NO. 21-793

In the Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

WILLIAM HENRY COSBY, JR.,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania, Middle District

REPLY BRIEF OF PETITIONER

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY
COUNSEL OF RECORD
KEVIN R. STEELE
DISTRICT ATTORNEY
MONTGOMERY COUNTY
DISTRICT ATTORNEY'S OFFICE
MONTGOMERY COUNTY COURTHOUSE
P.O. BOX 311
NORRISTOWN, PA 19403
(610) 278-3102
RFALIN@MONTCOPA.ORG

FEBRUARY 10, 2022 *COUNSEL FOR PETITIONER*

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ARGUMENT IN REPLY

The question here is not whether promises are binding, which is how Cosby simplistically characterizes it. The question is what kind of words, under the Due Process Clause of the Fourteenth Amendment, turn a simple public statement into a constitutionally-enforceable promise. In this case, all that is left after the trial court's fact-findings is the press release announcing that an elected district attorney chose not to prosecute a case with more than a decade remaining on the statute of limitations. But this is what prosecutors say and do all the time in similar circumstances, which is why this case is so important. Cosby now says that to keep such a statement from being treated—as a matter of law—as a binding promise, the prosecutor has the burden of stating explicitly that the declination is conditional. Brief in Opposition ("BIO") at 11-12 n.5 (explaining how "prosecuting agency can publicly announce a declination of charges without making a binding unconditional promise not to prosecute"). That is an accurate interpretation of the state supreme court decision. Yet that is the problem.

It is unreasonable to impose that burden on prosecutors when the central due process question is whether the defendant reasonably relied on the statement. Without any actual agreement, Cosby could not have known what was in the district attorney's mind; all he could rely on was the press release itself. Because a declination of charges is never final in itself—absent a mutual agreement or the expiration of the statute of limitations—no pros-

ecutor could have known before now that they were constitutionally required to explicitly state that the declination was "conditional." Untold cases now will be in jeopardy under such a rule—untold because who knows how many prior declination statements did not include the state supreme court's new magic words. Centuries of jurisprudence in this country have eschewed such "magic word" theories of justice, and the risk posed by this decision is grave and immense.

Cosby still contends this Court's review is unwarranted. He alleges that this is a fact-intensive case. He also argues that the state supreme court's decision does not conflict with other cases and that this question is unlikely to arise in the future. He is wrong on all fronts.

I. THE STATE SUPREME COURT BASED ITS DECISION ON A PRESS RELEASE LIKE THOSE USED IN MANY OTHER CASES; IT DID NOT BASE ITS DECISION ON DISCREDITED ALLEGATIONS THAT COSBY SAYS MAKE HIS CASE UNIQUE.

Cosby argues that the state supreme court's decision was "narrowly tailored to the unusual facts of the case" and that the question presented by the Commonwealth is not raised by it. BIO.9. To reach this conclusion, he insists that the court based it not only on the press release, but also former District Attorney Bruce L. Castor's testimony at the habeas hearings about his intent in writing it. BIO.9 ("the state supreme court's finding of an 'unconditional promise' was not based solely on Castor's press release"); *id.* at 11 (referring to promises made "with the intent of inducing them to waive cherished constitutional guarantees"); *id.* at 11 n.4 (faulting the Commonwealth for "ignoring Castor's testimony" about his intent in

writing press release); *id.* at 12 (characterizing promise as one made "to induce a suspect's waiver of his Fifth Amendment guarantee"). He is incorrect.

The state supreme court purported to use the federal Constitution to evade the requirements of Pennsylvania state law, and it has contorted due process to do that. The trial court's credibility and factual findings, as well as Pennsylvania state law on how those findings must be treated on appellate review, forced its hand. At the pretrial habeas hearings, Castor testified about, among other things, his intent "as the Sovereign" to bestow transactional immunity to Cosby—a theory that simply does not exist in Pennsylvania state law—and the Commonwealth extensively cross-examined him about it. *Commonwealth v. Cosby*, 252 A.3d 1092, 1104 (Pa. 2021). The trial court found that Castor's testimony was incredible and that there was therefore no promise, agreement, or understanding about immunity. *Commonwealth v. Cosby*, 2019 WL 2157653, at *19-32 (Pa.Com.Pl., Montgomery County May 14, 2019).[1] Under Pennsylvania state law, the trial court's credibility and factual findings were due deference on appeal. *Commonwealth of Pennsylvania, Dep't of Transp., Bureau of Driver Licensing v. O'Connell*, 555 A.2d 873, 875 (Pa. 1989).

Because of the trial court's findings and the deferential standard of review, the state supreme

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[1] Cosby disregards the trial court's credibility and factual findings. He also inaccurately characterizes basic facts, such as when he tells this Court that Castor declined prosecution after he and his "top deputy and experienced detectives [ ] thoroughly investigated the complaint." BIO.2. The record establishes the opposite. Castor peremptorily cut the investigation short while the detective team was strategizing about the next steps to take. N.T. 4/17/18, 82.

court crafted its opinion to avoid running smack into those obstacles. Rather than rely on Castor's testimony, which the trial court found incredible, it instead relied on what it called the "objectively indisputable evidence of record demonstrating D.A. Castor's patent intent to induce Cosby's reliance upon the non-prosecution decision":

> Much of that debate, and the attendant factual conclusions, were based upon the apparent absence of a formal agreement and former D.A. Castor's various efforts to defend and explain his actions ten years after the fact. As a reviewing court, we accept the trial court's conclusion that the district attorney's decision was merely an exercise of his charging discretion. As we assess whether that decision, and the surrounding circumstances, implicated Cosby's due process rights, former D.A. Castor's *post-hoc* attempts to explain or characterize his actions are largely immaterial. The answer to our query lies instead in the objectively indisputable evidence of record demonstrating D.A. Castor's patent intent to induce Cosby's reliance upon the non-prosecution decision.

Cosby, 252 A.3d at 1136-37 (footnote omitted) (emphasis added).

Importantly, the state supreme court then focused exclusively on the press release, leaving no doubt that it was the so-called "objectively indisputable evidence of record." Contrary to Cosby's repeated assertions, the state supreme court did not rely on Castor's discredited testimony. That would have violated Pennsylvania state law. *See O'Connell*, *supra*.

While focusing on the press release, the court outlined two factors about it that led to its conclusion that a reasonable person would interpret it as a permanent conferral of immunity: (1) Castor announced he had decided not to prosecute Cosby; and (2) Castor did not "say that he would re-evaluate this decision at a future date, that the investigation would continue, or that his decision was subject to being overturned by any future district attorney." *Cosby*, 252 A.3d at 1137; *see also id.*, 252 A.3d at 1137 ("There is nothing from a reasonable observer's perspective to suggest that the decision was anything but permanent."). These explicit conditions are missing from countless announcements that a prosecutor makes declining charges because the reality behind them is obvious. It need not be said that a government can, and many times does, reconsider a charging decision in light of countless factors. This essentially created a presumption of immunity for any prosecutorial announcement of a declination of charges—if the press release does not include magic words about a possible reopening the investigation, it confers total immunity.

The Pennsylvania Supreme Court said at one point that this declaration, "without more," would not bind the prosecutor. *Cosby*, 252 A.3d at 1138. Cosby latches on to this phrase because he knows that a unilateral non-prosecution announcement could not possibly be enough to forever prevent charges from being brought in the future. He insists that this phrase shows the state supreme court based its decision not only the press release, but also Castor's testimony at the habeas hearings. But what is the "more" that the court referred to? In a sentence left out by Cosby, the

answer is clear: reliance. And not even reasonable reliance—any detrimental reliance. *See Cosby*, 252 A.3d at 1138 ("Our inquiry does not end there. D.A. Castor's press release, without more, does not necessarily create a due process entitlement. Rather, the due process implications arise because Cosby detrimentally relied upon the Commonwealth's decision, which was the district attorney's ultimate intent in issuing the press release."). So contrary to Cosby's assertion, "without more" did not signal that the court also relied on Castor's discredited testimony.

Hemmed in by factual findings and state law, the state supreme court based its decision on the press release, holding that a reasonable person would view it as conferring transactional immunity and thus protecting Cosby from his incriminating statements made at a civil deposition and from any later prosecution. Even though there was nothing in the press release about civil depositions, waiver of Fifth Amendment rights, or the alleged intent of the "Sovereign," the court held that the press release showed Castor's "patent intent to induce Cosby's reliance upon the non-prosecution decision." *Cosby*, 252 A.3d at 1137.

Because of this, Cosby's claim that the decision was "narrowly tailored to the unusual facts of the case" is as incredible as the discredited testimony on which it relies. BIO.9. There is nothing uncommon about an announcement by a prosecutor that charges are not being filed. The Commonwealth's question presented therefore is indeed raised by the *Cosby* decision: when a prosecutor publicly announces that he will not file criminal charges based on lack of evidence, does the Due Process Clause transform that announcement into a binding promise that no charges

will ever be filed, a promise that the target may rely on as a grant of total immunity? This is an important issue that this Court has not answered, but should answer, as discussed below.

II. THE STATE SUPREME COURT DECISION CONFLICTS WITH OTHER CASES; AND THIS ISSUE WILL RECUR DUE TO COSBY'S NOTORIETY, THE COMMON PRACTICE OF ANNOUNCING DECLINATIONS, AND THE WINDFALL REMEDY.

Cosby argues that the state supreme court decision does not conflict with any other cases. In doing so, he addresses only two of the cases cited in the petition. He does not, for example, address *United States v. Kostandinov*, 734 F.2d 905, 912 (2d Cir. 1984) (prosecutor's press release is not a bilateral agreement); *Oden v. Reader*, 935 S.W.2d 470 (Tex. Crim. App. 1996) (prosecutor's press release is an administrative duty). Rather, he only discusses *Santobello v. New York*, 404 U.S. 257 (1971), and *State v. Johnson*, 360 S.W. 3d 104 (Ark. 2010).

Cosby argues that even if the state supreme court misapplied *Santobello*, this Court's review would be unwarranted because "[a] petition for a writ of *certiorari* is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Rule 10. Considerations Governing Review on *Certiorari*. But the state supreme court did not just misapply the rule of *Santobello*; it rewrote it. "[W]hen a defendant relies to his or her detriment upon the acts of a prosecutor, his or her due process rights are implicated," wrote the state supreme court. *Cosby*, 252 A.3d at 1135. This conflicts with *Santobello*. It not only extended the rule beyond plea negotiations, beyond agreements, and beyond in-court prosecutorial

actions, but it also disposed of the need for reasonable reliance. Detrimental reliance, reasonable or not, thus transforms an announcement of a decision not to prosecute into constitutionally guaranteed transactional immunity, unless the announcement specifically says otherwise. The state supreme court thus "decided an important federal question in a way that conflicts with [a] relevant decision[] of this Court." Rule 10(c). Considerations Governing Review on *Certiorari*.

Cosby is puzzled why the Commonwealth discussed *State v. Johnson*, *supra*, in its petition; he observes that it aligns with the state supreme court decision. He is right, and that consistency is the problem. Since *Santobello*, fifty years ago, there has been a slide towards due process rewarding defendants with immunity when they rely on informal statements rather than formalized plea agreements. *Johnson* is just one case, for example, where the court gave a defendant more protection from a promise than he would have had from a plea bargain. *Johnson* also discussed a trend of caselaw dispensing altogether with the need for reliance. As the Commonwealth explained in its petition, it makes "no sense to construe the Due Process Clause to bind the government in the absence of 'the kind of reasonable reliance that would even give rise to an estoppel against a private party.'" Petition at 23 (quoting *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 66 (1984)).

Cosby also argues that the case "is so factually unique that it fails to present any question that is likely to arise in the future with any regularity." BIO.15. As discussed above, however, the holding of the state supreme court is not fact-intensive. Prosecutors publicly decline to bring charges often in high-profile

cases.[2] There was no agreement here, no understanding, no handshake, beyond the prosecutor's press release. The press release was a unilateral declaration. It said only that the prosecutor was not going to bring charges because he thought there was not enough admissible evidence. However Cosby tries to spin it now, that is all it said. The state supreme court, citing the federal Due Process Clause, granted Cosby

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[2] *See*, *e.g.*, CBS NEWS, https://www.cbsnews.com/news/andrew-cuomo-sexual-harassment-investigation-no-charges-oswego-county-new-york/ (Jan. 31, 2022) (Oswego County DA's office declining to prosecute former-Governor Andrew Cuomo, noting an insufficient legal basis); CBS NEWS, https://www.cbsnews.com/news/andrew-cuomo-westchester-da-declines-to-prosecute-despite-credible-allegations-of-improper-conduct/ (Dec. 28, 2021) (Westchester County DA's office declining to prosecute former-Governor Andrew Cuomo, blaming "statutory requirements" of the laws); MILWAUKEE JOURNAL SENTINEL, https://www.jsonline.com/story/news/crime/2022/01/22/milwaukee-developer-accused-sex-assault-not-charged-prosecutor-says-police/9094856002/ (Milwaukee County DA's office declined to prosecute prominent real-estate developer accused of sexual assault, saying they did not believe they had enough evidence to prove the case to a jury).

Because press releases or announcements are more common in high-profile cases, the *Cosby* rule will also tend to unjustly benefit powerful people. Take for an example a politician under investigation for tax fraud. The prosecutor announces to the public that there is insufficient evidence to prosecute. That politician then admits in a newspaper interview that they know best how to close the loops in the tax code because they outsmarted the Internal Revenue Service many times, sometimes even breaking the law and getting away with it. Unrelated to these admissions, witnesses come forward to the prosecutor and give statements directly incriminating the politician in tax fraud. Under the *Cosby* decision, unless the prosecutor specifically said that they could change their mind in the future, not only would the admissions be suppressed, but the politician would be immune from prosecution, despite the new witnesses.

transactional immunity based on the press release alone. As word spreads that reliance by an accused may be rewarded with the windfall of transactional immunity, these sorts of constitutional claims will become even more popular than they are now immediately in the wake of the decision.

Respectfully submitted,

ROBERT M. FALIN
DEPUTY DISTRICT ATTORNEY
COUNSEL OF RECORD
KEVIN R. STEELE
DISTRICT ATTORNEY
MONTGOMERY COUNTY
DISTRICT ATTORNEY'S OFFICE
MONTGOMERY COUNTY COURTHOUSE
P.O. BOX 311
NORRISTOWN, PA 19403
(610) 278-3102
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