

**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 BY WILLIAM H. COSBY, JR. FOR  
ALLOWANCE OF APPEAL**

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On Petition for Allowance of Appeal from the April 25, 2016 Order of the Superior Court of Pennsylvania, No. 488 EDA 2016, Quashing Petitioner's Appeal from the February 4, 2016 Order of the Court of Common Pleas of Montgomery County, No. CP-46-MD-0003156-2015, Denying His Petition for a Writ of Habeas Corpus

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## **Petition for Allowance of Appeal**

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William H. Cosby, Jr. petitions for allowance of an appeal from the Superior Court's April 25, 2016 order quashing his appeal from the trial court's summary denial of his petition for a writ of habeas corpus. The trial court's order raised substantial questions of criminal procedure and constitutional law that qualify for immediate appellate review, and the Superior Court's holding that it lacks jurisdiction to consider those questions is erroneous. *See* PA. R. APP. P. 1114(b)(7).

This appeal 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 a 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, and Mr. Cosby then appealed that order to the Superior Court. The Superior Court then quashed Mr. Cosby's appeal. The quashal order was erroneous because the court had jurisdiction under the collateral order rule, PA. R. APP. P. 313, and under the exceptional circumstances doctrine recently recognized and applied in *Commonwealth v. Ricker*, 120 A.3d 349, 353 (Pa. Super. 2015), *appeal granted*, 588 MAL 2015, 2016 WL 1562068 (Pa. Apr. 18, 2016).

Mr. Cosby has a constitutional right to meaningful appellate review, and the Commonwealth's commitment never to bring this prosecution should be enforced now. Delaying or avoiding review of this issue by proceeding to trial serves neither the public—who have an important interest in the enforceability of such commitments by the Commonwealth—nor the constitutional rights of criminal defendants—who should not be forced to trial when the Commonwealth committed never to prosecute at all. This case thus presents issues of first impression that are of substantial public importance and call out for immediate review. *See* PA. R. APP. P. 1114(b)(3)–(4).

### **OPINIONS BELOW**

The Superior Court issued no opinion supporting its decision to quash Mr. Cosby's appeal, and the trial court issued no opinion supporting its denial of the petition for habeas corpus.

### **ORDERS IN QUESTION**

The Superior Court's order dated April 25, 2016 (a copy of which is attached as Ex. A) states:

“The ‘Commonwealth’s Motion to Quash Appellant’s Pretrial Interlocutory Appeal’ is GRANTED. The temporary stay entered on March 1, 2016 is lifted. The Appellant’s motion for ‘Corrected Notice of Appeal’ is DISMISSED as moot.”

### **QUESTIONS PRESENTED**

Where a District Attorney induces a potential defendant to waive his rights by making a commitment that the defendant will never be prosecuted for the alleged charges, and where the Commonwealth later breaches that commitment and seeks to prosecute the defendant on those same charges, is an order denying the defendant's petition for habeas corpus seeking dismissal immediately appealable under the collateral order or exceptional circumstance doctrines?

### **STATEMENT OF THE CASE**

*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. Bruce

Castor, the District Attorney of Montgomery County at that time, oversaw the investigation of Ms. Constand's allegations. R. 276a–278a. After investigating, Mr. Castor “decided that there was insufficient credible 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.” To accomplish that, Mr. Castor, acting as District Attorney, “made the decision as the sovereign that Mr. Cosby would not be prosecuted no matter what. As a matter of law, that then made it so that he could not take the Fifth Amendment . . . .” R. 316a.

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

Q: . . . You gave the word of the Commonwealth of Pennsylvania in this case to Mr. Phillips that you would not prosecute his client for the allegations involved in the Constand matter; am I correct?

A: I was not acting as Bruce Castor. I was acting as the Commonwealth. And on behalf of the Commonwealth, I promised that we would not — that the Commonwealth, the sovereign, would not prosecute Cosby for the Constand matter in order to forever strip his Fifth Amendment privilege from him in the Constand sexual assault allegation case.

Q: Ever?

A: Ever, yes.

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

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

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

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

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

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

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

*The Commonwealth’s renewed effort to prosecute Mr. Cosby.* After 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. 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 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 19, 2016, the Commonwealth filed an application to quash the appeal, and on February 24, 2016, the trial court issued an advisory opinion (“Op.,” appended to this application as Ex. B) supporting the Commonwealth's view that this appeal should be quashed for lack of jurisdiction. Also on February 24, 2016, the trial court affirmed that the preliminary hearing would proceed on March 8, 2016, despite the pending appeal. R. 248a. Mr. Cosby immediately applied to the Superior Court for a writ of prohibition to prevent the trial court from conducting further proceedings, and on March 1, 2016, the Superior Court stayed the trial court proceedings pending resolution of the

application to quash. The Superior Court then issued a briefing schedule for the merits of the appeal, and, pursuant to that schedule, Mr. Cosby filed his merits brief on April 11, 2016.

On April 25, 2016, in an order attached to this application as Ex. A, the Superior Court granted the Commonwealth's application to quash Mr. Cosby's appeal and lifted the stay. In a notice that it issued the next day, the trial court scheduled the preliminary hearing for May 24, 2016. On May 3, 2016, Mr. Cosby filed an emergency application with this Court to stay the trial court proceedings pending the outcome of this petition for allowance of an appeal. The emergency application is currently pending.

#### **REASONS FOR ALLOWANCE OF AN APPEAL**

I. **This Court Should Grant Mr. Cosby's Petition for Allowance of Appeal Because the Superior Court Failed to Follow This Court's Precedents in Holding That It Did Not Have Jurisdiction Over Mr. Cosby's Appeal**

Pursuant to Rule of Appellate Procedure 1114, this Court may allow an appeal where "the intermediate appellate court has erroneously entered an order quashing or dismissing an appeal." PA. R. APP. P. 1114(b)(7); *see also PPM Atl. Renewable v. Fayette Cty. Zoning Hearing Bd.*, 81 A.3d 896, 899 n.3 (Pa. 2013) (allowing an appeal that was quashed by the Commonwealth Court, because "[o]ne of the items enumerated in the standards governing allowance of appeal is consideration of whether an intermediate appellate court has erroneously quashed

or dismissed an appeal”). The Superior Court erred because jurisdiction for this appeal exists under both the collateral order rule and the exceptional circumstances doctrine.

**A. The Superior Court Had Jurisdiction to Decide the Appeal Pursuant to the Collateral Order Rule**

The collateral order rule vests the Superior Court with jurisdiction to decide an interlocutory order when three prongs are met: “(1) the order must be separable from, and collateral to, the main cause of action; (2) the right involved must be too important to be denied review; and (3) the question presented must be such that if review is postponed until after final judgment, the claim will be irreparably lost.” *Commonwealth v. Harris*, 32 A.3d 243, 248 (Pa. 2011) (citing PA. R. APP. P. 313(b)). A collateral-order appeal may be taken “as of right”; review of a collateral order is not discretionary. PA. R. APP. P. 313(a).

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

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

*The first prong* is met because this appeal would decide whether Mr. Cosby has the right to be free from prosecution, not whether he is innocent or guilty of the alleged criminal charges. “The first prerequisite, separability, is met where review

of the order in question does not implicate the merits of the underlying dispute.” *Commonwealth v. Wright*, 78 A.3d 1070, 1077 (Pa. 2013) (finding element met because the merits of the defendant’s petition for post-conviction relief were “completely independent” of the issue on appeal).

Mr. Cosby seeks a determination that he has the right to be free from this prosecution based on the binding commitment that the Commonwealth made in 2005 never to prosecute him, as well as the almost-twelve-year delay in filing charges, which prejudiced Mr. Cosby 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 charges brought against Mr. Cosby. *See, e.g., Commonwealth v. Sabula*, 46 A.3d 1287, 1291 (Pa. Super. 2012) (finding separability element met because “all of the acts and facts pertaining to the non-prosecution agreement have absolutely no relationship to the facts underlying the [criminal] charges”) (citations omitted).

***The second prong*** is also met because Mr. Cosby’s appeal seeks to protect rights—the right to be free from prosecution, the right to due process, and the right against self-incrimination—that 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 v. Doe*, 123 A.3d 781, 786 (Pa. Super. 2015) (citation omitted); *see*

*Commonwealth v. Dennis*, 859 A.2d 1270, 1278 (Pa. 2004) (“It is beyond question that the exercise of a privilege is an important right deeply rooted in public policy.”); *Ben v. Schwartz*, 729 A.2d 547, 552 (Pa. 1999) (holding that issue whether certain files are subject to privilege “implicates rights rooted in public policy, and impacts on individuals other than those involved in this particular litigation”); *Harris*, 32 A.3d at 249 (reaffirming *Ben*); *Commonwealth v. Kennedy*, 876 A.2d 939, 943–44 (Pa. 2005) (holding that the appellant’s claims to privilege “meet the importance element of Rule 313”); *Sabula*, 46 A.3d at 1292 (concluding “the rights implicated by Appellant’s appeal are too important to be denied review” because “requiring the Commonwealth to adhere to its agreements implicates fundamental fairness concerns, due process concerns and general moral obligations”) (citation omitted).

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

important to be denied review. *Commonwealth v. Ginn*, 587 A.2d 314, 316–17 (Pa. Super. 1991) (upholding agreement not to prosecute); *see also Commonwealth v. Hemingway*, 13 A.3d 491, 500–01 (Pa. Super. 2011) (holding Commonwealth is bound by pre-trial agreements); *Sabula*, 46 A.3d at 1292 (citing *Ginn* and *Hemingway* for the same).

*Second*, the order involves Mr. Cosby’s privilege against self-incrimination, which also is too important to be denied review. The Superior Court 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 (citation omitted).<sup>1</sup> This prong consistently has been found met where the order involves a defendant’s privilege, even privileges less sacrosanct than the privilege against self-incrimination at issue here. *See, e.g., Dennis*, 859 A.2d at 1278; *Ben*, 729 A.2d at 551–52; *Harris*, 32 A.3d at 248; *Kennedy*, 876 A.2d at 943–44; *Commonwealth v. Schultz*, 133 A.3d 294, 308–09 (Pa. Super. 2016); *In re T.B.*, 75 A.3d 485, 490–91 (Pa. Super. 2013); *M.M. v. L.M.*, 55 A.3d 1167, 1168 n.1 (Pa. Super. 2012) (citations omitted). There is no question that Mr. Cosby’s privilege not to incriminate himself is at issue in this case. The former District Attorney

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<sup>1</sup> Although the Court in *Veloric* held that a self-incrimination right is sufficiently important to satisfy 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.3d at 787–91.

testified that he pledged not to prosecute Mr. Cosby for the purpose of preventing Mr. Cosby from invoking his privilege at a deposition in Ms. Constand's civil case, and it is undisputed that Mr. Cosby then did testify at the deposition without invoking his privilege. Mr. Cosby's counsel testified without contradiction that Mr. Cosby would not have testified if there were any doubt about Mr. Castor's commitment of non-prosecution. *See* R. 543a–547a.

*Third*, the order involves Mr. Cosby's right to due process, which is also too important to be denied review. Breach of a non-prosecution commitment raises serious due process concerns, as does an eleven-year delay in prosecution of charges. *See Dunn v. Colleran*, 247 F.3d 450, 462 (3d Cir. 2001) (“due process and equity require” enforcement of prosecutor's commitment); *Commonwealth v. Scher*, 803 A.2d 1204, 1215 (Pa. 2002) (undue, prejudicial delay is violative of state and federal due process rights); *Commonwealth ex rel. Kane v. Philip Morris, Inc.*, 128 A.3d 334, 344–45 (Pa. Commw. 2015) (“Generally, the implication of due process concerns is too important to be denied review”).

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

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

The Commonwealth's sole argument to the Superior Court in opposition to collateral order review was that Mr. Cosby's right to be free from prosecution can be adequately vindicated by a post-prosecution appeal if Mr. Cosby is convicted. This argument is incorrect. Whether the third collateral-order prong is met depends on "whether a right is 'adequately vindicable' or 'effectively reviewable.'" *Id.* at 345 (citations omitted). "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.* (citing *Pridgen v. Parker Hannifin Corp.*, 905 A.2d 422, 433 (Pa. 2006)).

Mr. Cosby's right to be free from prosecution would be irreparably lost for purposes of the collateral order doctrine even if he were acquitted, because he still would have been subjected to a prosecution that the Commonwealth has committed not to conduct. The substantial time, cost, and effort incurred in that prosecution cannot be recovered. *Pridgen*, 905 A.2d at 433 (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”).<sup>2</sup>

The Commonwealth relied below on the Superior Court’s decision in *Sabula* to argue that allowing a criminal prosecution to proceed instead of enforcing a promise of non-prosecution is not an irreparable injury, but this case is very different from *Sabula*. In *Sabula*, a police officer allegedly made an agreement not to file charges if the putative defendant cooperated in an effort to arrest his drug supplier. The trial court and Superior Court both noted that the officer “did not speak with the District Attorney and did not obtain the District Attorney’s authorization to make the agreement.” 46 A.3d at 1289. The purported agreement therefore was invalid.<sup>3</sup> The putative defendant breached the agreement, and the officer filed charges. *Id.* The defendant contended that the prosecution deprived him of his bargained-for benefit of freedom from “the expense and ordeal of trial,” explaining that he likely would “be incarcerated, have to expend sizable sums of

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<sup>2</sup> See also *Bulebosh v. Flannery*, 91 A.3d 1241, 1242 n.1 (Pa. Super. 2014) (citing *Osborne v. Lewis*, 59 A.3d 1109, 1111 n.3 (Pa. Super. 2012) (holding 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 . . .”)); *Yorty v. PJM Interconnection*, 79 A.3d 655, 660–61 (Pa. Super. 2013) (citing *Pridgen* for the same).

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

money for legal representation, and, in all likelihood, remain in jail while the issue proceeds through the appellate courts.” *Id.* at 1292. The Superior Court concluded, however, that such freedom was not the bargained-for benefit, that the consideration the defendant received under his agreement with the officer was only “the avoidance of criminal sanctions,” and that any “incidental consequences of the processes necessary to impose that criminal sanction were not at the heart of the agreement.” *Id.* at 1292–93.

Here, in contrast to *Sabula*, a duly-authorized District Attorney, acting expressly on behalf of the Commonwealth, promised Mr. Cosby would never be prosecuted with respect to Ms. Constand’s allegations.<sup>4</sup> 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. R. 492a–493a. This was confirmed at the February 2, 2016 hearing, when former District Attorney Castor testified that he wanted to

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<sup>4</sup> It is well-established that a sitting District Attorney (unlike a police officer) is empowered to make a non-prosecution commitment. *Stipetich*, 652 A.2d at 1295 (“district attorneys, in their investigative and prosecutorial roles, have broad discretion over whether charges should be brought in any given case,” and may “consent to a non-prosecution agreement”); *see also Commonwealth v. DiPasquale*, 246 A.2d 430, 432 (Pa. 1968) (“A District Attorney has a General and widely recognized power to conduct criminal litigation and prosecutions on behalf of the Commonwealth, and to decide whether and when to prosecute, and whether and when to continue or discontinue a case”); *Commonwealth v. Spatz*, 716 A.2d 580, 590 (Pa. 1998) (the determination whether to prosecute is supported by the district attorney’s “inherent, discretionary powers . . .”).

forever remove any possibility of criminal prosecution and thereby to remove Mr. Cosby's Fifth Amendment protections (which, of course, could only exist if there was a continuing threat of prosecution<sup>5</sup>). R. 492a–493a. This testimony was un rebutted. Moreover, Mr. Castor specifically referred to his non-prosecution pledge as the equivalent of a grant of transactional immunity. As he stated, “I wanted there to be the equivalent of transactional immunity, which by default lays solely with the sovereign . . . .” R. 487a–488a. Thus, being free from “the processes necessary to impose” criminal sanctions—as Mr. Castor testified, having the equivalent of transactional immunity—was indeed “the heart of the agreement.” *Sabula*, 46 A.3d at 1292–93.

The Superior Court's holding in *Sabula* hinged on the limited nature of the particular agreement at issue in that case and, if it were read more broadly, would create an effective split of authority on the right to seek interlocutory appeal of immunity issues and similar rights. In *Sabula*, the Superior Court did not hold that the collateral order doctrine is inapplicable whenever a non-prosecution commitment provides immunity. Indeed, such a holding would be inconsistent with holdings of both this Court and the Superior Court, which have recognized that immunities and similar rights are uniquely qualified for interlocutory review

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<sup>5</sup> See, e.g., *Commonwealth v. Long*, 625 A.2d 630, 637 (Pa. 1993) (stating that, to deny the privilege against self-incrimination, it must be “*perfectly clear*” that the person “cannot possibly incriminate himself”) (emphasis in original).

under the collateral order doctrine. *See, e.g., Pridgen*, 905 A.2d at 432 (holding immunity-like claim appealable under the collateral order doctrine); *Yorty*, 79 A.3d at 660–61 (citing *Pridgen* for the same); *Osborne*, 59 A.3d at 1111 n.3 (holding 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 . . .”). The right at issue here calls for similar protection.

In its February 24, 2016 opinion supporting the Commonwealth’s motion to quash, the trial court argued that post-prosecution review would provide a sufficient remedy apart from dismissal for “the Commonwealth’s potential use of [Mr. Cosby’s] statements given during his depositions” (that is, the deposition testimony Mr. Cosby gave in reliance on the District Attorney’s commitment of non-prosecution). *See Ex. B*, at 5. But the admissibility of testimony was not at issue in Mr. Cosby’s Petition for Writ of Habeas Corpus, and it is not at issue here. Mr. Cosby’s claim to his right to be free from prosecution will be irreparably lost *even if he is acquitted*, because the prosecution would have already occurred. Other remedies for *other* potential violations of his rights—such as the Commonwealth’s apparent plan to improperly use his deposition testimony against him—will not vindicate Mr. Cosby’s fundamental right not to be prosecuted at all.

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

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

“The exceptional circumstances doctrine follows the principle ‘that a finding of finality must be the result of a practical rather than a technical construction.’ The exceptional circumstances doctrine requires that an appeal be permitted when immediate resolution of the controversy is necessary to protect the defendant’s rights.” *Commonwealth v. Bolden*, 373 A.2d 90, 94 (Pa. 1977) (citation omitted). The doctrine is separate from, and independent of, the collateral order doctrine. *See Schultz*, 133 A.3d at 310 (noting that in *Ricker*, the Court had exercised jurisdiction by virtue of exceptional circumstances, and had not discussed the collateral order doctrine). This Court has not had occasion to consider the

exceptional circumstances doctrine in recent cases,<sup>6</sup> but its earlier case law suggests that application of this doctrine in habeas cases is broader than that of the collateral order rule, since the collateral order rule is the codification of only *one* exceptional circumstance. *Bolden*, 373 A.2d at 94 (referring to the collateral order doctrine as “one important exception” encompassed within the exceptional circumstances doctrine). “Exceptional circumstances exist ‘. . . (1) where an appeal is necessary to prevent a great injustice to the defendant, or (2) where an issue of basic human rights is involved, or (3) where an issue of great public importance is involved.’” *Id.* (citing *Commonwealth v. Swanson*, 225 A.2d 231, 232 (Pa. 1967); *Commonwealth v. Bruno*, 225 A.2d 241 (Pa. 1967); *Commonwealth v. Byrd*, 219 A.2d 293 (Pa. 1966)); *see Ricker*, 120 A.3d at 353–54.

According to this Court, Pennsylvania “case law permits appeals prior to judgment of sentence when an immediate appeal is necessary to vindicate the right asserted by the defendant.” *Bolden*, 373 A.2d at 94; *see, e.g., Commonwealth v. Leaming*, 275 A.2d 43, 44 (Pa. 1971) (*nolle prosequi* order appealable where defendant asserted violation of right to a speedy trial); *Commonwealth v. Bunter*, 282 A.2d 705, 707–08 (Pa. 1971) (order dismissing petition to quash indictment appealable due to asserted violation of right to a speedy trial); *Commonwealth v. Kil-*

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<sup>6</sup> If the Court agrees that this case qualifies for appeal under the collateral order rule, it need not reach this alternative basis for jurisdiction at this time.

*gallen*, 108 A.2d 780, 783 (Pa. 1954), *superseded by statute as recognized in Commonwealth v. Swinehart*, 664 A.2d 957 (Pa. 1995) (order appealable where defendant asserted infringement of defendant’s right against self-incrimination).

For the reasons discussed above as to collateral orders, the rights involved in this appeal—the right to be free from prosecution, the right to due process, and the privilege against self-incrimination—are too important to be denied review and cannot be adequately vindicated after Mr. Cosby has been prosecuted. Absent an immediate appeal, Mr. Cosby will suffer great injustice because these rights will be lost, multiple issues of his basic human rights are involved, and the issues are of great public importance. Thus, the Superior Court had jurisdiction to decide the appeal pursuant to the exceptional circumstances doctrine.

The Commonwealth’s exceptional circumstances argument in the Superior Court was contained in a single paragraph. It argued that the exceptional circumstances doctrine “is not applicable here” because Mr. Cosby purportedly did not file a valid “habeas petition” that presents exceptional circumstances. (Com. App. ¶ 26). The Superior Court should not have rejected Mr. Cosby’s jurisdictional argument on the basis of the Commonwealth’s cursory argument. *Cf. Commonwealth v. Galvin*, 985 A.2d 783, 798 n.16 (Pa. 2009) (finding an issue waived for purposes of appellate review because party had “fail[ed] to develop this argument in any meaningful fashion in his brief . . .”).

Moreover, the Commonwealth did not oppose Mr. Cosby’s petition in the trial court on the ground that it did not qualify as a proper habeas request, and it therefore cannot raise such a challenge now to argue against the Superior Court’s jurisdiction. *Cf.* PA. R. APP. P. 302(a) (“Issues not raised in the lower court are waived and cannot be raised for the first time on appeal”). In any event, a habeas petition may be filed “by or on behalf of any person restrained of his liberty within this Commonwealth under any pretense whatsoever.” 42 PA. CONS. STAT. § 6503(a). Mr. Cosby correctly styled his motion in the trial court as a petition for a writ of habeas corpus, and it certainly qualified as a proper request under Section 6503.

The Commonwealth complained below that the “one case” applying this doctrine is the Superior Court’s 2015 decision in *Commonwealth v. Ricker*. Of course, *Ricker* is a recent, on-point decision from the Superior Court which cites several other decisions that have applied the exceptional circumstances doctrine, and it therefore stands as a sound basis for the doctrine’s existence. Indeed, this Court very recently granted review of the merits issue in *Ricker*—application of confrontation rights to a preliminary hearing in a criminal matter—without raising any question about jurisdiction. 2016 WL 1562068. Other decisions likewise confirm that exceptional circumstances jurisdiction exists here. *See, e.g., Commonwealth v. Swartz*, 579 A.2d 978, 980 (Pa. Super. 1990).

The trial court's advisory opinion on jurisdiction attempted to distinguish *Ricker* by claiming that this case does not raise an important constitutional question. Ex. B, at 8. In *Ricker*, the issue on appeal was the propriety of finding a *prima facie* case at a preliminary hearing based on hearsay evidence alone. The Court found that, “[n]ot only is Appellant’s claim capable of evading review, it presents an important constitutional question regarding whether a powerful state governmental entity violates federal and state constitutional principles in allowing a defendant to be restrained of his liberty and bound over for trial based solely on hearsay evidence.” *Ricker*, 120 A.3d at 354. For those reasons, the Superior Court found that it had jurisdiction to consider the merits of the appellant’s substantive claims. *Id.* And, as noted, this Court plainly found this issue to be important enough to warrant this Court’s review, as it recently granted allowance of appeal to address the merits of the issue.

Similarly, the Superior Court had jurisdiction to decide Mr. Cosby’s appeal. Mr. Cosby’s claim to his right to be free from prosecution would not survive the processes of trial, because, regardless of whether he is acquitted or convicted, he will have been prosecuted in violation of the agreement. Moreover, as the Superior Court observed, including in *Sabula*, the Commonwealth’s failures to comply with commitments to criminal defendants do indeed present important constitutional questions because “requiring the Commonwealth to adhere to its agreements

implicates ‘fundamental fairness concerns, due process concerns and general, moral obligations’ as recognized in our case law and applicable beyond the present parties and litigation.” 46 A.3d at 1292. Accordingly, the Superior Court held that “the rights implicated by [Mr. Sabula’s appeal from an order denying a motion to compel enforcement of a non-prosecution agreement] are *too important to be denied review.*” *Id.* (emphasis added). Thus, because the Commonwealth’s failure to “live up to its obligation” implicates “the integrity of the judicial system,” there are exceptional circumstances that establish this Court’s jurisdiction over this case. *Ginn*, 587 A.2d at 316 (upholding agreement not to prosecute); *see also Hemingway*, 13 A.3d at 500–01 (holding Commonwealth is bound by pre-trial agreements); *Sabula*, 46 A.3d at 1282 (citing *Ginn* and *Hemingway* for the same).

The Superior Court had jurisdiction to decide Mr. Cosby’s appeal based on both the collateral order and exceptional circumstances doctrines. Accordingly, the Superior Court erred in granting the Commonwealth’s motion to quash the appeal, and this Court should remand the appeal to the Superior Court for a determination on the merits.

**II. This Court Should Grant Mr. Cosby’s Petition for Allowance of Appeal Because This Case Presents an Issue of Substantial Importance That Calls for Immediate Resolution.**

This Court also should allow an appeal because of the substantial importance of the question presented here. The question is one of first impression in this

Court, though it is governed by several appellate precedents in related areas. All of these precedents suggest that the Superior Court erred and that an immediate appeal is appropriate here.

*The question presented is one of first impression for this Court.* This Court has never directly addressed whether an order denying enforcement of a district attorney’s promise never to prosecute is appealable as of right pursuant to the collateral order or extraordinary circumstances doctrines. The question thus is one of first impression. See PA. R. APP. P. 1114(b)(3); *United Farm Bureau Mut. Ins. Co. v. U.S. Fid. & Guar. Co.*, 462 A.2d 1300, 1302 (Pa. 1983) (allowing appeal because “the case presents an important question of first impression . . . .”); *Love v. Borough of Stroudsburg*, 597 A.2d 1137, 1138 (Pa. 1991) (allowing appeal because the case presented a question of first impression). Only one intermediate appellate court opinion comes close to answering this question—the Superior Court’s decision in *Sabula*—but even that decision fails to answer this question of first impression because it hinged on a police officer’s invalid non-prosecution commitment and the limited nature of the agreement made there. Unlike the commitment at issue in *Sabula*, the Commonwealth’s commitment to Mr. Cosby was never to prosecute, and it conferred a right that, by its nature, cannot be vindicated after prosecution, even if it results in acquittal. This Court should grant this appeal to consider this issue of first impression.

*The question presented is one of such public importance as to require prompt and definitive resolution by this Court.* Whether an order denying enforcement of a district attorney’s promise never to prosecute is appealable as of right is a question of special public importance. Mr. Castor made his promise explicitly to induce Mr. Cosby to testify in a related civil matter without invocation of his rights against self-incrimination. Ten years later and after Mr. Cosby gave his civil testimony, the new District Attorney of Montgomery County filed charges against Mr. Cosby based on that induced testimony and the same allegations that the Commonwealth had promised never to prosecute.

Mr. Cosby’s underlying appeal implicates the public’s interest in the integrity of the judicial system and the Commonwealth’s compliance with its own promises. *Ginn*, 587 A.2d at 316–17 (enforcing district attorney’s commitment not to prosecute because “the integrity of the judicial system demands that the Commonwealth live up to its obligation”). This is an issue important to all criminal defendants in the Commonwealth who might rely on a district attorney’s promises. But, more broadly, the issue is important to *all citizens* of the Commonwealth who must rely on the Commonwealth’s integrity. Moreover, several constitutional rights are threatened here—pre-trial vindication of a criminal defendant’s absolute right to be free from prosecution under a binding commitment by the Commonwealth, the right to due process, the right against self-

incrimination, and the Pennsylvania constitutional right to appeal—and “[t]he Constitution protects all citizens, not just a few. When any citizen’s constitutional rights are violated, all citizens are affected.” *Fontroy v. Beard*, No. 02-2949, 2007 WL 1810690, at \*5 (E.D. Pa. Jun. 21, 2007). Because the question presented here implicates the integrity of the judicial system and affects all citizens, it is one of such public importance as to require prompt and definitive resolution by this Court. *See* PA. R. APP. P. 1114(b)(4); *Flora v. Luzerne Cnty.*, 118 A.3d 385 (Pa. 2015) (expressly allowing appeal pursuant PA. R. APP. P. 1114(b)(4)).

***The holding of the Superior Court conflicts with Pennsylvania appellate precedents.*** The Superior Court’s holding that it has no jurisdiction to decide Mr. Cosby’s appeal is inconsistent with this Court’s holding in *Pridgen*, 905 A.2d at 432, that collateral order review is appropriate in cases dealing with immunities and similar rights and with Superior Court decisions reaching similar results. *See, e.g., Yorty*, 79 A.3d at 660–61; *Osborne*, 59 A.3d at 1111 n.3; *Bulebosh*, 91 A.3d at 1242 n.1. Although none of those decisions dealt with the precise question presented here, each precedent called for a result in this case that is similar to the results in those cases. Similar, the Superior Court’s *Ricker* decision and the decisions of this Court on which *Ricker* relied demonstrate that the Superior Court had jurisdiction to hear Mr. Cosby’s appeal under the exceptional circumstances doctrine outlined in those cases.

This Court may grant review where “the holding of the intermediate appellate court conflicts with another intermediate appellate court opinion.” PA. R. APP. P. 1114(b)(1); *see also McMullen v. Kutz*, 985 A.2d 769, 773 (Pa. 2009) (allowing appeal to resolve conflict between Superior Court decisions); *Commonwealth v. Scarpone*, 634 A.2d 1109, 1112 (Pa. 1993) (allowing appeal and noting conflict between two intermediate appellate courts). It also may grant review where “the holding of the intermediate appellate court conflicts with a holding of the Pennsylvania Supreme Court . . . on the same legal question.” PA. R. APP. P. 1114(b)(2); *Flora*, 118 A.3d at 385. The precedents in this Court and the Superior Court demonstrate that Mr. Cosby had a right to appeal under the collateral order and exceptional circumstances doctrines because he claims immunity from suit and deprivation of the important rights asserted in his habeas petition. Because the Superior Court’s holding conflicts with these precedents, this Court should allow this appeal.

***The Superior Court has so abused its discretion as to call for exercise of this Court’s supervisory authority.*** 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. For this additional reason, they call for immediate appellate review. The collateral order rule and exceptional circumstances doctrine provide for such review. That review is not discretionary;

appeal is a matter of right. The Superior Court provided no reasons why it quashed Mr. Cosby's appeal, and its quashal order was an error of law.

This Court may grant review where "the intermediate appellate court has so far departed from accepted judicial practices or so abused its discretion as to call for the exercise of the Pennsylvania Supreme Court's supervisory authority." PA. R. APP. P. 1114(b)(6); *see also Wolloch v. Aiken*, 815 A.2d 594, 595 (Pa. 2002) (allowing appeal to resolve conflict between Superior Court opinion and applicable rules). This is such a case.

### **III. Mr. Cosby Is Also Likely to Prevail on His Underlying Appeal**

This petition for allowance of appeal challenges the Superior Court's jurisdictional rulings, and only those rulings need to be considered by this Court at this time. Mr. Cosby notes, however, that once his appeal is heard, he is likely to prevail on the merits of that appeal. The trial court's order allowing the Commonwealth to breach its District Attorney's express commitment not to prosecute Mr. Cosby was entered in error. The evidence below was unequivocal: the former District Attorney of Montgomery County testified that he made that commitment in 2005 with the intent to bind the Commonwealth, and Mr. Cosby's counsel affirmed he understood the District Attorney's commitment to mean Mr. Cosby could never be prosecuted, and relied on it. No witness testified to the contrary. When a district attorney acts for the Commonwealth and assures a

criminal defendant that he will never be prosecuted for a particular event, that promise must be enforced. And it certainly must be enforced where, as here, the defendant detrimentally relies on that assurance in waiving constitutional rights, including his right against self-incrimination.

#### IV. CONCLUSION

For the foregoing reasons, Mr. Cosby requests that this Court grant Mr. Cosby's petition for allowance of appeal and remand for a decision on the merits of his appeal.

Respectfully Submitted,

/s/ Carl A. Solano

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Dated: May 12, 2016.

# Exhibit A

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

**ORDER**

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

The Appellant's motion for "Corrected Notice Of Appeal" is DISMISSED as moot.

**PER CURIAM**

# Exhibit B



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

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

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

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<sup>2</sup> Defendant's "Memorandum of Law in Support of Petition for Writ of Habeas Corpus and Motion to Disqualify," para. III(B).

<sup>3</sup> Memorandum of Law, para. III(C).

<sup>4</sup> Memorandum of Law, para. III(D).

## II. Discussion

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

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

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<sup>5</sup> Pa. R.A.P. 341.

<sup>6</sup> 42 Pa.C.S.A. §702(b); Pa. R.A.P. 1311.

<sup>7</sup> Pa. R.A.P. 311; 42 Pa.C.S.A. § 5105.

<sup>8</sup> Pa. R.A.P. 313.

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

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

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

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

**b. "Exceptional circumstances" do not exist.**

Insofar as the "exceptional circumstances" doctrine remains viable, it is not applicable to the instance case. Generally, in the absence of "exceptional circumstances," an immediate appeal will not lie from an order denying a pretrial petition for *habeas corpus* as such order is interlocutory.

Commonwealth v. Bernhardt, 519 A.2d 417, 420 (citations omitted).

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

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

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

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

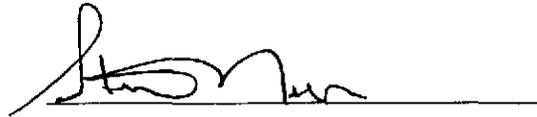
found that the question of whether hearsay evidence alone can be used to establish an *prima facie* case “presents an important constitutional question regarding whether a powerful state governmental entity violates federal and state constitutional principles in allowing a defendant to be restrained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

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

**III. Conclusion**

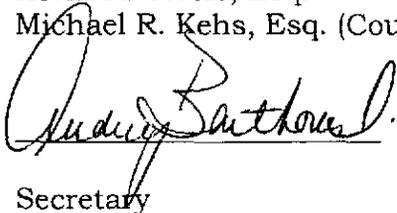
Based on the foregoing, this Court respectfully submits that the Defendant's dilatory attempts to obtain review of its clearly interlocutory orders should not be entertained and these appeals should be quashed.<sup>10</sup>

**BY THE COURT:**



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

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



Secretary

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

## **CERTIFICATIONS**

This 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.

***Length.*** This petition contains 7,276 words, as counted by the undersigned Microsoft Word software, and this length complies with the requirements of Appellate Rule 1115(f).

***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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