NO. 21-_____

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

PETITION FOR A WRIT OF CERTIORARI

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

NOVEMBER 24, 2021 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTION PRESENTED

The District Attorney of Montgomery County, Pennsylvania, issued a press release announcing that his office would not file sexual assault charges against William H. Cosby because there was "insufficient credible and admissible evidence" to prove Cosby's guilt beyond a reasonable doubt, so "a conviction under the circumstances of this case would be unattainable." The press release also stated that the District Attorney "cautions all parties to this matter that he will reconsider this decision should the need arise." Several years later, after Cosby made a series of inculpatory admissions in civil depositions, a new District Attorney charged Cosby with the same crimes, and he was ultimately convicted.

THE QUESTION PRESENTED IS:

When a prosecutor publicly announces that he will not file criminal charges based on lack of evidence, does the Due Process Clause of the Fourteenth Amendment transform that announcement into a binding promise that no charges will ever be filed, a promise that the target may rely on as if it were a grant of immunity?

LIST OF PROCEEDINGS

Supreme Court of Pennsylvania, Middle District

No. 39 MAP 2020

Commonwealth of Pennsylvania, *Appellee,* v. William Henry Cosby Jr., *Appellant.*

Published: 252 A.3d 1092

Date of Final Opinion: June 30, 2021

Superior Court of Pennsylvania

No. 3314 EDA 2018

Commonwealth of Pennsylvania, *Appellee,* v. William Henry Cosby Jr., *Appellant.*

Published: 224 A.3d 372

Date of Final Opinion: December 10, 2019

Montgomery County Court of Common Pleas, State of Pennsylvania

Commonwealth of Pennsylvania v. William Henry Cosby Jr.

No. CP-46-CR-0003932-2016

Date of Trial Court Judgment and Deferred Sentencing: September 25, 2018

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

OPINIONS BELOW

The Opinion of the Supreme Court of Pennsylvania, reported at 252 A.3d 1092, is attached hereto in the Appendix ("App.") at App.1a.

The Opinion of the Superior Court of Pennsylvania, reported at 224 A.3d 372, is attached hereto at App.126a.

The Entry of Judgment and Deferred Sentencing by the Common Pleas of Montgomery County, Pennsylvania, Criminal Division is unpublished and attached hereto at App.247a.

JURISDICTION

The judgment for which review is sought is *Commonwealth of Pennsylvania v. William H. Cosby, Jr.*, 252 A.3d 1092 (Pa. 2021) (App.1a). By this Court's order of July 19, 2021, the deadline to file a petition for a writ of certiorari remains extended to 150 days for final judgments entered prior to the order date. This petition is timely filed prior to the November 29, 2021 deadline. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1
Due Process Clause

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

The Pennsylvania Supreme Court discharged Cosby's criminal case with prejudice under the Due Process Clause. It concluded he had relied, to his detriment, on a press release in which the prosecutor declined to file charges years ago. Purportedly believing that the declination immunized him from future prosecution, Cosby provided evidence relating to the crime in subsequent civil litigation. That evidence was (unintentionally) incriminating and led the state to file the charges it had previously decided not to pursue due to lack of evidence.

But as the dissent of Pennsylvania's former Chief Justice concluded, Cosby's reliance on the press release, whether real or not, was not reasonable. The press release said that no charges would be filed, not that they would never be filed, and indeed, it could be read to say that the prosecutor could reconsider if new evidence was found. For Cosby to provide such evidence in supposed reliance on a vague press release may well have been detrimental — but it was not reasonable.

Yet the due process rule created by the Pennsylvania Supreme Court in this case requires only reliance that is detrimental. It does not require detrimental reliance that is reasonable.

The Pennsylvania Supreme Court's expansion of the Due Process Clause goes far beyond anything contemplated by this Court. Because it construes the federal constitution, it is poised to transform similar decisions not to prosecute into effective grants of immunity in other states. At the least, it presages extensive litigation of such claims nationwide, particularly in light of the widespread media coverage this case has received. This Court should grant further review.

In January 2004, Cosby invited Andrea Constand to his home on the pretext of discussing her career. They sat and talked. She said she had been feeling stressed. Cosby gave her some pills, telling her "These are your friends. They'll help take the edge off . . . They'll help you relax" (N.T. 4/13/18, pp. 59-60). She thought they were natural or herbal pills because she had told Cosby that she did not take drugs, and she trusted him. She began feeling ill; she was slurring her words, her mouth felt dry and "cottony," and she had double vision. She told Cosby that she was seeing two of him. Eventually, she was unable to speak. She tried standing but could not stand on her own; her legs were "shaky" and felt "rubbery" (*id.* at 60-63). Cosby took her arm, helped her to a couch, laid her down on her side, and told her to relax. She was soon unconscious. She later recalled, during a brief bout of semi-consciousness, Cosby lying on the couch behind her, penetrating her vagina with his fingers and fondling her breasts. He also took her hand, placed it on his penis and masturbated himself with it.

Throughout the assault, she was trying to move, but she could not. She wanted to speak to tell him to stop, but she could not. The next thing she remembered was waking up on the couch early in the morning, disheveled, with her bra around her neck and her pants partially unzipped. After composing herself, she stood up and walked to the kitchen door. Cosby was standing in the doorway. He told her there was a muffin and a cup of tea for her on the table. She took two sips of tea, grabbed the muffin, and left (*id.* at 62-66).

In January 2005, Ms. Constand awoke crying from a recurring bad dream. Unable to deal with her memory of the assault any longer, she told her mother and contacted police (*id.* at 76-78).

Cosby gave a statement to detectives at his attorney's office. He claimed that he gave Ms. Constand Benadryl pills, though he admitted that he never told her what the pills were. He denied having sexual intercourse with her (N.T. 4/17/18, at 113, 126-127, 129-130).

On February 17, 2005, Bruce Castor, Esquire, then District Attorney of Montgomery County, Pennsylvania, issued a press release stating that he had decided not to prosecute Cosby. The press release explained that this decision was based on an analysis of the law and the current state of the evidence, and that "under the circumstances of this case" a conviction would be "unattainable" (N.T. 2/2/16, at 70, Defendant's Exhibit D-4). It also said, "District Attorney Castor

cautions all parties to this matter that he will reconsider this decision should the need arise" (*id.*).[1]

---

[1] More comprehensively, the press release said, in relevant part, as follows:

> After reviewing the above and consulting with County and Cheltenham detectives, the District Attorney finds insufficient, credible, and admissible evidence exists upon which any charge against Mr. Cosby could be sustained beyond a reasonable doubt. In making this finding, the District Attorney has analyzed the facts in relation to the elements of any applicable offenses, including whether Mr. Cosby possessed the requisite criminal intent. In addition, District Attorney Castor applied the Rules of Evidence governing whether or not evidence is admissible. Evidence may be inadmissible if it is too remote in time to be considered legally relevant or if it was illegally obtained pursuant to Pennsylvania law. After this analysis, the District Attorney concludes that a conviction under the circumstances of this case would be unattainable. As such, District Attorney Castor declines to authorize the filing of criminal charges in connection with this matter.
>
> Because a civil action with a much lower standard of proof is possible, the District Attorney renders no opinion concerning the credibility of any party involved so as not to contribute to the publicity, and taint prospective jurors. The District Attorney does not intend to expound publicly on the details of his decision for fear that his opinions and analysis might be given undue weight by jurors in any contemplated civil action. District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise. Much exists in this investigation that could be used (by others) to portray persons on both sides of the issue in a less than flattering light. The District Attorney encourages the parties to resolve their dispute from this point forward with a minimum of rhetoric.

(*Id.*).

Ms. Constand filed civil proceedings against Cosby. In depositions in 2005 and 2006, Cosby did not invoke the Fifth Amendment, nor did his counsel claim that he could not because he had been given immunity. Cosby testified that he developed a romantic interest in Ms. Constand the first time he saw her. By "romantic interest," he said, he meant "romance in terms of steps that will lead to some kind of permission or no permission or how you go about getting to wherever you're going to wind up" (N.T. Excerpted Testimony, 4/17/18, at 24-25). Cosby admitted that he gave Ms. Constand Benadryl pills on the night of the incident, and also admitted having access to, and knowledge of, another central nervous system suppressant, Quaaludes. He said he obtained multiple prescriptions for them without intending to use them himself, but "for young women [he] wanted to have sex with" (*id.* at 35, 40-41, 47-50). He discussed how the Quaaludes affected one woman: "[s]he became, in those days, what was called high" (*id.* at 36). When asked to clarify, Cosby said she was unsteady and "[w]alking like [she] had too much to drink" (*id.* at 37).

After the depositions were made public, in July 2015, a new Montgomery County District Attorney, Risa Vetri Ferman, initiated contact with the victim, reopened the investigation, and decided to charge Cosby.

Cosby moved to dismiss the charges on the ground that District Attorney Castor had promised never to prosecute him. The trial court held an extensive two-day hearing. Castor's story was curious. He testified that he — acting as "the Sovereign," his own words — had orally granted Cosby transactional immunity by declining to charge him, but he also testified that

there was no agreement or *quid pro quo*, and certainly no judge ever approved such an arrangement. Castor also insisted that he had never spoken to Ms. Constand's two trial attorneys about his grant of immunity to Cosby, testimony that contradicted his previous statements made in emails to his successor, in which he claimed to have had the support of these same attorneys for a "deal" with Cosby. In fact, there was no record of any "deal" or negotiations. There was only the press release itself — but in the press release, he had also cautioned that he could reconsider the decision "should the need arise."

At the hearing, John Patrick Schmitt, Esquire, testified for the defense. He represented Cosby in 2005 as general counsel, and he claimed that another lawyer, Walter Phillips, Esquire, who was Cosby's criminal lawyer at the time, told him that Castor had promised never to prosecute Cosby. Schmitt also testified that Cosby relied on that promise in deciding not to invoke his Fifth Amendment right in the civil case. But Schmitt's own actions cast doubt on this testimony. At the time of this supposed promise not to prosecute, Schmitt failed to document the arrangement in any way. Schmitt certainly knew the importance of this kind of memorialization, and he knew how to do it: At roughly the same time, he was engaged in an extensive, documented negotiation with the NATIONAL ENQUIRER over Cosby agreeing to an interview about the case. And when Cosby and Ms. Constand settled the civil case, Cosby's lawyers tried hard to include a clause preventing all future criminal prosecutions based on the attack of Ms. Constand. This provision would likely have been illegal, so Cosby settled for an agreement, in writing of course, that Ms. Constand

would not initiate a criminal complaint. Not only do these efforts show that Cosby's team knew the importance of memorializing agreements like this in writing; but if there had actually been a grant of transactional immunity, none of this would have been necessary.

Other aspects of Cosby and his lawyers' behavior was at odds with his claim that he only testified because he believed himself forever immune from prosecution. For example, before there was any hint of such an agreement, Schmitt had permitted Cosby to sit for an interview with several detectives during the criminal investigation. He agreed with this strategy because he was not afraid that Cosby would incriminate himself. He also permitted Cosby to answer questions about the case in an interview with the NATIONAL ENQUIRER, in which he again maintained his innocence. At the civil depositions, moreover, Cosby refused to answer many questions about the victim, but was eventually compelled to do so by the court — hardly consistent with someone with immunity. Cosby also answered questions about other victims, who Castor's "sovereign edict" would not have covered. The Commonwealth used this to suggest that Cosby was not concerned with invoking his right against self-incrimination. Instead, he sought to provide self-serving exculpatory information while avoiding the pitfalls pleading the Fifth would bring. So the actions of Cosby and Schmitt, the Commonwealth argued, undermined the notion that Cosby relied on anything Castor allegedly said when deciding his strategy for the civil depositions.

The Commonwealth also presented Dolores Troiani, Esquire, and Bebe Kivitz, Esquire, Ms.

Constand's civil attorneys. They testified that Castor had never discussed with them any arrangement to give Cosby transactional immunity to compel him to testify at a future civil deposition. Castor, according to them, never talked to them at all. They found out about his decision not to prosecute from the press. They also testified that, if Castor had consulted them, they would not have wanted Cosby immunized. If he had refused to answer questions about the case, they explained that the jury would only hear Ms. Constand's account and that they would receive a favorable jury instruction — the jury could infer from Cosby's failure to testify that his testimony would have been unfavorable to him.

For present purposes, the important point is that the trial court made credibility determinations against Cosby's witnesses, finding that there was no deal, no promise of non-prosecution, no actual reliance, and no reason to provide Cosby with immunity.

Cosby proceeded to trial and was convicted of three counts of aggravated indecent assault. After unsuccessfully appealing his conviction to the Pennsylvania Superior Court, he obtained review in the state supreme court.

The Pennsylvania Supreme Court held that Cosby was entitled to relief under the Due Process Clause of the Fourteenth Amendment. Acknowledging that the trial court as factfinder had found against Cosby's testimonial evidence of an alleged promise not to prosecute, the court focused solely on an objective fact that had never been in dispute; *viz.*, the text of District Attorney Castor's 2005 press

release.[2] It found that Cosby had detrimentally relied on the press release as a grant of permanent immunity:

> In that press statement, D.A. Castor explained the extent and nature of the investigation and the legal rules and principles that he considered. He then announced that he was declining to prosecute Cosby. The decision was not conditioned in any way, shape, or form. D.A. 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.
>
> There is nothing from a reasonable observer's perspective to suggest that the decision was anything but permanent.

Id. (App.87a).

As for the line in the press release stating that Castor might "reconsider this decision," the court construed that as a reference only to Castor's decision not to speak publicly on the matter, not his decision

---

[2] Specifically, the state supreme court explained as follows:

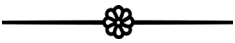
> As we assess whether that decision, and the surrounding circumstances, implicated Cosby's due process rights, former D.A. Castor's *post-hoc* attempts to explain or characterize his actions are largely immaterial. The answer to our query lies instead in the objectively indisputable evidence of record demonstrating D.A. Castor's patent intent to induce Cosby's reliance upon the non-prosecution decision.

Cosby, 252 A.3d at 1137 (App.86a).

to decline prosecution. It thus dismissed all charges against Cosby with prejudice.

In dissent, former Chief Justice Thomas G. Saylor did not agree "that the press release issued by former District Attorney Bruce Castor contained an unconditional promise that the Commonwealth would not prosecute Appellant in perpetuity." *Id.*, 252 A.3d at 1152 (Saylor, J., dissenting) (App.121a). He further noted that Cosby's reliance on the supposed promise was "unreasonable, if not reckless." *Id.*, 252 A.3d at 1154 n.3 (Saylor, J., dissenting) (App.125a).

The Commonwealth seeks certiorari.



REASONS FOR GRANTING THE PETITION

Sometimes in criminal investigations, the prosecutor announces a decision not to file criminal charges.[3] This happened here: In 2005, District Attorney Castor issued a press release stating, in part, that he found "insufficient, credible, and admissible evidence" to prove Cosby guilty of the sexual assault of Andrea Constand. The issue here is whether the Due Process Clause of the Fourteenth Amendment transforms this bare announcement into a binding promise never to prosecute, upon which the accused has a right to rely in perpetuity. The Pennsylvania Supreme Court

[3] A prosecutor may issue a press release, or even just say out loud, that no charges are being filed. A prosecutor could also convey such a decision by doing nothing at all — in some circumstances, doing nothing conveys a decision as clearly as a press release.

held that once the press release had been issued, the Due Process Clause precluded any further prosecution.

Cosby is a dangerous precedent. A prosecution announcement not to file charges should not trigger due process protections against future criminal proceedings because circumstances could change, including new incriminating statements by the accused. The Pennsylvania Supreme Court held that due process makes detrimental reliance on a decision not to prosecute constitutionally enforceable, regardless of reasonableness. Detrimental reliance, according to that court, transforms a mere decision not to prosecute, or even the absence of a decision to prosecute, into a promise of non-prosecution with a constitutional guarantee. A suspect need only rely to his detriment to ratify his immunity to future prosecution. That is quite an attractive proposition, not only to celebrities like Cosby, but to all manner of garden-variety litigants. *E.g.*, Supplemental Brief to Petition for Writ of Certiorari, *O'Brien v. United States SEC*, U.S. Supreme Court No. 20-1727 (cert. denied Oct. 4, 2021) (arguing that *Cosby* establishes a constitutional right not to testify to information disclosed pursuant to a proffer agreement).

This case therefore presents an important but heretofore unexamined question under the Due Process Clause. The expansive nature of the ruling of the Pennsylvania Supreme Court makes it important for this Court to decide whether, and to what extent, due process requires detrimental reliance to be reasonable before the Constitution may be invoked to make permanent a state's decision not to prosecute.

I. THE PENNSYLVANIA SUPREME COURT GRANTED RELIEF UNDER ITS ERRONEOUS CONSTRUCTION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WITHOUT AN INDEPENDENT AND ADEQUATE STATE GROUND; THIS ERROR REQUIRES CORRECTION BY THIS COURT.

In reversing defendant's conviction and barring further prosecution, the Pennsylvania Supreme Court held that:

> [W]hen a prosecutor makes an unconditional promise of non-prosecution, and when the defendant relies upon that guarantee to the detriment of his constitutional right not to testify, the principle of fundamental fairness that undergirds due process of law in our criminal justice system demands that the promise be enforced.

Cosby, 252 A.3d at 1131 (App.73a).

In reaching this conclusion, the Court relied primarily on *Santobello v. New York*, 404 U.S. 257 (1971), various Third and other federal Circuit opinions, and Pennsylvania case law applying federal due process analysis. Indeed, the court specifically noted that under Pennsylvania law, federal and state due process principles "generally are understood as operating co-extensively." *Cosby*, 252 A.3d at 1135 (App.82a), *citing Commonwealth v. Sims*, 919 A.2d 931, 941 n.6 (Pa. 2007). Nowhere did the court identify an analysis unique to Pennsylvania due process law.

As this Court noted in *Michigan v. Long*, 463 U.S. 1032 (1983), "when, as in this case, a state court decision fairly appears to rest primarily on federal law,

or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041. This Court has "jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground." *Id*. No such statement exists in the Pennsylvania Supreme Court opinion in this case. The Court should grant the writ in this case to address a serious misconstruction of the Due Process Clause, with far-ranging potential effects, as discussed below.

II. WHETHER A PUBLIC PRESS RELEASE GRANTS A DEFENDANT TRANSACTIONAL IMMUNITY IS AN IMPORTANT DUE PROCESS ISSUE THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Pennsylvania Supreme Court decision — that a defendant may reasonably conclude that he has transactional immunity when a prosecutor publicly announces the declination of charges[4] — wrongly extends this Court's limited precedent in this area. And because this case conferred transactional immunity when reliance was not only unreasonable, but reckless, it has paved the road for thousands of other

---

[4] The state supreme court skirted the trial court's factual findings that there was no promise and no actual reliance by focusing solely on the press release. *See Cosby*, 252 A.3d at 1137 (App.86a) (stating that 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" and then discussing the press release).

defendants to raise this issue and to seek similar windfalls.

The Pennsylvania Supreme Court misapplied *Santobello v. New York*, transforming it from a shield to a sword. In *Santobello*, the defendant negotiated a plea deal with the prosecutor. He agreed to plead guilty in exchange for the prosecutor's promise to make no sentencing recommendation. There were delays in sentencing. When the sentencing finally happened, there was a new prosecutor, and he asked the trial judge for the maximum sentence. The defendant objected, citing the plea agreement. The trial judge said that the recommendation did not affect his judgment and imposed the maximum sentence. This Court explained that "[t]his phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Santobello*, 404 U.S. at 262. Based on the record, this Court determined that the defendant "'bargained' and negotiated for a particular plea in order to secure dismissal of more serious charges, but also on the condition that no sentence recommendation would be made by the prosecutor." *Id.* As such, the defendant was "reasonably due in these circumstances" the benefit of the bargain. *Id.*

The state supreme court here misapplied *Santobello*. Indeed, it stretched that case to the breaking point, rendering it unrecognizable. It extended it beyond plea negotiations, which is what triggered the *Santobello* Court's scrutiny in the first place. And it applied *Santobello*, despite the missing crucial component the *Santobello* Court relied on — an enforce-

able agreement. There is no dispute that there was no agreement between Castor and Cosby.

The *Cosby* court did not stop at distorting the *Santobello* decision beyond recognition. It pushed *Santobello*'s reach outside the courtroom to a press release, ignoring where this Court intended that decision to apply. These were not in-court statements or promises, like *Santobello*. And, even more to the point, there was no promise of any benefit. Rather, the prosecutor merely told the public that he "declines to authorize the filing of criminal charges in connection with this matter" (N.T. 2/2/16, at 70, Defendant's Exhibit D-4). No reasonable person would conclude from this sentence that the prosecutor had just given Cosby forever immunity.

That no reasonable person would interpret the press release in the way suggested by the state supreme court is made even more clear when it is viewed in context. Castor's 2005 press release left open the possibility that he could reconsider his decision not to prosecute: "District Attorney Castor cautions all parties to this matter that he will reconsider this decision should the need arise" (N.T. 2/2/16, at 217) (emphasis added).[5] While it is rational to caution the

---

[5] The trial court found Castor incredible, yet the state supreme court still accepted his *post-hoc* interpretation of the press release. Castor testified that this sentence referred to his earlier statement in the release about not intending further comment (N.T. 2/2/16, at 217). Earlier in the release, however, he referred to "his decision" not to prosecute; in the next sentence, he said he might reconsider "the decision." Reasonable people would read the second sentence as referring to the decision not to prosecute. That was the important announcement, not Castor's availability for comment. At any rate, if there were an attempted grant of transactional immunity, Castor would have been more careful with language

parties about the possibility of future prosecution, it makes less sense to caution the parties about further public comment.

Castor recognized as much when he gave an interview to THE PHILADELPHIA INQUIRER in 2016, recounting: "I put in there that if any evidence surfaced that was admissible then I would revisit the issue. And that evidently is what the D.A. is doing [referring to the then-District Attorney's renewed investigation]" (*id.* at 220) (emphasis added). Still, the state supreme court determined that "[t]here is nothing from a reasonable observer's perspective to suggest that the decision was anything but permanent." *Cosby*, 252 A.3d at 1137 (App.87a). This is a remarkable position, transforming a declination of charges into an ironclad guarantee of non-prosecution in perpetuity, even though no reasonable person would read that press release and reach that conclusion. *Cf. Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 66 (1984) ("That is not the kind of reasonable reliance that would even give rise to an estoppel against a private party. It therefore cannot estop the Government."). *Santobello* does not support such a broad-reaching and counter-intuitive due process rule.

Meanwhile, the *Cosby* decision is also in tension with state and federal cases that, if applied here, would preclude criminal defendants from seeking forever immunity based on a public declination of charges. For example, in *United States v. Kostandinov*,

---

in a press release that suggested the case could be reopened. Likewise, defendant's attorneys would have spotted the language, sought to clarify it, or otherwise document the supposed immunity. Their silence can be likened to the watchdog that did not bark in the night.

734 F.2d 905 (2d Cir. 1984), a defendant charged with espionage claimed that a press release unilaterally granted him status as a commercial attaché with diplomatic immunity — even though he was, in reality, a mere assistant commercial counselor in Bulgaria's New York trade office. The Second Circuit warned that "[c]ertainly a press release is not a bilateral agreement" which can bestow immunity. *Id.* at 912.

Importantly, moreover, press releases by prosecutors are generally considered administrative duties. In *Oden v. Reader*, 935 S.W.2d 470 (Tex. Crim. App. 1996), in deciding whether a prosecutor had absolute immunity for statements made during a press release, the court said: "[C]ommunications made by Oden to the press cannot be connected to the furtherance of his quasi-judicial duties of prosecuting Reader." *Id.* at 475. Meaning, "Oden's press releases were administrative duties of his office." *Id.* A prosecutor is therefore not entitled to absolute immunity for statements made in a press release because they "do not relate to an advocate's preparation for the initiation of a prosecution[.]" *Id.* (internal citations omitted) (emphasis added).

Oden cited this Court's decision in *Burns v. Reed*, 500 U.S. 478 (1991), which noted that the prosecutor's actions there (appearing before a judge and presenting evidence in support of a motion for search warrant) involved the prosecutor's role as advocate for the state rather than their role as an administrator or investigative officer. In contrast, press releases are merely administrative duties meant to keep the public informed and do not relate to the prosecutor's preparation for the initiation of a prosecution. As a result, it is unreasonable for a criminal defendant to

rely on them as a promise made directly to him; if there was a promise meant to apply to him, a prosecutor would send him a personal letter or draft a formal agreement, not issue a release for the public.

These courts reached the right results. But now after the jurisprudential upheaval from the state supreme court's decision in *Cosby*, there is nationwide uncertainty about whether forever immunity can be bestowed upon a defendant simply by a public statement declining to file charges.

Under the *Cosby* court's holding, a prosecutor's announcement that they are not seeking charges against a defendant is now the functional equivalent of a grant of transactional immunity. Were this true, it would devastate a prosecutor's discretion to choose what, if any, charges to file against a defendant. And, as this Court recognized, "such discretion is an integral feature of the criminal justice system[.]" *United States v. LaBonte*, 520 U.S. 751, 762 (1997).

Prosecutors often decline prosecution, issuing press releases much like that in *Cosby*. For example, following the police shooting of Elijah McClain, an unarmed massage therapist, the District Attorney explained: "[N]o state criminal charges will be filed as a result of this incident."[6] Similarly, after a 7-year-old girl was murdered, the State's Attorney's Office declined to file charges based on insufficient evidence, but explained that it would continue to work with police

---

6 District Attorney Dave Young, *Press Release* dated Nov. 22, 2019, https://p1cdn4static.civiclive.com/UserFiles/Servers/Server_1881137/File/Departments/APD/Press%20packet%20FINAL.PDF.

as they continued to investigate the crime.[7] These public press statements have never bound the acting District Attorney or successive District Attorneys. Indeed, the San Francisco District Attorney's Office even has a unit that reviews certain cases in which the previous administrations declined to file charges.[8]

Under the *Cosby* decision, however, a statement meant to update the public would grant specific defendants immunity and bind the prosecutor's office indefinitely, even if there were a change in circumstances or evidence. So even if new evidence against that defendant is uncovered, the prosecutor is barred from seeking justice if the defendant relies on that purported immunity in any way.

This is an indefensible rule. Indeed, it is nonsensical. Silence about any conditions under which a prosecution might still be possible, despite the declination of charges, should not turn it into forever immunity. The rule should be the opposite: A defendant cannot reasonably rely on a declination of charges unless it also specifically says the prosecutor is giving him perpetual immunity, too.

The instant decision creates a moral hazard precisely because it is constitutionally plausible. It is not the first of its kind. As noted therein, its theory

---

[7] John Garcia, *Cook County State's Attorney's Office Criticized for not Filing Charges in Murder of 7-Year-Old Girl*, (Sept. 11, 2021), https://abc7chicago.com/cook-county-states-attorney-chicago-police-serenity-broughton-kim-foxx/11013357/.

[8] District Attorney Chesa Boudin, *Press Release* dated May 27, 2021, https://sfdistrictattorney.org/press-release/district-attorneys-office-announces-refiling-of-charges-against-alameda-county-sheriffs-deputies-declines-to-file-charges-in-two-other-cases/.

of due process detrimental reliance arises from a series of fairly well settled propositions. If "assurances of immunity made incident to cooperation agreements . . . are analogous to plea agreements," *United States v. Flemmi*, 225 F.3d 78, 84 (1st Cir. 2000), it is but a short step from there to decide that no actual agreement is necessary. *United States v. Kuchinski*, 469 F.3d 853, 858 (9th Cir. 2006) ("where detrimental reliance is shown, the government may be bound even before the district court accepts the agreement") (footnote omitted). If "plea bargains are essentially contracts" *Puckett v. United States*, 556 U.S. 129, 137 (2009), and if no plea or agreement is necessary, then due process includes contract-law equitable principles such as estoppel, and the key question becomes simply one of detrimental reliance. *Cosby*, 252 A.3d at 1134 (App.114a), *citing Gov't of Virgin Islands v. Scotland*, 614 F.2d 360, 365 (3d Cir. 1980) for the proposition that "when a defendant detrimentally relies on the government's promise, the resulting harm from this induced reliance implicates due process guarantees") (internal quotation marks omitted).

The culmination of this chain of reasoning is *State v. Johnson*, 360 S.W.3d 104 (Ark. 2010). In that case the Arkansas Supreme Court determined that, as a matter of "fundamental fairness," a prosecution promise that is not a plea bargain is more enforceable than a plea bargain if there is detrimental reliance. In *Johnson*, the state told the defendant he would not be charged if he submitted to a mental examination that determined he was not a pedophile. Relying on that, he, like Cosby, decided to waive his right against self-incrimination and paid for his own psychiatric exam. While that led to the desired diagnosis, in the

meantime the state took a closer look at the evidence and decided to charge him anyway. On the state's appeal from the trial court's order dismissing the charges, the Arkansas Supreme Court ruled that the critical factor was Johnson's detrimental reliance on the prosecutor's representations. *Id*. at 114-115.

Indeed, in *Johnson* the Arkansas Supreme Court observed that other states have gone further still, dispensing even with the need for detrimental reliance in their fundamental fairness analysis. *E.g.*, *Bowers v. State*, 500 N.E.2d 203, 204 (Ind. 1986) (enforcing promise not to prosecute offered in exchange for the defendant's provision of information; "the promise of a state official in his public capacity is a pledge of the public faith and is not to be lightly disregarded"); *State v. Davis*, 188 So.2d 24, 27 (Fla. Dist. Ct. App. 1966) (enforcing promise to dismiss charges if defendant took a lie detector test that showed he was telling the truth in his favor; state was bound by its "pledge of public faith — a promise made by state officials — and one that should not be lightly disregarded."); *Jackson v. State*, 747 A.2d 1199, 1208 (Md. 2000) (enforcing agreement not to prosecute that did "not contemplate that the defendant do anything more than cooperate with the State").

These evolving state cases, like *Cosby*, go beyond any application of due process addressed by this Court. It has been some time since this Court ruled, in *Santobello*, that due process applies to plea agreements. In the absence of such an agreement, due process should contain a reasonableness component — a component that none of these more recent cases address as a specific constitutional factor. Yet it would make 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." *Heckler*, 467 U.S. at 66.

Imposing a meaningful reasonableness requirement on the due process analysis would have changed the outcome of this and other similar due process disputes. Here, for instance, a state statute, 42 Pa.C.S. § 5947, required immunity grants to be approved by a court. *Cosby* implicitly interpreted the press release as a pardon, but the Pennsylvania Supreme Court had previously held that prosecutors may not grant pardons. *Commonwealth v. Brown*, 196 A.3d 130, 144 & n.5 (Pa. 2018). Further, in *Thatcher's Drug Store of W. Goshen, Inc. v. Consol. Supermarkets, Inc.*, 636 A.2d 156, 160 (Pa. 1994), the state court applied common law contract principles to conclude that it is unreasonable to rely, in an important matter, on "an indefinitely worded promise uttered in an informal conversation." 636 A.2d at 161 ("Despite the gravity of these matters, the record fails to reveal that the parties even so much as shook hands to formalize their agreement. This weighs against enforcing any promise"). That analysis casts doubt on the reasonableness of Cosby's reliance on a press release — the sole memorialization of the alleged promise — saying the prosecutor would "reconsider this decision should the need arise."

The point is not that the Pennsylvania Supreme Court violated its own state laws. The point, rather, is that a reasonably prudent person would have been reckless to rely on a supposed guarantee that the prosecutor did not clearly convey and may not have had the power to grant. Prosecutors have used similar

words in many press releases, in many serious cases, and they — many of whom are elected state officials — no doubt will continue to do so. Defendants who are later prosecuted in such cases on the basis of new evidence might now plausibly claim immunity under the Due Process Clause, citing *Cosby* and similar state decisions.

This Court, not the Pennsylvania Supreme Court, should be the one to decide whether *Cosby*'s drastic expansion of *Santobello* is appropriate and whether its dramatic shift in law about prosecutorial statements should continue through our court systems. The issue is important because other courts have rejected the idea that press releases are bilateral agreements or issued as anything more than an administrative task. Further, prosecutors often use similar language in statements to the press. Under *Cosby's* rationale, the accused in those cases now have transactional immunity, regardless of any potentially new evidence coming to light, and regardless of whether the accused's reliance on the statements was reasonable. This Court should therefore review *Cosby* to address an issue of first impression for this Court, to reconcile its conflicts with state and federal law, and to avoid potentially widespread jurisprudential confusion and possible windfall rewards for those accused of crimes.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court grant the petition for writ of *certiorari.*

Respectfully submitted,

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

COUNSEL FOR PETITIONER

NOVEMBER 24, 2021