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**IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY  
CRIMINAL TRIAL DIVISION**

**COMMONWEALTH OF PENNSYLVANIA** : **MISC. NO:**  
: :  
: :  
**vs.** : :  
: :  
**WILLIAM H. COSBY JR.** :

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**PETITION FOR WRIT OF HABEAS CORPUS AND MOTION TO DISQUALIFY THE  
MONTGOMERY COUNTY DISTRICT ATTORNEY’S OFFICE**

Defendant William H. Cosby Jr., by and through his attorneys, brings this Petition for Writ of Habeas Corpus, pursuant to 42 Pa.C.S.A. Sections 6501 et seq., and Pa.R.Crim.P. 108, and Motion to Disqualify the Montgomery County District Attorney’s Office, and respectfully requests this Honorable Court to grant an Order dismissing all charges against him after an evidentiary hearing to consider the matters raised herein, or in the alternative an Order disqualifying the Montgomery County District Attorney’s Office, and in support thereof states the following.

On December 30, 2015, the District Attorney of Montgomery County charged Mr. Cosby with aggravated indecent assault. The charges violate an express agreement made by the Montgomery County District Attorney in 2005, in which the Commonwealth agreed that Mr. Cosby would never be prosecuted with respect to the allegations of sexual assault made by complainant Andrea Constand. This agreement was made for the express purpose of inducing Mr. Cosby to testify fully in Ms. Constand’s civil litigation against him. In reliance on that agreement, Mr. Cosby testified in 2005 and again in 2006 without invocation of his Constitutional rights against self-incrimination. Now, to fulfill campaign promises, the newly-elected District Attorney has repudiated the agreement and has based these criminal charges on

the very testimony Mr. Cosby gave in reliance on the Commonwealth's non-prosecution agreement.

The charges should separately be dismissed on due process grounds because the over ten-year delay in bringing these charges was inexcusable and has greatly prejudiced Mr. Cosby, as set forth below.

Finally, if dismissal is not granted, the Court should at a minimum disqualify the District Attorney Kevin Steele and the Montgomery County District Attorney's Office from any further involvement in this prosecution due to the Office's and Mr. Steele's intentional breach of the Commonwealth's non-prosecution agreement, and due to repeated violations of ethical rules—including Mr. Steele's deliberate injection of the allegations against Mr. Cosby into a political campaign through repeated public statements made while serving as First Assistant District Attorney and while directly involved in his office's investigation of the allegations—that served no purpose other than to advance Mr. Steele's political ambitions by inflaming the public against Mr. Cosby.

**WHEREFORE**, the Defendant respectfully requests that this Honorable Court grant this Petition for Writ of Habeas Corpus in this matter after an evidentiary hearing or in the alternative an Order disqualifying the Montgomery County District Attorney's Office.

January 10, 2016

Respectfully submitted,

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**MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF HABEAS  
CORPUS AND MOTION TO DISQUALIFY**

**I. INTRODUCTION**

*We strongly condemn the conduct of the state’s attorney in this case. The awesome power to prosecute ought never to be manipulated for personal or political profit.<sup>1</sup>*

On December 30, 2015, the District Attorney for Montgomery County wrongfully charged defendant William H. Cosby Jr. in direct violation of an express non-prosecution agreement. The Commonwealth made that agreement with Mr. Cosby over ten years ago, when the District Attorney first investigated the allegations and concluded they could not support any charges. The First Assistant District Attorney’s use of Mr. Cosby as a political tool in his recent election campaign for District Attorney was wildly improper standing alone. But his office is now abusing the judicial process itself, knowingly repudiating a binding non-prosecution agreement and trampling Mr. Cosby’s due process rights for political gain. Immediate habeas relief is necessary to enforce the Commonwealth’s agreement with Mr. Cosby. The charges

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<sup>1</sup> *State v. Hohman*, 420 A.2d 852, 855 (Vt. 1980) (disqualifying prosecutor for campaign ad pledging to prosecute defendant, and referring matter to Professional Conduct Board), *overruled on other grounds by Jones v. Shea*, 532 A.2d 571, 572 (1987).

should be dismissed, or at a minimum, the Montgomery County District Attorney's office should be disqualified from any further participation in this prosecution.

There can be no question the Commonwealth entered into a non-prosecution agreement with Mr. Cosby. The Commonwealth, through then-District Attorney Bruce Castor, promised in 2005 that Mr. Cosby would not be charged in connection with these allegations, in exchange for Mr. Cosby giving testimony in the complainant's civil case against him. The express intent of the agreement was to induce Mr. Cosby not to assert his Constitutional rights under the Fifth Amendment, and Mr. Castor reminded the District Attorney's office about that agreement in 2015, before these charges were brought. Nonetheless, the District Attorney proceeded and not only breached the agreement, but in the probable cause affidavit is using the very testimony Mr. Cosby provided in reliance on that agreement *against* him as a basis for the charges. A citizen's Constitutional rights cannot be thwarted by politically motivated prosecutors willing to break agreements made by their predecessors. The Commonwealth's agreement must be enforced, and the charges dismissed.

Even if the Commonwealth had not agreed these charges would not be brought, its inexcusable and prejudicial delays in doing so separately warrant dismissal. Due process prohibits unreasonable delays in making arrests, even if the charges are made at the eleventh hour, arguably before the statute of limitations expires. In the ten years since these allegations were first investigated, Mr. Cosby's attorney—who negotiated the non-prosecution agreement with the District Attorney and could give critical testimony requiring dismissal of the charges—has died; his testimony is lost forever. In addition, Mr. Cosby has lost his eyesight—and with it his ability to identify the physical appearance of witnesses and accusers as well as review other pieces of physical evidence—and his age and the passage of time have substantially impaired his memories of the relevant events and witnesses. In addition to the death of a key witness to the

non-prosecution agreement, other material third-party witnesses are now a decade removed from the events at issue and may no longer be available.

The real reason for the delay and resulting prejudice to Mr. Cosby was of course the non-prosecution agreement, which the District Attorney's office kept until politics and public opinion made it expedient to disregard it. But even setting aside the non-prosecution agreement, there was no legitimate reason for a ten-year delay. In announcing these charges to the press, First Assistant District Attorney Kevin Steele claimed they were the result of "new information," including allegations made by third parties, but—by Mr. Steele's own admission—that is false. On the contrary, just weeks before arresting Mr. Cosby, Mr. Steele claimed during his political campaign that all relevant evidence was available and evaluated in 2005, running a TV commercial claiming that the office "could have used" third party allegations against Mr. Cosby years earlier "but didn't even try." Declaration of Brian McMonagle ("McMonagle Decl."), Ex. D. The probable cause affidavit supporting the charges confirms this, claiming Mr. Cosby's civil deposition led prosecutors to "believe it is likely he gave the drugs to other persons." *Id.*, Ex. G at 17. But that is not new information at all; allegations by other persons were investigated in 2005 when the District Attorney declined to prosecute. Indeed, for support the probable cause affidavit quotes a **2005** deposition that the District Attorney was fully aware had taken place, but never sought to subpoena. The District Attorney's inaction for over a decade, with full knowledge of the civil case and deposition, further evidences the existence of a non-prosecution agreement. Nothing—other than the non-prosecution agreement—prevented the District Attorney from evaluating Mr. Cosby's 2005 deposition or any of the other evidence on which the charges are now based.

The District Attorney's office's unethical, self-promoting breach of its agreement with Mr. Cosby coupled with the denial of due process through the completely avoidable decade-long

delay necessitates dismissal of all charges. However, even if the charges are not dismissed on the above grounds at this stage, the Court should at a minimum disqualify the Montgomery County District Attorney's office from further participation in this prosecution. Under Pennsylvania law, prosecutors are forbidden "from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused" except for statements "necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose." Pa. R. Prof'l Conduct 3.8(e). Violating and ignoring these ethical obligations, the First Assistant District Attorney, Kevin Steele, made Mr. Cosby a centerpiece of his campaign for District Attorney, producing television commercials and promotional materials portraying Mr. Cosby as a "sexual predator" and criticizing his political opponent for failing to prosecute, all in an effort to seize upon and increase public condemnation of Mr. Cosby and urge voters not to elect the District Attorney who had agreed not to prosecute Mr. Cosby. McMonagle Decl, Ex. D. Mr. Steele's improper and unethical campaign tactic was successful—his commercial and disparaging accusations against Mr. Cosby and the former District Attorney garnered extensive national media coverage and significantly increased public animosity toward Mr. Cosby.

Far from "exercis[ing] reasonable care to prevent [Mr. Steele] from making an extrajudicial statement that the prosecutor would be prohibited from making," as required by law, the Montgomery County District Attorney's office did nothing to correct or retract Mr. Steele's inflammatory and prejudicial campaign statements. Instead, the office tacitly endorsed Mr. Steele's repeated public statements designed to inflame the public against Mr. Cosby, implying that it agreed and confirming that it was re-investigating the matter, in violation of the non-prosecution agreement.

Justice requires that the Court dismiss the charges at this stage. But even if not yet persuaded to dismiss, there will be no justice at all unless the Court removes Mr. Steele and the Montgomery County District Attorney's office from the prosecution immediately, prior to the preliminary hearing.

## **II. ALLEGATIONS OF FACT**

This petition “specifically allege[s] facts, which if true would entitle the defendant to an award of writ of habeas corpus.” *Com. v. Lawson*, 650 A.2d 876, 879 (1994). The court accepts the allegations as true to determine whether an evidentiary hearing is warranted. If the petition is dismissed without a hearing, the appellate court will review the lower court's order to determine “if the allegations of the petition are such that a hearing should have been held to allow the petitioner to support his allegations by evidence . . . .” *Balsamo v. Mazurkiewicz*, 417 Pa. Super. 36, 41, 611 A.2d 1250, 1253 (1992).

### **A. The Commonwealth's 2005 Agreement of Non-Prosecution with Mr. Cosby**

Almost eleven years ago, on February 17, 2005, Montgomery County District Attorney Bruce Castor announced he was declining to file charges in connection with allegations by Andrea Constand that Defendant had “touched her inappropriately” in January of 2004, an allegation she first reported on January 13, 2005. *See* Press Release, Feb. 17, 2005, Declaration of Brian McMonagle (“McMonagle Decl.”), Ex. A. District Attorney Castor noted his consideration of all relevant evidence—including “statements from other persons” who had made similar allegations against Defendant—and concluded that while “a conviction under the circumstances of this case would be unattainable,” a civil action by Ms. Constand “is possible.” *Id.*

In advance of issuing this press release, District Attorney Castor reached an agreement with counsel for Mr. Cosby. The District Attorney intentionally and specifically bound the



Commonwealth that there would be no state prosecution of Mr. Cosby in order to remove from him the ability to claim his Fifth Amendment protection against self-incrimination, thus forcing him to sit for a deposition under oath in a civil case. Although Mr. Cosby's then-counsel is since deceased, then-District Attorney Bruce Castor has confirmed he entered into this agreement on behalf of the Commonwealth. Mr. Cosby is prepared to offer Mr. Castor's testimony at an evidentiary hearing on this petition. Mr. Castor will also confirm that it was the specific intent of all parties involved, including the Commonwealth and Mr. Cosby's counsel, that Mr. Cosby's testimony in the civil case—and any other evidence derived from it—would not be used in any criminal prosecution against him by the Commonwealth. The District Attorney intended to, and did, bind the Commonwealth to this agreement of non-prosecution.

Three weeks after this agreement and press release, Ms. Constand filed a civil suit against Mr. Cosby, based on the same allegations. *See* Constand Complaint, McMonagle Decl., Ex. B. Relying on the Commonwealth's promise not to prosecute him, Mr. Cosby testified fully in Ms. Constand's civil case, without invocation of his Constitutional right against self-incrimination.

**B. The First Assistant District Attorney Repudiates the Commonwealth's Agreement and Publicly Condemns Mr. Cosby for Political Gain**

In his 2005 press release, the District Attorney expressly stated he would not “expound publicly” on the investigation “for fear that his opinions and analysis might be given undue weight by jurors in any contemplated civil action.” McMonagle Decl., Ex. A at 2. For years, this appropriate restriction on prosecutors' public discussion of the matter remained in place. That changed in 2015, during the regular election for Montgomery County District Attorney. Trailing in the polls, on October 21, 2015—less than two weeks before election day—First Assistant District Attorney Kevin Steele launched what he called “a crucial new phase of his campaign,” consisting of TV ads, public statements, and flyers lambasting “his opponent's

failure to prosecute Bill Cosby.” *McMonagle Decl.*, Ex. C at 4; *see also id.*, Exs. D & E.<sup>2</sup> In these public statements, Mr. Steele accused Mr. Cosby of being a “sexual predator,” and asserting the office “didn’t even try” to use the testimony of third party witnesses. *Id.*, Ex. D. Mr. Steele’s statements made no mention of the Commonwealth’s non-prosecution agreement, and instead suggested he would prosecute Cosby if elected as District Attorney. *Id.*

Although Pennsylvania ethical rules clearly prohibit such public statements by prosecutors, the Montgomery County District Attorney’s Office did nothing to stop Mr. Steele’s improper use of Mr. Cosby as a tool for political gain. On the contrary, the office tacitly endorsed Mr. Steele’s inflammatory accusations, stating in response to media inquiries that old decisions of non-prosecution are being re-evaluated, again making no mention of the Commonwealth’s non-prosecution agreement with Mr. Cosby. *Id.*, Ex. F at 4.

On the heels of his widely publicized accusations against Mr. Cosby, Mr. Steele narrowly won election as District Attorney.

**C. The Prejudice Caused by the Commonwealth’s Breach of Its Agreement and Inexcusable Delay**

In the nearly 11 years since Mr. Castor closed the investigation of these events and promised not to prosecute, key evidence has been forever lost. Mr. Cosby’s attorney who negotiated the non-prosecution agreement is now deceased; his testimony and contemporaneous documents are lost forever and Mr. Cosby will be forced to prove the existence of this agreement without this critical, potentially dispositive evidence. Notably, the Montgomery County District

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<sup>2</sup> As of January 10, 2016, Mr. Steele’s TV commercial is available at <https://www.youtube.com/watch?v=upjxu5hlBQg>.

Attorney's Office appears to have re-opened its investigation shortly after the February 7, 2015 death of Mr. Cosby's attorney, a well-known former federal prosecutor and defense attorney.<sup>3</sup>

Loss of this evidence alone would be sufficient, but Mr. Cosby has suffered many other prejudices due to delay as well. Mr. Cosby has lost his eyesight, hampering his ability to identify the physical appearance of witnesses, to view documents, photographs and videos, and thus is limited and in many instances incapable of working with attorneys in preparation of his own defense as well as hindered in his ability to confront evidence offered against him by the District Attorney's Office. Moreover, Mr. Cosby's advancing age and the passage of time have substantially impacted his ability to recall key events and witnesses. In addition, other material witnesses are now twelve years removed from the events at issue. The delays have seriously prejudiced Mr. Cosby's defense against the charges.

### **III. ARGUMENT**

#### **A. Legal Standard**

“[A]n application for habeas corpus to inquire into the cause of detention may be brought by or on behalf of any person restrained of his liberty within this Commonwealth under any pretense whatsoever.” 42 Pa.C.S.A. § 6503(a); *see also* 42 Pa.C.S.A. § 6502(a) (“Any judge of a court of record may issue the writ of habeas corpus to inquire into the cause of detention of any person or any other lawful purpose.”). This includes, as here, a pre-trial petition in advance of a preliminary hearing. *See, e.g., Com. ex rel. Levine v. Fair*, 394 Pa. 262, 146 A.2d 834 (1958) (finding habeas corpus petition filed in advance of preliminary hearing was proper and stating “[i]t is true . . . that the usual criminal procedure, after an arrest has been effected, is for the court not to interfere until the arresting magistrate has conducted a preliminary hearing to determine if

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<sup>3</sup> Mr. Cosby's former attorney's death received considerable local media coverage including: [http://articles.philly.com/2015-02-10/news/58972422\\_1\\_prosecutor-marimow-clark-jr](http://articles.philly.com/2015-02-10/news/58972422_1_prosecutor-marimow-clark-jr). *See* McMonagle Decl., Ex. H.

a prima facie case has been produced against the defendant. This is indeed the normal practice as it is the normal routine for one to leave his home through the door, but it can happen, as in the case of fire, when the householder may find it wiser and more expedient to depart via the window”). That Mr. Cosby has been released on bond does not preclude him from seeking habeas relief. *See Commonwealth v. Hess*, 489 Pa. 580, 587, 414 A.2d 1043, 1046-47 (1980) (“The restraints on an accused bound over for court and released on bail are sufficient to satisfy the custody requirement of a habeas corpus petition.”).

In response to a habeas petition, the Commonwealth has the burden of establishing a prima facie case, offering some proof to establish each material element of the offense as charged. *Commonwealth v. Owen*, 397 Pa. Super. 507, 512, 580 A.2d 412, 415 (1990) (affirming grant of pre-trial habeas petition). Evidence sufficient “to justify a trial judge submitting the case to the jury at the trial of the case, is required.” *Id.* at 414 (quoting *Commonwealth v. Snyder*, 335 Pa. Super. 19, 23-24, 483 A.2d 933, 935 (1984)). A pre-trial petition for a writ of habeas corpus thus is similar in purpose to a preliminary hearing, the primary purpose of which “is to protect an individual’s right against unlawful arrest and detention.” *Id.* (quoting *Commonwealth v. Morman*, 373 Pa. Super. 360, 365, 541 A.2d 356, 359 (1988)).

The decision to dismiss charges “is within the sound discretion of the trial judge and will be reversed on appeal only where there has been a clear abuse of discretion.” *Commonwealth v. Niemetz*, 282 Pa. Super. 431, 439, 422 A.2d 1369, 1373 (1980). An abuse of discretion has been defined as not merely an error of judgment, but if in reaching a conclusion the law is overridden or misapplied, or the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias, or ill-will as shown by the evidence or the record, discretion is abused.

*Commonwealth v. Kocher*, 529 Pa. 303, 306, 602 A.2d 1308, 1310 (1992) (quoting *Commonwealth v. Moyer*, 497 Pa. 643, 647, 444 A.2d 101, 103 (1982)).

**B. The Charges Against Mr. Cosby Must Be Dismissed Because They Violate The Commonwealth's Express Agreement of Non-Prosecution**

Like plea agreements, non-prosecution agreements are enforceable, binding against the Commonwealth, and must be strictly enforced, “[b]ecause the integrity of the judicial system demands that the Commonwealth live up to its obligation.” *Commonwealth v. Ginn*, 402 Pa. Super. 405, 410, 587 A.2d 314, 316-17 (1991) (affirming trial court’s dismissal of charges based on enforcement of promise made by district attorney). Although it arises in a criminal context, the agreement between the prosecutor and the accused is “contractual in nature and is to be analyzed under contract law standards.” *Commonwealth v. Hainesworth*, 82 A.3d 444, 449 (2013) (quoting *Commonwealth v. Kroh*, 440 Pa. Super. 1, 9, 654 A.2d 1168, 1172 (1995) (affirming specific enforcement of plea agreement)). Ambiguities in such agreements “will be construed against the [Commonwealth].” *Id.* (quoting *Kroh*, 654 A.2d at 1172).

While perhaps helpful for election season, the current district attorney’s repudiation of his predecessor’s non-prosecution agreement is immaterial in court—“What one assistant district attorney has agreed to binds another assistant district attorney.” *Commonwealth v. Burton*, 54 Pa. D. & C.2d 264, 270-71 (1971). Indeed, the Third Circuit has granted federal habeas relief where Pennsylvania prosecutors have attempted to renege on oral agreements with defendants. *See Dunn v. Collieran*, 247 F.3d 450, 461 (3d Cir. 2001) (recognizing that such agreements must be enforced because “a defendant voluntarily and knowingly surrenders a plethora of constitutional rights in exchange for a commitment by the prosecutor to do or not do certain things” and “[w]hen the prosecutor breaches that agreement, he or she violates the defendant’s due process rights”).

There is no question such an agreement was reached here. Although Mr. Cosby's lawyer who negotiated the agreement is deceased, the District Attorney who entered into the agreement on the Commonwealth's behalf has confirmed the terms of the agreement and the parties' meeting of the minds. As discussed above, Mr. Cosby intends to present his testimony at an evidentiary hearing on this motion, which will establish the essential terms of the agreement. There is also no question the current prosecutors are fully aware of this agreement, but are simply choosing to ignore it. Both the current District Attorney and the District Attorney-elect were in the office in 2005 when the agreement was reached, and Mr. Castor reminded the office of the agreement in 2015 after Mr. Steele began making public statements suggesting Mr. Cosby could still be prosecuted.

Nothing further is required to establish the terms of the agreement, and the remedy of specific performance in the form of dismissal is appropriate. *See Ginn*, 587 A.2d at 316-17 (affirming trial court's dismissal of charges based on enforcement of promise made by district attorney).<sup>4</sup>

**C. The Charges Against Mr. Cosby Must Be Dismissed Because The Commonwealth's Unreasonable Delay Violates Due Process**

Regardless of whether charges are brought within the applicable statute of limitations, unreasonable delay in bringing charges against a defendant violates due process rights guaranteed under both the Pennsylvania Constitution and the Fourteenth Amendment of the

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<sup>4</sup> Even where a non-prosecution agreement is unenforceable—here it is clearly enforceable because it was entered into by the District Attorney—the Supreme Court has ruled any evidence flowing from defendant's reliance on such an agreement must be suppressed. *Commonwealth v. Stipetich*, 539 Pa. 428, 431-32, 652 A.2d 1294, 1296 (1995) (ordering suppression of evidence to put the defendants "in the same position as if the unauthorized promise not to prosecute had never been made by the police"); *see also People v. Gallego*, 430 Mich. 443, 458, 424 N.W.2d 470, 476 (1988) (where police entered an unauthorized agreement not to prosecute, appropriate remedy was suppression of evidence obtained thereby).

United States Constitution. *Snyder*, 713 A.2d at 605. These rights “protect[] defendants from having to defend stale charges, and criminal charges should be dismissed if improper pre-arrest delay causes prejudice to the defendant’s right to a fair trial.” *Id.* at 599-600. The Supreme Court of Pennsylvania adopted a two-prong test to evaluate a claim of undue delay: if (1) there is actual prejudice to the defendant, and (2) no proper reason for postponing the defendant’s arrest, then “the due process clauses of the Constitutions of the United States and Pennsylvania require that the charges be dismissed.” *Id.* at 605. Here, both prongs are clearly met.

*First*, Mr. Cosby has suffered substantial actual prejudice due to the Commonwealth’s delay. His lawyer who negotiated the non-prosecution agreement is since deceased. McMonagle Decl. ¶ 2. That attorney—Mr. Walter M. Phillips Jr.—negotiated the non-prosecution agreement prohibiting this very prosecution. His testimony is lost forever and Mr. Cosby will be forced to prove the existence of this agreement without this critical, potentially dispositive evidence. Loss of this evidence alone would be sufficient to meet the prejudice requirement, but Mr. Cosby has suffered many other prejudices to due delay as well. Mr. Cosby has lost his eyesight, substantially hampering his ability to identify the physical appearance of witnesses or to view documents and work with attorneys. Moreover, Mr. Cosby’s advancing age and the passage of time have substantially impacted his ability to recall key events and witnesses. Memories have faded by twelve years and, coupled with his loss of sight, impede his defense against accusations by accusers who claim to have met him previously but whom he cannot now recognize or identify. Moreover, many of the relevant witnesses may now be unavailable.

*Second*, there is plainly no legitimate reason for the Commonwealth’s delay. During his election campaign, Mr. Steele argued repeatedly that there was *no reason at all* for the Commonwealth’s choice not to charge Mr. Cosby in 2005, claiming in a TV commercial that all material evidence was equally available when then-District Attorney Bruce Castor chose not to

bring charges in 2005. *See* McMonagle Decl., Ex. D. Where prejudice exists and a reasonable basis for the Commonwealth’s 11-year delay does not exist, the charges must be dismissed. *See, e.g., United States v. Morrison*, 518 F. Supp. 917, 918 (S.D.N.Y. 1981) (dismissing based on delay of six months); *United States v. Sabbath*, 990 F. Supp. 1007, 1008 (N.D. Ill. 1998) (four year delay); *United States v. Santiago*, 987 F. Supp. 2d 465, 484 (S.D.N.Y. 2013) (five years); *State v. Whitlow*, 326 P.3d 607, 612 (Or. Ct. App. 2014) (less than five years); *United States v. Barket*, 530 F.2d 189, 193 (8th Cir. 1976) (less than four years); *United States v. Sample*, 565 F. Supp. 1166, 1185-86 (E.D. Va. 1983) (less than six years); *United States v. Alderman*, 423 F. Supp. 847, 855 (D. Md. 1976) (less than three years).

**D. Alternatively, The Montgomery County District Attorney’s Office and Mr. Steele Should Be Disqualified**

Kevin Steele’s misconduct during his election campaign—and the complicity of the Montgomery County District Attorney’s office—require disqualification of the entire office, including Mr. Steele. A “prosecution is barred when an actual conflict of interest affecting the prosecutor exists in the case; under such circumstances a defendant need not prove actual prejudice in order to require that the conflict be removed.” *Commonwealth v. Eskridge*, 529 Pa. 387, 392, 604 A.2d 700, 702 (1992). A prosecutor may also be disqualified for having a “non-economic, personal interest in the outcome of the prosecution.” *Commonwealth v. Stafford*, 749 A.2d 489, 494 (2000). If the conflict affects the entire District Attorney’s office, the matter should be referred elsewhere, or dismissed. *See, e.g., Stafford*, 749 A.2d at 493-94 (discussing referral to the Attorney General of matter in which district attorney’s office was potentially disqualified).

Pennsylvania courts have repeatedly condemned prosecutors’ improper public statements concerning a defendant, and found such statements sufficient to warrant disqualification. *See,*



*e.g.*, *Commonwealth v. Theodore Brooks, Lulu McNeal, Valentino Birchett, Earl Christy*, 1 Phila. Co. Rptr. 440, 442 (Pa. Com. Pl. 1978) (disqualifying district attorney from further involvement in case after he “issued a news release and went on the radio to say that the court had been too lenient”); *see also id.* at 460 (“We are of the opinion that the District Attorney’s conduct certainly violates the spirit of canon 7; and, more significantly, it trespasses upon a defendant’s right to appear before a court uninfluenced by the extrajudicial conduct of the lawyer (District Attorney) who appears or may appear against him on behalf of the Commonwealth.”).

In a case strikingly similar to this one, the Vermont Supreme Court disqualified a prosecutor and referred the matter to the state’s Professional Conduct Board. *State v. Hohman*, 138 Vt. 502, 504, 420 A.2d 852, 854-55 (1980), *overruled on other grounds by Jones v. Shea*, 148 Vt. 307, 532 A.2d 571 (1987). In *Hohman*, “the state’s attorney found himself in a battle for re-election” and ran an advertisement in a newspaper. *Id.* at 854. The ad stated that the defendant had previously been convicted, that the conviction had been overturned, and that, “if I am re-elected, I will vigorously prosecute Hohman and obtain a second conviction.” *Id.* Based on those statements alone, the Court “strongly condemn[ed] the conduct of the state’s attorney in this case,” noting that the “power to prosecute ought never to be manipulated for personal or political gain.” *Id.* at 855. The Court reversed the trial court’s denial of disqualification, and held that “because serious questions exist as to the ethical propriety of the state’s attorney’s conduct, we will refer this matter to the Professional Conduct Board.” *Id.* The statements at issue in *Hohman* were far less inflammatory, and far more isolated, than Mr. Steele’s statements.

Here, the newly-elected District Attorney has repeatedly made public statements violating the Pennsylvania Rules of Professional Conduct and has infringed on Mr. Cosby’s right to a fair trial. During his recent campaign, Mr. Steele used TV ads, public statements, and flyers referring to Mr. Cosby as a “sexual predator” and lambasting “his opponent’s failure to prosecute

Bill Cosby.” McMonagle Decl., Ex. C at 4. In these public statements, Mr. Steele asserted the office “didn’t even try” to use the testimony of third party witnesses and that the failure to prosecute Mr. Cosby was tantamount to “not looking out for the victims.” *Id.*, Ex. D. Mr. Steele’s statements made no mention of the Commonwealth’s non-prosecution agreement, and instead suggested he would prosecute Cosby if elected as District Attorney. *Id.* The Montgomery County District Attorney’s Office did nothing to stop Mr. Steele’s statements. On the contrary, the office suggested that old decisions of non-prosecution are being re-evaluated, again making no mention of the Commonwealth’s non-prosecution agreement with Mr. Cosby. *Id.*, Ex. F at 4.

These statements—made by the *sitting* First Assistant District Attorney and condoned by the entire office—plainly violated Pennsylvania Rule of Professional Conduct 3.8 (“Special Responsibilities of Prosecutors”). The statute requires that the “prosecutor in a criminal case shall . . . refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.” Here of course, the express *purpose* of Mr. Steele’s campaign statement was to increase public condemnation of Mr. Cosby and, by extension, Mr. Steele’s political opponent. In addition, the district attorney’s office was obligated to “exercise reasonable care” to prevent Mr. Steele from making these improper statements. Pa. R. Prof’l Conduct 3.8(e). It failed to do so, and instead encouraged him and fanned the flames by implicitly disclosing that it was re-opening an investigation of Mr. Cosby. McMonagle Decl., Ex. F.

“A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” Pa. R. Prof. Conduct 3.8, Explanatory Comment. Mr. Steele’s repeated violations of this duty were willful and inexcusable, and worse, were tacitly condoned by the district attorney’s office in Montgomery County. Further, the misconduct has inflamed the public

against Mr. Cosby, both within this district and throughout the country. Mr. Steele and the office should be disqualified.

### **III. CONCLUSION**

For the reasons set forth above, the defendant respectfully requests that the Court grant this Petition and dismiss all charges following an evidentiary hearing on these matters. In the alternative, the defendant requests the Court disqualify Mr. Steele and the Montgomery County District Attorney's office from continued involvement in this prosecution.

January 10, 2016

Respectfully Submitted,

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