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

**COMMONWEALTH OF
PENNSYLVANIA**

vs.

WILLIAM H. COSBY, JR.

: CP-46-MD-3156-2015
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2016 FEB 12

MONTGOMERY COUNTY

CLERK OF COURT

**DEFENDANT WILLIAM H. COSBY, JR.'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)**

Defendant William H. Cosby Jr., by and through his attorneys, respectfully requests that this Court amend its February 4, 2016 Order denying his Petition for Writ of Habeas Corpus (the "Order") to include certification language specified in 42 Pa. C.S. § 702(b), thereby certifying the Order for interlocutory appeal. Section 702(b) provides:

When a court or other government unit, in making an interlocutory order in a matter in which its final order would be within the jurisdiction of an appellate court, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter, it shall so state in such order. The appellate court may thereupon, in its discretion, permit an appeal to be taken from such interlocutory order.

I. INTRODUCTION

On December 14, 2015, the Commonwealth filed a criminal complaint against Mr. Cosby, charging him with assault based on conduct alleged to have occurred roughly twelve years ago. On January 11, 2016, Mr. Cosby petitioned this Court for a writ of habeas corpus on the grounds that the Commonwealth, acting through then-District Attorney Bruce Castor, had promised and bound the Commonwealth that Mr. Cosby would never be charged in connection

with the alleged incident, and in addition that the Commonwealth had violated Mr. Cosby's due process rights by delaying almost twelve years to file the complaint.

On February 4, 2016, after briefing and two days of testimony and argument, this 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.

Mr. Cosby has already appealed this Order on an interlocutory basis as a matter of right, both as a collateral order and because "exceptional circumstances" exist such that an immediate appeal from denial of the petition for writ of habeas corpus is proper. Nonetheless, in the interest of avoiding disputes over appellate jurisdiction and reducing burden on the Courts and the parties, Mr. Cosby independently requests that this Court certify the Order for permissive appeal pursuant to Section 702(b).

II. ARGUMENT

A. Mr. Cosby Has Appealed as of Right, but Seeks Certification to Avoid Jurisdictional Motion Practice

Under Pennsylvania law, an appeal may be taken from, among other things, a collateral order, an interlocutory habeas order in cases of exceptional circumstances, and an interlocutory order by permission. *Commonwealth v. Bolden*, 373 A.2d 90 (Pa. 1977); *Moyer v. Gresh*, 904 A.2d 958, 963 (Pa. Super. Ct. 2006).

The Court's February 4, 2016 Order qualifies as both a collateral order and as an appealable habeas order, and Mr. Cosby therefore has filed an appeal as of right. A collateral order is "an order separable from and collateral to the main cause of action where the right

involved is too important to be denied review and the question presented is such that if review is postponed until final judgment in the case, the claim will be irreparably lost.” Pa. R.A.P. 313(b). An appeal from such an order “may be taken as of right.” Pa. R.A.P. 313(a); *see Commonwealth v. Wright*, 78 A.3d 1070 (Pa. 2013). Mr. Castor’s agreement and promise not to prosecute Mr. Cosby and the Commonwealth’s 12-year delay in bringing charges against Mr. Cosby raise issues separate and independent from the merits of the case against Mr. Cosby. Those issues are far too important to be denied review, as they relate to Mr. Cosby’s due process rights and because they concern “the integrity of the judicial system[, which] demands that the Commonwealth live up to its obligation.” *See Commonwealth v. Ginn*, 587 A.2d 314, 316 (Pa. Super. 1991). These issues must be resolved now, because lack of immediate appellate review will cause Mr. Cosby’s interests to be irreparably lost, since he will be prosecuted in breach of the Commonwealth’s direct promise and agreement not to do so and in violation of his due process rights. Significantly, as shown by the Commonwealth’s affidavit of probable cause, the prosecution will be based on deposition testimony given by Mr. Cosby, despite his privilege against self-incrimination, because Mr. Cosby relied on the Commonwealth’s promise that he would not (and, therefore, could not) be prosecuted for the events that he discussed at the deposition. Such loss of a privilege qualifies for collateral-order review. *See Commonwealth v. Harris*, 612 Pa. 576, 584-90 (Pa. 2011).

In addition, “exceptional circumstances” trigger a right to immediate appeal of an order denying a habeas petition, “(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.” *Bolden*, 373 A.2d at 94 (quotation marks and citations omitted); *see Commonwealth v. Ricker*, 120 A.3d 349 (Pa. Super. Ct. 2015) (finding jurisdiction over appeal from interlocutory habeas order based on such exceptional circumstances). The Order

declining to enforce the Commonwealth's binding promise never to prosecute Mr. Cosby meets these requirements. The issues presented here are matters of great public interest that relate to safeguarding of basic human rights. They raise important constitutional questions and go to the integrity of judicial processes.

Although the Court's order thus may be appealed as of right, Mr. Cosby recognizes that some of the issues implicated by the Court's order are novel and that the question of appellate jurisdiction with respect to them may be the subject of disputes and motions practice. In this situation, the leading treatise on Pennsylvania appellate law recommends that "both a petition for permission to appeal [under Section 702(b)] and a notice of appeal should be filed." G.R. Darlington, *et al.*, PENNSYLVANIA APPELLATE PRACTICE § 313:1, at p. 654 (West's Pa. Prac. Ser. 2015). The treatise explains that following this dual course will prevent uncertainty. *See id.* § 313:3. Certification of an appeal under Section 702(b) removes the need to analyze other bases for appellate jurisdiction and therefore can expedite appellate review by eliminating motion practice regarding those issues. For these reasons, Mr. Cosby seeks amendment of this Court's order under Section 702(b), although he remains confident that the order also is immediately appealable as of right.¹

B. The Court Should Certify the February 4 Order for Permissive Appeal

This Court may certify the Order for interlocutory appeal by amending it to state that (1) the order involves controlling questions of law; (2) there is substantial ground for difference of

¹ Regardless of the outcome of this motion, the filing of Mr. Cosby's notice of appeal has divested this Court of subject matter jurisdiction over the merits of this case until the Superior Court decides the appeal. Pa. R.A.P. 1701(a) ("after an appeal is taken . . . , the trial court . . . may no longer proceed further in the matter"); *see R.W.E. v. A.B.K.*, 961 A.2d 161, 170 (Pa. Super. 2008) (en banc); *Jones v. Trojak*, 586 A.2d 397, 399 (Pa. Super. 1990), *aff'd*, 634 A.2d 201 (Pa. 1993). However, the Court retains jurisdiction for 30 days from the date of this filing for the limited purpose of deciding this motion. *See* Pa. R.A.P. 1701(b)(1) (jurisdiction "to take other action permitted or required by these rules or otherwise ancillary to the appeal"); 1311(b) (30 days to act on motion to amend under Section 702(b)).

opinion on the questions of law; and (3) immediate appeal would materially advance the ultimate termination of this matter. *Commonwealth v. Dennis*, 859 A.2d 1270, 1275 (Pa. 2004). All three factors are met here.

First, the Order involves controlling questions of law. It involves a ruling on whether the terms of the Commonwealth's non-prosecution agreement and promise bar the prosecution of Mr. Cosby. The Commonwealth's agreement "is to be analyzed under contract law standards," *Commonwealth v. Hainesworth*, 82 A.3d 444, 447 (Pa. Super. 2013), and its interpretation is a question of law. *McMullen v. Kutz*, 985 A.2d 769, 773 (Pa. 2009). This question presents several related legal issues, such as: whether the District Attorney's promise bound the Commonwealth; whether the Commonwealth is estopped from prosecuting Mr. Cosby, regardless of whether there was a valid agreement; and (again regardless of whether there was a valid agreement), whether Mr. Cosby's due process rights have been violated by the fact that the Commonwealth honored the commitment for more than a decade and then, after such a lengthy delay, elected to breach it and file charges after critical evidence had been lost.

Second, there is substantial ground for difference of opinion on these controlling questions of law. The differences of opinion are set forth in the parties' briefing on Mr. Cosby's petition for a writ of habeas corpus. It also is reflected in the different opinions expressed by the current District Attorney and his predecessor, Mr. Castor, regarding both what Mr. Castor did and its binding effect. Moreover, 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 attempt to bind the Commonwealth by promising never to prosecute a

defendant and thereby removing the defendant's ability to invoke his privilege against self-incrimination at a civil deposition.

Third, there can be no question that an immediate appeal would materially advance the ultimate termination of this case. If Mr. Cosby is successful on appeal, the case would be terminated immediately. Pennsylvania courts frequently allow appeals under Section 702(b) when they present case-dispositive questions. *See, e.g., Lahav ex rei. Lahav v. Main Line Ob/Gyn Assocs., P. C.*, 727 A.2d 1104 (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 (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 immunity claim could end case); *Hospodar v. Schick*, 885 A.2d 986 (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).

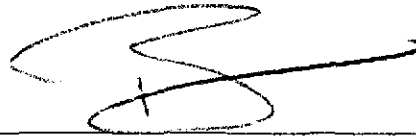
III. CONCLUSION

For the foregoing reasons, although permission to appeal the Order is not required pursuant to the exceptional circumstances and collateral order doctrines, in the interest of judicial economy, Mr. Cosby respectfully requests that the Court amend the Order to include the following language specified in 42 Pa. C.S. Section 702(b):

"The Order involves controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal from the order may materially advance the ultimate termination of the matter."

February 12, 2016

Respectfully Submitted,



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