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IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

NO. 326 MAL 2016

COMMONWEALTH OF PENNSYLVANIA,
RESPONDENT,
v.
WILLIAM HENRY COSBY
PETITIONER.

ANSWER TO PETITION FOR ALLOWANCE OF APPEAL

ANSWER TO THE PETITION FOR ALLOWANCE OF APPEAL FROM THE APRIL 25, 2016 ORDER OF THE PENNSYLVANIA SUPERIOR COURT QUASHING THE APPEAL FROM THE FEBRUARY 4, 2016 ORDER OF THE HONORABLE STEVEN T. O'NEILL, IN THE COURT OF COMMON PLEAS, MONTGOMERY COUNTY, PENNSYLVANIA, AT NO. CP-46-MD-0003156-2015.

KEVIN R. STEELE
DISTRICT ATTORNEY

EDWARD F. McCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY

OFFICE OF THE DISTRICT ATTORNEY
MONTGOMERY COUNTY COURTHOUSE
NORRISTOWN, PA 19404
(610) 278-3102

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COUNTERSTATEMENT OF THE CASE

Defendant is seeking discretionary review of the Pennsylvania Superior Court's order quashing his pretrial interlocutory appeal. He relies on the collateral order and exceptional circumstances doctrines. His claim, however, will not be irreparably lost if review is deferred until after final judgment. As such, the Superior Court properly quashed his premature appeal. The factual and procedural background is as follows.

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

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

(3) the current District Attorney and his entire office should be disqualified based on his campaign statements.

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

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

The hearing took two days. The first day, Castor, who was the district attorney in 2005, testified for the defense. He specifically denied that there was an agreement, explaining that there was no "*quid pro quo*" (N.T. 2/2/16, 99). Instead, he testified that he decided that he did not want to go forward with what he believed would be a difficult criminal prosecution, even though he believed the victim (*id.* at 63, 113, 115). He said he still "wanted some measure of justice," however (*id.* at 63). He thus made what he

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

called "a final determination as the sovereign" not to prosecute defendant (*id.*). He testified that he told defendant's criminal defense attorney at the time, Walter Phillips, Esquire, that he believed that his decision and press release announcing that no charges would be filed would strip defendant of his Fifth Amendment rights in any future civil lawsuit (*id.* at 64-65). Castor testified that Phillips agreed with this "legal assessment" (*id.* at 65). Castor insisted that he did this to benefit the victim in her then-unfiled civil action against defendant and that he did so with the agreement of the victim's civil attorneys (*id.* at 98).[2]

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[2] Castor unveiled this version of events for the first time at the hearing. It was not only different from what he had repeatedly said in the past, but also legally confused and baseless. Though a district attorney may enter into a contractual agreement not to prosecute a defendant, he may not ***unilaterally*** confer what amounts to transactional immunity. "Our Supreme Court has determined that under Pennsylvania law only use immunity is available to a witness." *Commonwealth v. Swinehart*, 642 A.2d 504, 506 (Pa. Super. 1994), *aff'd,* 664 A.2d 957 (Pa. 1995). Use immunity is available only through a court order. *Commonwealth v. Parker*, 611 A.2d 199, 200 n.1 (Pa. 1992). Of course, there was no court order here. Further, a defective attempt to confer immunity does not strip an individual of his or her Fifth Amendment rights. *See United States v. Doe*, 465 U.S. 605, 616-617 (1984)(holding that a government promise of immunity without court order does not strip an individual of his Fifth Amendment rights).

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

The second day, the defense concluded its case by presenting John Schmitt, Esquire, a civil attorney who had represented defendant in various matters since 1983 (N.T. 2/3/16, 7). He testified that he never spoke with Castor, but Phillips had told him that Castor had made "an irrevocable commitment" not to prosecute defendant (*id.* at 11). Schmitt testified that, but for this alleged commitment, he would not have allowed defendant to sit for the civil deposition (*id.* at 14).

Schmitt's testimony about the alleged "irrevocable commitment" was dubious. His failure to obtain such an important agreement in writing, or even to make it a part of the record at any

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

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

Schmitt's testimony that he would have advised defendant to invoke his Fifth Amendment rights at the depositions but for the "irrevocable commitment" was also dubious. Defendant frequently spoke about the incident without invoking his right to remain silent. Schmitt had permitted defendant to be interviewed by detectives during the criminal investigation, and at no time did he invoke his Fifth Amendment rights (*id.* at 18). That worked out well for him, since no charges were filed at that time. During the criminal investigation, Schmitt also negotiated an agreement for defendant to give an interview about the case to the *National Enquirer*, and defendant did so after the investigation was concluded (*id.* at 33, 176). Finally, at the civil depositions,

defendant maintained his innocence, as he did in the police interview. Significantly, he did not invoke his Fifth Amendment rights when questioned about ***other*** potential victims, who clearly would not have been covered by any supposed arrangement with Castor (*id.* at 58-59).

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

The Commonwealth thereafter presented Dolores Troiani, Esquire, and Bebe Kivitz, Esquire, the two civil attorneys who had represented the victim in 2005. They testified that Castor never mentioned any understanding with Phillips that defendant could not invoke his Fifth Amendment rights in a civil lawsuit, and neither defendant nor his several civil attorneys ever mentioned this supposed arrangement at any time throughout the civil litigation (*id.* at 184, 236-237). Troiani also testified that if defendant had invoked his Fifth Amendment rights at the deposition, it would have ***benefited*** their civil case (*id.* at 176). Specifically, it could have resulted in an adverse-inference instruction at trial, and "the only

testimony in our case would have been [the victim's] version of the facts" (*id.*).

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

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

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

Defendant also filed a notice of appeal under Pa.R.A.P. 313 ("Collateral Orders"), in the Pennsylvania Superior Court. The Commonwealth filed a motion to quash the appeal as interlocutory.

On April 25, 2015, the Superior Court granted the Commonwealth's motion to quash and denied defendant's petition for review. He has now filed this petition for allowance of appeal.

SUMMARY OF ARGUMENT

Defendant alleges that the Pennsylvania Superior Court erred by quashing his pretrial interlocutory appeal. The underlying claim involves the alleged breach of a purported non-prosecution agreement, even though the Commonwealth argued that it never existed, and the trial court denied the claim holding that a credibility determination was an essential part of its ruling.

Defendant nevertheless insists that his criminal case should be put on hold for months, perhaps years, for pretrial review. He first asserts that such review is justified under the collateral order doctrine. But this claim, if necessary, must be raised at the conclusion of trial. Defendant is not in a "now or never" situation, as required for a collateral order appeal. Nor do exceptional circumstances otherwise justify immediate review. He may raise his issues on direct appeal following a judgment of sentence, just like other criminal defendants. He is not entitled to special treatment. The Superior Court properly quashed the appeal, and so the Commonwealth respectfully requests that this Court deny defendant's petition for allowance of appeal.

REASONS SUPPORTING OPPOSITION TO THE ALLOWANCE OF APPEAL

I. THE SUPERIOR COURT PROPERLY QUASHED DEFENDANT'S INTERLOCUTORY APPEAL.

The Superior Court quashed defendant's pretrial interlocutory appeal. Defendant repeats the same arguments he advanced below, contending that his appeal is appropriate under the collateral order doctrine and the exceptional circumstances doctrine. For the reasons discussed below, he is incorrect.

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

Defendant first contends that the order denying his claim is a "collateral order" under Pa. R.A.P. 313. That rule permits a "narrow exception to the general rule that only final orders are appealable." *Commonwealth v. Wells*, 719 A.2d 729, 730 (Pa. 1998). It is construed "narrowly" to avoid "piecemeal determinations and the consequent protraction of litigation." *Commonwealth v. Sabula*, 46 A.3d 1287, 1291 (Pa. Super. 2012) (quoting *Rae v. Funeral Directors Association*, 977 A.2d 1121, 1129 (Pa. 2009)).

Under the collateral order doctrine, an immediate appeal of an otherwise unappealable interlocutory order is permissible if it meets

the following three requirements: (1) the order must be separable from, and collateral to, the main cause of action; (2) the right involved must be too important to be denied review; and (3) the question presented must be such that if review is postponed until after final judgment, the claim will be irreparably lost. *Commonwealth v. Harris*, 32 A.3d 243, 248 (Pa. 2011) (citations omitted). "All three prongs of Rule 313(b) must be met before an order may be subject to a collateral order appeal; otherwise, the appellate court lacks jurisdiction over the appeal." *Id.*

Importantly, the third prong "requires that the matter must effectively be unreviewable on appeal from final judgment." *Wells*, 719 A.2d 730. In even stronger language, this Court has explained that a collateral order appeal is permissible only if "denial of immediate review would render impossible any review whatsoever of [the] individual's claim." *Commonwealth v. Myers*, 322 A.2d 131, 133 (Pa. 1974) (quoting *United States v. Ryan*, 402 U.S. 530, 533 (1971)).

Assuming *arguendo* that defendant could meet the first two prongs of the test, his "non-prosecution agreement" claim does not meet the third prong of the collateral order doctrine. His claim will

not be irreparably lost if postponed until after final judgment.

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

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

> To satisfy this element, an issue must actually be lost if review is postponed. Orders that make a trial inconvenient for one party or introduce potential inefficiencies, including post-trial appeals of orders and subsequent retrials, are not considered as irreparably lost. An interest or issue must actually ***disappear*** due to the processes of trial.

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

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

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

Sabula, 46 A.3d at 1293.

Defendant's case is indistinguishable from *Sabula*. His claim that he entered into a "non-prosecution agreement" with the former district attorney would be rendered moot by an acquittal or, if he is convicted, reviewed by the Superior Court in an appeal following final judgment. It is also worth noting that, unlike *Sabula*, and despite defendant's continued assertions to the contrary on appeal, his claim does not involve an agreement at all; as mentioned previously, Castor specifically denied the existence of any *quid pro quo* (N.T. 2/2/16, 99).

Defendant, in a superficially mesmerizing paragraph, attempts to distinguish *Sabula*. He argues that his agreement is different than the one in that case; he says that his agreement was supposedly "that he would never be prosecuted at all" (*Petition by William H. Cosby, Jr. for Allowance of Appeal* at 17). This is no different than *Sabula*. The defendant there bargained for the Commonwealth's "promise not to prosecute." *Id.*, 46 A.3d at 1292. Defendant's attempted distinction is illusory.

The Commonwealth respectfully submits that whether defendant's non-prosecution claim will be irreparably lost is not a complicated issue requiring strained interpretations of cases involving immunity provisions in federal aviation statutes or tariff agreements (*Petition by William H. Cosby, Jr. for Allowance of Appeal* at 15-16, citing cases). This instead is an issue that is squarely—and easily—resolved by *Sabula*.

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

Defendant relies on *Commonwealth v. Bolden,* 373 A.2d 90 (Pa. 1977), and a handful of other decades-old cases in arguing his appeal should be heard based on the "exceptional circumstances"

doctrine.[4] His reliance on those cases is misplaced. The "exceptional circumstances" doctrine—to the extent it even remains viable today in light of the adoption of Pa. R.A.P. 313—does not confer jurisdiction to hear defendant's premature appeal.

As an initial matter, the Commonwealth would be remiss if it failed to point out that in almost half of these cases relied upon by defendant to advance his claim that "exceptional circumstances" warrant appellate jurisdiction, the court actually held that "exceptional circumstances" did ***not*** exist to warrant an appeal from an interlocutory order. *See, e.g., Swanson,* 225 A.2d at 232-233 (quashing appeal from an interlocutory order denying defendant's request for change of venue due to pre-trial publicity where no exceptional facts or circumstances existed to depart from the general rule that an appeal only lies from a final order); *Byrd,* 219 A.2d at 295 (quashing appeal from interlocutory order requiring defendant to submit to a neuropsychiatric examination where the

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

appeal did not fall within the exceptional circumstances doctrine); *Bruno,* 225 A.2d at 242-243 (quashing appeal from an interlocutory order committing defendant to a mental health facility where appeal did not fall within the exceptional circumstances doctrine). These cases, consequently, fail to advance defendant's quest to have this Court exercise appellate jurisdiction.[5]

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

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

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

In any event, to the extent that the exceptional circumstances doctrine continues to remains viable despite the enactment of Rule 313, defendant has unearthed but a single case invoking this

doctrine in the more than two decades since Rule 313's adoption: *Commonwealth v. Ricker,* 120 A.3d 349, 354 (Pa. Super. 2015).

Ricker, however, is readily distinguishable from this case. There, the Superior Court found that "exceptional circumstances" supported an interlocutory appeal from a pre-trial habeas corpus petition because, *inter alia,* the issue was capable of evading review. *Id.* at 354. To be sure, the Court found that if the defendant was acquitted or convicted, the issue of whether hearsay evidence alone may establish a *prima facie* case at a preliminary hearing would become moot. *See id.* at 353 (noting that "it is well-settled that errors at a preliminary hearing regarding the sufficiency of the evidence are considered harmless if the defendant is found guilty at trial") (quoting *Commonwealth v. Sanchez,* 82 A.3d 943, 984 (Pa. 2013). Simply put, the defendant in *Ricker* was in a "now or never" situation. This defendant is not. If he is ultimately convicted, he may raise his challenge to the purported non-prosecution agreement following his conviction. *Ricker,* accordingly, has no application here.

One final note. Defendant cites *Commonwealth v. Schultz,* 2016 Pa. Super. LEXIS 30 (Pa. Super. Jan. 22, 2016), for the

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

C. Defendant's remaining arguments for discretionary review fail.

Defendant lastly argues that this Court should grant discretionary review because his claim is purportedly of "great

public importance" and other similar reasons (*Petition by William H. Cosby, Jr. for Allowance of Appeal* at 27). He insists that the Commonwealth made a "commitment" not to prosecute him and that he supposedly relied on it when he decided to testify at a civil deposition (*id.* at 3).

The trial court, after hearing all the evidence, found these allegations incredible (N.T. 2/3/16, 307). Yet defendant vigorously persists with this now discredited theory, insisting that he is entitled to review and relief based on allegations already rejected by the factfinder. While it's understandable that defendant clings to his revisionist narrative, the reality is that it lacks any credible factual basis, as found by the trial court. His bid for discretionary review should be denied not only because the Superior Court properly quashed his interlocutory appeal, but also because there is very little, if anything, on the merits for an appellate court to review here. *See Commonwealth v. Myers*, 722 A.2d 649, 651-652 (Pa. 1998) (factual findings are due deference on appeal as long as they have support in the record, and credibility determinations are binding on appeal).

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court deny defendant's petition for allowance of appeal.

RESPECTFULLY SUBMITTED:

KEVIN R. STEELE
DISTRICT ATTORNEY

EDWARD F. McCANN, JR.
FIRST ASSISTANT DISTRICT ATTORNEY

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY

IN THE
SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent,	:	326 MAL 2016
v.	:	
WILLIAM H. COSBY, JR., Petitioner.	:	

CERTIFICATE OF COMPLIANCE

I, Kevin R. Steele, District Attorney of Montgomery County, Pennsylvania, do hereby certify that the within brief complies with Pa. R.A.P. 1116(c). Although the brief is more than twenty-pages, it contains only 4,187 words.

RESPECTFULLY SUBMITTED:

KEVIN R. STEELE
DISTRICT ATTORNEY