382 (Pa. 1991). Its elements are “1) misleading words, conduct, or silence by the party against whom the estoppel is asserted; 2) unambiguous proof of reasonable reliance upon the misrepresentation by the party asserting the estoppel; and 3) the lack of a duty to inquire on the party asserting the estoppel.” *Id.*

Each element of estoppel is met here.

- *First*, the Commonwealth’s words support estoppel. Mr. Castor “told [Mr. Phillips] in no uncertain terms, and [Mr. Phillips] understood . . . explicitly,” that “the Commonwealth, the sovereign, would not prosecute Cosby for the Constand matter in order to forever strip his Fifth Amendment privilege from him in the Constand sexual assault allegation case.” R. 492a–493a. Mr. Castor’s

words unambiguously demonstrate the Commonwealth's promise never to prosecute Mr. Cosby.

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

- *Third*, there was no duty for Mr. Cosby to inquire whether the Commonwealth would honor its commitment never to prosecute him. Mr. Cosby was never given any reason to doubt that the Commonwealth would do so until 2015—long after he had testified in the *Constand* civil case in reliance on the Commonwealth's commitment. As soon as the Commonwealth reneged and filed charges against him, Mr. Cosby sought relief through his habeas petition. R. 2a. Because each element is met, the Commonwealth's commitment never to prosecute Mr. Cosby is enforceable pursuant to the doctrine of estoppel.

Finally, this appeal 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 its non-prosecution 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. Whether the Commonwealth’s undue, prejudicial pre-charge delay violates federal or state due process guarantees is a question of law, because the facts on which the legal question is based are undisputed. *Crawford Cent. Sch. Dist. v. Commonwealth*, 888 A.2d 616, 620 (Pa. 2005) (“Since the facts are undisputed, we are left with a question of law”).

Each of these questions of law is sufficient standing alone to justify allowing an appeal in this case.

***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 the 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. *Compare* R. 7a–25a and R. 194a–207a with R. 112a–147a and R. 208a–221a. 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, as a matter of law, commit not to prosecute and that a court order issued pursuant to 42 PA. CONS. STAT. § 5947 is the *only* means of granting immunity.<sup>3</sup> The considerable difference of opinion between the current

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<sup>3</sup> As Mr. Cosby explained below, the witness immunity statute, 42 PA. CONS. STAT. § 5947, applies only where, in an ongoing proceeding, a witness whose testimony “may be necessary to the public interest” has refused to testify on the basis of his or her privilege against self-incrimination and a grant of immunity is necessary to compel the testimony. *See id.* § 5947(b), (d), (f). As the trial court noted, R. 642a–643a, that provision does not apply here. And even if the District Attorney had failed to follow proper procedures in making his non-prosecution

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. CONS. STAT. § 702(b) when they present such case-dispositive questions. *See, e.g., 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 the case); *Lahav ex rel. Lahav v. Main Line Ob/Gyn Assocs., P. C.*, 727 A.2d 1104,

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commitment or in granting immunity, the Commonwealth cannot use its own errors to renege on its commitment. *See, e.g., People v. Brunner*, 108 Cal. Rptr. 501, 506 (Cal. Ct. App. 1973) (“It would be anomalous to permit the People, represented by the district attorney, to argue that an earlier agreement entered into by the district attorney was void for lack of compliance with a statute of whose existence the district attorney must have been aware”); *State v. Reed*, 253 A.2d 227, 232 (Vt. 1969) (“[I]f a prosecutor, in the furtherance of justice, makes an agreement to withhold prosecution, the court may, upon proper showing, even in the absence of statute authority, honor the undertaking”); *see also United States v. Librach*, 536 F.2d 1228, 1230 (8th Cir. 1976) (immunity agreement where “government admittedly did not seek court approval pursuant to the statutory immunity provisions” was not unlawful simply because prosecutor failed “to seek court approval”). However, the parties continue to dispute this question of law.

1104–05 (Pa. 1999) (allowing interlocutory appeal from Commonwealth Court order partially denying preliminary objections so that Court could decide questions of liability of Medical Professional Liability Catastrophe Loss Fund); *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. City of Philadelphia*, 847 A.2d 778, 779 (Pa. Commw. 2004) (permitting appeal on immunity issue over trial court’s refusal to amend); *City of Philadelphia v. Brown*, 618 A.2d 1236, 1238 (Pa. Commw. 1992) (permitting appeal on governmental immunity issue over trial court’s refusal to amend); *City of Philadelphia v. Glim*, 613 A.2d 613, 615–16 (Pa. Commw. 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), *vacated on other grounds*, 749 A.2d 452 (Pa. 2000).

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. *See, e.g., 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 over trial court’s refusal to certify); *Commonwealth v. Boyle*, 532 A.2d 306 (Pa. 1987) (permitting appeal on pre-trial challenge to trial court’s jurisdiction over 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 and abused its own discretion in failing to do so.

### CONCLUSION

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. For the reasons stated in Mr. Cosby’s petition for allowance of appeal, the Superior Court had direct appellate jurisdiction to hear Mr. Cosby’s appeal. But to the extent that the Superior Court had doubts about that jurisdiction, it should have granted Mr.

Cosby's petition for review because the trial court's order qualifies for permissive interlocutory review by meeting all three requirements of Section 702(b). The Superior Court therefore should have exercised its discretion under the Interlocutory Appeals Act to remove any jurisdictional issue and to 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 the foregoing reasons, Mr. Cosby requests that this Court grant Mr. Cosby's petition for review and remand for a decision on the merits of his appeal.

Respectfully Submitted,

/s/ Carl A. Solano

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(*pro hac vice*)  
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*Attorneys for Petitioner William H. Cosby, Jr.*

Dated: May 12, 2016.

# Exhibit A

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 B

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**

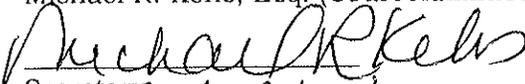
**AND NOW**, this 4 day of February, 2016, it is hereby **ORDERED** as follows:

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

CLERK OF COURT  
MONTGOMERY COUNTY  
100 N. 11TH ST.  
PHILADELPHIA, PA 19107

# Exhibit C

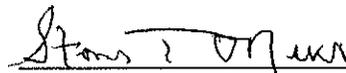
**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY, PENNSYLVANIA  
CRIMINAL DIVISION**

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

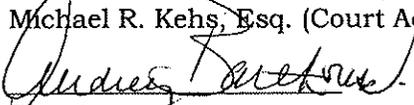
**ORDER**

**AND NOW**, this 16 day of February, 2016, upon consideration of the Defendant's "Motion to Amend the February 4, 2016 Order<sup>1</sup> Denying His Petition for Writ of Habeas Corpus to Certify the Order for Appeal Pursuant to 42 Pa. C.S. Section 702(b)," filed February 12, 2016, the Court finds that: (1) the Orders of February 4, 2016 do not involve controlling questions of law as to which there is substantial ground for difference of opinion, and (2) an immediate appeal from these orders would not materially advance the ultimate termination of the matter, therefore, it is hereby **ORDERED** and **DECREED** that the motion is **DENIED**.

**BY THE COURT:**

  
\_\_\_\_\_  
**STEVEN T. O'NEILL J.**

Copies of this Order mailed on 2/16/16 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

2016 FEB 16 PM 12:15  
MONTGOMERY COUNTY  
CLERK OF COURT

<sup>1</sup> The Defendant only seeks certification of the order pertaining to the non-prosecution agreement.

## CERTIFICATIONS

This 12th day of May, 2016, I certify that:

*Electronic filing.* The electronic version of this petition 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 petitioner.

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

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