

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

Filed 03/04/2016 Superior Court Eastern District  
23 EDM 2016

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**No. \_\_\_ EDM 2016**

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**COMMONWEALTH OF PENNSYLVANIA,**

*Respondent.*

**v.**

**WILLIAM H. COSBY, JR.,**

*Petitioner,*

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**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)**

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On Petition for Review of the February 16, 2016 Order of the Court of  
Common Pleas of Montgomery County, No. CP-46-MD-0003156-2015,  
Denying Petitioner's Motion to Amend to Certify for Interlocutory Appeal  
Its February 4, 2016 Order

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**PETITION FOR REVIEW OF DENIAL OF MOTION  
TO AMEND ORDER TO PERMIT INTERLOCUTORY APPEAL**

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Pursuant to Pennsylvania Rule of Appellate Procedure 1311, *et seq.*, William H. Cosby, Jr. petitions for review of the Court of Common Pleas' February 16, 2016 order denying Mr. Cosby's Motion to Amend the Trial Court's February 4, 2016 Order Denying His Petition for Writ of Habeas Corpus to Certify that Order for Appeal Pursuant to 42 Pa. C.S. § 702(b). This petition is related to the appeal pending at **No. 488 EDA 2016**.

In his Petition for Writ of Habeas Corpus, Mr. Cosby sought dismissal of this case on two grounds: that (1) the Commonwealth, acting through its then-District Attorney Bruce Castor, had promised and bound the Commonwealth in 2005 never to prosecute Mr. Cosby with respect to complainant Andrea Constand's allegations of sexual assault; and (2) the Commonwealth had violated Mr. Cosby's due process rights through its almost twelve-year delay before filing the complaint. After the trial court denied Mr. Cosby's petition in its February 4, 2016 order, Mr. Cosby independently appealed that ruling on February 12, 2016, noting that it is immediately appealable as of right as a collateral order and under the exceptional circumstances doctrine applicable to habeas cases. That appeal is docketed at No. 488 EDA 2016, and an application to quash that appeal is being briefed separately. Mr. Cosby respectfully requests that this petition be considered together with the

proceedings in that appeal, as it provides an alternate basis for appellate jurisdiction in this case that may render consideration of the quashal issues moot.

As an additional basis for jurisdiction, Mr. Cosby sought amendment of the February 4 order to certify it for permissive appellate review under the Interlocutory Appeals Act, 42 Pa. C.S. § 702(b). The trial court's February 16, 2016 order denied that motion, but its denial was error. This Court should permit interlocutory appellate review under Section 702(b) because these issues involve controlling questions of law about which there is substantial ground for difference of opinion, and appellate resolution of these questions will materially advance the ultimate termination of this action by requiring dismissal of the charges against Mr. Cosby with prejudice.

#### **BASIS FOR JURISDICTION**

This Court has jurisdiction under 42 Pa. C.S. §§ 702(a), 742, & 5105(c); the Note to Pa. R.A.P. 1311 (Petition for Permission to Appeal); and Pa. R.A.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 Court of Common Pleas of Montgomery County, a disinterested government unit under Rule of Appellate Procedure 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. A copy of the trial court's docket sheet is attached as Exhibit A to the Declaration of Joseph Sarles in Support of this Petition for Review (the "Sarles Decl."). The underlying briefing is attached as Exhibits D-G to the Sarles Declaration. Pursuant to Rule of Appellate Procedure 313 and the exceptional circumstances doctrine, Mr. Cosby filed an appeal as of right from the February 4 Order, docketed at **No. 488 EDA 2016**. On February 12, 2016, and in an abundance of caution, Mr. Cosby also moved to amend the February 4 Order to include the language required by 42 Pa. C.S. § 702(b), to ensure that he could pursue an interlocutory appeal of any issue that this Court might conclude was not immediately appealable under Rule 313 or the exceptional circumstances doctrine. On the next business day, February 16, 2016, the trial court issued a one-sentence denial of that motion. *See* Sarles Decl., Ex. B. Mr. Cosby now petitions for review of this February 16 Order.

## II. NATURE OF DETERMINATION

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

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

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

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



privilege from him in the Constand sexual assault allegation case.

Q: Ever?

A: Ever, Yes.

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

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

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

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

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

A: I had an understanding it could not be. I spoke to Mr. Phillips who indicated that, although the District Attorney had determined there wasn't sufficient evidence to charge Mr. Cosby, that he did anticipate that there would be a civil litigation. And he wanted to ensure that Mr. Cosby could be

compelled to testify in a civil litigation. And, therefore, his decision was – it was an irrevocable commitment to us that he was not going to prosecute.

...

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

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

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

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

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

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

*See* Sarles Decl., Ex. C. The same day, the trial court denied Mr. Cosby's request for findings of fact and conclusions of law supporting this order. (2/3/15 Hearing Tr. at 321-22) (Sarles Decl., Ex. J).

On February 12, 2016, Mr. Cosby filed a Notice of Appeal pursuant to the exceptional circumstances doctrine, recognized in *Commonwealth v. Ricker*, 120 A.3d 349, 353-54 (Pa. Super. Ct. 2015), and Appellate Rule 313. Also on February 12, 2016, Mr. Cosby requested that the Trial Court certify the February 4 Order for permissive appeal pursuant to 42 Pa. C.S. § 702(b). On the next business day, the trial court issued another one-sentence order, denying Mr. Cosby's Motion to Amend. The court stated only:

AND NOW, this 16 day of February, 2016, upon consideration of the Defendant's "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. 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.<sup>1</sup>

**OBJECTIONS TO THE TRIAL COURT’S FAILURE TO AMEND ITS ORDER**

The trial court abused its discretion in failing to amend its February 4 Order to certify it for interlocutory appellate review. A trial court may certify an interlocutory order for immediate appeal by amending it to state that (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. C.S. § 702(b).

The February 4 Order Involves Controlling Questions of Law. The February 4 Order involves the issue whether the Commonwealth’s commitment not to prosecute—and Mr. Cosby’s reliance on that commitment—require dismissal of

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<sup>1</sup> In a footnote, the Trial Court asserted that “Defendant only seeks certification of the order pertaining to the non-prosecution agreement.” That is incorrect. In his Motion to Amend, Mr. Cosby sought certification of the February 4 Order as it relates *both* to the non-prosecution agreement *and* undue delay. (Pet. for Writ of Habeas Corpus at 13-14, and 14-15, respectively.) Because the order pertaining to the non-prosecution agreement also pertained to undue delay, Mr. Cosby interprets the Order to deny certification as to both issues.

the charges the Commonwealth had promised never to bring, a clearly controlling question of law.<sup>2</sup> The Commonwealth’s commitment “is to be analyzed under contract law standards,” *Commonwealth v. Hainesworth*, 82 A.3d 444, 449 (Pa. Super. 2013), and its interpretation and enforceability is a question of law. *McMullen v. Kutz*, 985 A.2d 769, 773 (Pa. 2009). This controlling question presents several legal issues, all of which would terminate this action when resolved in Mr. Cosby’s favor, including whether the District Attorney’s promise bound the Commonwealth not to prosecute Mr. Cosby and whether the Commonwealth is estopped from prosecuting Mr. Cosby given his reliance on the District Attorney’s promise. The February 4 Order 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 the commitment for more than a decade and then disavowing it to file charges after critical evidence about the commitment had been lost during the lengthy delay.

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<sup>2</sup> As noted above, Mr. Castor has testified that he, “acting as the Commonwealth,” promised never to bring charges against Mr. Cosby “in order to forever strip his Fifth Amendment privilege from him in the Constand sexual assault allegation case.” 2/2/16 Hearing Tr. at 240:12-241:4. Mr. Cosby’s attorney at the time—Walter M. Philips—died in 2015. Mr. Castor is the only surviving person with personal knowledge as to these facts and, for that reason, his testimony is unrebutted.

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 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 Court noted at the hearing, 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. 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.” 2/2/16 Hearing Tr. at 240:12-241:4 (Sarles Decl., Ex. I). Notably, Mr. Castor characterized his

commitment not to prosecute Mr. Cosby as equivalent to a grant of transactional immunity. *Id.* at 232-36. The current District Attorney, on the other hand, has argued that the Commonwealth cannot commit not to prosecute. He argues that a court order pursuant to 42 Pa. C.S. § 5947 is the only means of granting immunity. (Com. Opp. to Habeas Pet. at 14-15, 17-19) (Sarles Decl., Ex. E). And he argues that if Mr. Castor did not have the power to do what he was trying to do, then Mr. Cosby may not seek enforcement of the Commonwealth's commitment not to prosecute. The considerable difference of opinion between the current 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 also an issue important to all criminal defendants 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. C.S. § 702(b) when they present such case-dispositive questions. *See, e.g., Lahav ex rei. Lahav v. Main Line Ob/Gyn Assocs., P. C.*, 727 A.2d 1104, 1105 (Pa. 1999) (allowing interlocutory appeal from Commonwealth Court order partially denying preliminary objections so it could decide questions of liability of Medical Professional Liability Catastrophe Loss Fund); *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 case); *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 state supreme court decision 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. Philadelphia*, 847 A.2d 778, 779 (Pa. Cmwlth. 2004) (permitting appeal on immunity issue over trial court's refusal to amend); *Philadelphia v. Brown*, 618 A.2d 1236, 1238 (Pa. Cmwlth. 1992) (permitting appeal on governmental immunity issue over trial court's refusal to amend); *Philadelphia v. Glim*, 613 A.2d 613, 615-16 (Pa. Cmwlth. 1992) (same); *see also Stanton v. Lackawanna Energy, Ltd.*, 820 A.2d 1256, 1258 (Pa. Super. Ct. 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. Ct. 1998) (same), *rev'd on other grounds*, 749 A.2d at 452.

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. *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 against him over trial court’s refusal to certify); *Commonwealth v. Boyle*, 532 A.2d 306 (Pa. 1987), *rev’d on other grounds*, 625 A.2d 616 (Pa. 1993) (permitting appeal on pre-trial challenge to the trial court’s jurisdiction over the 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. Ct. 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), this Court should grant this petition for review and order that the case be set for briefing on the merits.<sup>3</sup>

Finally, the petition for review also should be 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. The Pennsylvania Supreme Court has held that a trial court’s “[d]iscretion must be exercised on the foundation of reason,”

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<sup>3</sup> This Court already has entered a briefing order in Mr. Cosby’s direct appeal (No. 488 EDA 2016) that calls for Mr. Cosby’s brief to be filed on or before April 11, 2016. If this Court grants this petition, it should be consolidated with No. 488 and can be set on the same briefing schedule.

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 Court should grant this petition for review.

#### **CONCLUSION AND STATEMENT OF RELIEF SOUGHT**

For the foregoing reasons, the trial court’s failure to certify its February 4 Order is “so egregious as to justify prerogative appellate correction of the exercise of discretion by the lower tribunal.” Note to Pa. R.A.P. 1311. This Court should

grant this petition for review given that Mr. Cosby's constitutional rights would be violated by any delay.

WHEREFORE, Mr. Cosby respectfully requests that this Court grant this petition for review of the trial court's denial of its motion to amend the February 4, 2016 order and set this case for briefing on the merits..

March 4, 2016

Respectfully Submitted,

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