


**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**

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Where: (1) the Montgomery County District Attorney (“MCDA”) promised never to prosecute Cosby, in part, to compel his testimony at a deposition in Constand’s civil action; (2) the MCDA issued a formal public statement reflecting that intent; (3) Cosby reasonably relied upon the MCDA’s oral and written statements by providing deposition testimony in the civil action, thus forfeiting his constitutional right against self-incrimination; and (4) the MCDA later broke the promise by prosecuting Cosby and introducing his civil deposition testimony into evidence against him, did the Pennsylvania Supreme Court properly conclude that Cosby’s prosecution was fundamentally unfair?

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INTRODUCTION

The Commonwealth’s Petition for a Writ of Certiorari must be denied where it asks this Court to review a holding the Pennsylvania Supreme Court never made. As the decision reflects, the *Cosby* court held that when 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. *Commonwealth v. Cosby*, 252 A.3d 1092, 1131 (Pa 2021). (App.73a)¹ In a classic strawman tactic, the Commonwealth distorts this holding, claiming that the *Cosby* court held that a prosecutor’s press release announcing a declination to prosecute constitutes a grant of transactional immunity. (Pet.14) The Pennsylvania Supreme Court made no such holding.

Contrary to the Commonwealth’s contention, the Pennsylvania Supreme Court relied on a robust, factually unique record when it concluded that the district attorney made an “unconditional promise” not to prosecute Cosby for the purpose of inducing him to forfeit his Fifth Amendment right in an anticipated civil litigation. The press release was evidence of the promise—it was not the promise. In fact, the *Cosby* court expressly stated that “D.A. Castor’s press release, without more, does not necessarily create a

¹ Appendix cites are to the Petitioner’s Appendix and are abbreviated “App.” Petition cites are abbreviated “Pet.”

due process entitlement.” *Cosby*, 252 A.2d at 1138. (App.89a-90a) (emphasis added) Thus, the Commonwealth’s “QUESTION PRESENTED” is simply not raised by the *Cosby* decision.

The Commonwealth fails to identify a single case from any court that conflicts with the *Cosby* decision. In short, the Commonwealth’s petition offers no compelling reason for this Court to disrupt the state supreme court’s decision which is legally uncontroversial and based on a “rare, if not entirely unique” set of circumstances unlikely to occur again in the Commonwealth of Pennsylvania or elsewhere. *Id.* at 1145. (App.103a) (stating “[t]he circumstances before us here are rare, if not entirely unique.”)



STATEMENT OF THE CASE

In 2005, Andrea Constand (“Constand”) lodged a complaint with the Cheltenham police department in Montgomery County and the district attorney’s office, alleging that Cosby sexually assaulted her a year earlier at his Cheltenham, Pennsylvania residence. *Id.* at 1099. (App.2a) Montgomery County District Attorney Bruce Castor (“Castor”), along with his top deputy and experienced detectives, thoroughly investigated the complaint but ultimately declined to prosecute. *Id.* Castor was concerned that Constand had failed to promptly file a complaint against Cosby which diminished the reliability of her recollections and foreclosed any opportunity to secure corroborating physical or forensic evidence. *Id.* at 1103. (App.11a) Castor identified several troubling inconsistencies in her

various statements to investigators and found her frequent and regular telephone and in-person communications with Cosby in the year following the alleged assault atypical. *Id.* at 1103-1104. (App.11a-12a) Castor predicted that Constand's actions of secretly, and likely illegally, recording phone conversations with Cosby might be interpreted as an attempt by Constand and her mother to force Cosby to pay Constand in exchange for not contacting the police. *Id.* at 1104. (App.12a) Castor also learned that before reporting the alleged crime with law enforcement, Constand contacted civil attorneys in Philadelphia for the purpose of pursuing a civil lawsuit against Cosby. *Id.* (App.11a) Ultimately, Castor concluded that "there was insufficient credible and admissible evidence upon which any charge against Mr. Cosby related to the Constand incident could be proven beyond a reasonable doubt." *Id.* (App.12a)

Recognizing that the burden of proof is lower in a civil proceeding, Castor conceived of an alternative course of action to obtain "some measure of justice" for Constand. *Id.* Castor determined that "as the sovereign," his office would not prosecute Cosby, and he intended that decision to bind the Commonwealth and future district attorneys. *Id.* Castor emphasized that it was "absolutely" his intent to remove "for all time" the possibility of prosecution. *Id.* at 1105. (App.14a) Castor reasoned that by removing the threat of criminal prosecution "for all time," Cosby would be forced to participate in civil discovery which included giving testimony at a civil deposition under penalty of perjury without the benefit of the Fifth Amendment privilege against self-incrimination. *Id.* Castor later testified:

The Fifth Amendment to the United States Constitution states that a person may not be compelled to give evidence against themselves. So you can't subpoena somebody and make them testify that they did something illegal or evidence that would lead someone to conclude they did something illegal on the threat of if you don't answer, you'll be subject to sanctions because you're under subpoena. So the way you remove that from a witness is if you want to, and what I did in this case is I made the decision as the sovereign that Mr. Cosby would not be prosecuted no matter what. As a matter of law, that then made it so that he could not take the Fifth Amendment ever as a matter of law. *Id.* at 1104. (App.12a-13a)

Castor conveyed his decision to Cosby's criminal attorney, Walter Phillips,² who agreed with Castor's legal assessment that Cosby no longer enjoyed a Fifth Amendment right considering MCDA's decision to never prosecute Cosby. Phillips told Castor that he would communicate the decision to Cosby's civil attorneys. *Id.* at 1105. (App.14a)

Castor then published a press release on behalf of MCDA declaring that after reviewing and consulting with County and Cheltenham detectives, the District Attorney finds "insufficient, credible, and admissible evidence" to charge Mr. Cosby and "declines to authorize the filing of criminal charges in connection with this matter." *Id.* at 1105-1106. (App.16a) The press release continued:

² Phillips died before Cosby was charged in 2015.

Because a civil action with a much lower standard for proof is possible, the District Attorney renders no opinion concerning the credibility of any party involved so as to not 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 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.* at 1106. (App.12a)

Less than one month after the press release was issued, Constand filed a lawsuit against Cosby in the United States District Court for the Eastern District of Pennsylvania. *Id.* Cosby sat for four depositions and did not claim the protections of the Fifth Amendment privilege even once. *Id.* (App.18a) Eric Schmitt, Cosby's civil attorney, testified that Phillips communicated to him that a non-prosecution decision had been made by Castor and that from the perspective of Cosby's attorneys and the district attorney, Cosby had no legal basis for invoking his Fifth Amendment right at the civil depositions. *Id.*

Eventually, Constand settled her civil suit with Cosby for \$3.38 million. *Id.* at 1107. (App.20a) The terms of the settlement and records of the case,

including Cosby's deposition, were sealed. *Id.* However, following a media request, the federal judge who presided over the civil suit unsealed the records in 2015. *Id.* at 1107-1108. (App.20a)

In 2015, Castor was no longer district attorney, having been succeeded by his former first assistant, Risa Vetri Ferman. *Id.* at 1108. (App.20a-21a) Despite her predecessor's decision not to prosecute, District Attorney Ferman reopened the criminal investigation of Constand's allegations. *Id.* (App.21a) On September 23, 2015, Castor sent an email to Ferman reminding her that he had "intentionally and specifically bound the Commonwealth that there would be no state prosecution of Cosby in order to remove from him the ability to claim the Fifth Amendment protection against self-incrimination, thus forcing him to sit for a deposition under oath." *Id.* Ferman nonetheless pressed forward with an investigation and nearly a decade after Castor's public decision not to prosecute Cosby, the Commonwealth charged Cosby with three counts of aggravated indecent assault, stemming from the January 2004 incident. *Id.* at 1110. (App.25a-26a)

On January 11, 2016, Cosby filed a petition for a writ of *habeas corpus* seeking, *inter alia*, dismissal of all charges based on Castor's promise not to prosecute. *Id.* (App.26a) The trial court held a hearing in connection with that motion, eventually denying it, concluding that the "press release, signed or not, was legally insufficient to form the basis of an enforceable promise not to prosecute." *Id.* at 1117. (App.44a)

The trial court also denied Cosby's motion to bar introduction of the deposition testimony, allowing Cosby's jury to hear selected excerpts wherein he admitted that in the 1970s he provided Quaaludes to

women with whom he wanted to have sexual intercourse. *Id.* at 1107, 1123. (App.20a, 46a-47a) Based on the admitted deposition testimony, the prosecution urged the jury to conclude that Cosby had engaged in a pattern of drugging and raping women in the 1970s with the use of Quaaludes. *Id.*

At the conclusion of a second jury trial,³ Cosby was convicted of all three counts of aggravated indecent assault. *Id.* at 1123. (App.56a-57a) He was sentenced to three to ten years in prison. *Id.* A unanimous panel of the Superior Court affirmed the judgment of sentence in all respects. *Commonwealth v. Cosby*, 2019 PA Super. 354 (Pa. Super. 2019).

On June 23, 2020, the Pennsylvania Supreme Court granted Cosby's petition for allowance of appeal on two issues, including the question of whether Cosby should have been prosecuted considering the district attorney's promise not to prosecute and whether the trial court should have allowed the Commonwealth to admit his civil deposition testimony into evidence. *Id.* at 1123. (App.67a-68a)

The Pennsylvania Supreme Court showed deference to the trial court's finding that Castor did not enter into a formal immunity agreement with Cosby, but that Castor's actions amounted to a unilateral exercise of prosecutorial discretion. *Id.* at 1130.

³ Cosby's first jury trial ended in a mistrial, because the jury could not reach a unanimous verdict. Prior to the second trial, the trial court judge reconsidered his decision to allow the Commonwealth to introduce one incident of prior bad act evidence and permitted the Commonwealth to introduce five incidents of prior bad act evidence, all of which occurred between 1982 and 1989—decades before the charged offense. *Id.* at 1119. (App.47a-48a)

(App.73a) The state supreme court observed that this characterization was consistent with Castor’s testimony at the *habeas* hearing that he never entered in an “agreement” with Cosby or any kind of *quid pro quo* exchange. *Id.*

While bound by the trial court’s factual determinations, the state supreme court observed that it was not bound by its legal determinations. *Id.* Under the unique facts of the case, the Pennsylvania Supreme Court concluded that Castor had made an unconditional promise of non-prosecution, and that Cosby had relied on that promise to his detriment, namely foregoing his Fifth Amendment guarantees and testifying at four days of depositions, and that as a matter of fundamental fairness, the promise should be enforced. *Id.* 1131. (App.73a)



REASONS FOR DENYING CERTIORARI

I. THE *COSBY* DECISION DOES NOT RAISE THE QUESTION PRESENTED BY THE COMMONWEALTH.

The Commonwealth contends that the *Cosby* decision announced a “dangerous” new rule of law, namely that the Due Process clause demands that a press release be treated as a grant of transactional immunity. (Pet.12, 14) The Commonwealth warns that the sweeping and unprecedented decision has thrown lower courts into turmoil and will result in a “get out of jail free” card for thousands of prospective defendants who “need only rely to [their] detriment to ratify their immunity to future prosecution.” (Pet.12)

The Commonwealth grossly mischaracterizes the holding in *Cosby* and its impact on prosecutorial discretion. After reviewing a fully developed record and giving deference to the trial court's factual findings, the Pennsylvania Supreme Court held that "when 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) Because this holding is legally uncontroversial, the Commonwealth shamelessly distorts the *Cosby* decision, attempting to manufacture compelling reasons for review.

The Pennsylvania Supreme Court made no sweeping proclamation that all press releases announcing a declination to charge amount to an unconditional promise to never prosecute, nor did it hold that "forever immunity can be bestowed upon a defendant simply by a public statement declining to file charges." (Pet.19) Quite the opposite, the state supreme court expressly stated that "D.A. Castor's press release, without more, does not necessarily create a due process entitlement" and "not . . . each and every exercise of prosecutorial discretion with regard to a charging decision invites a due process challenge." *Id.* at 1138, 1135 (emphasis added)

The *Cosby* court's decision was narrowly tailored to the unusual facts of the case. Importantly, the state supreme court's finding of an "unconditional promise" was not based solely on Castor's press release as the Commonwealth suggests. Rather, the Pennsylvania Supreme Court noted:

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. There was no evidence of record indicating that D.A. Castor intended anything other than to induce Cosby's reliance. Indeed, the most patent and obvious evidence of Cosby's reliance was his counseled decision to testify in four depositions in Constand's civil case without ever invoking his Fifth Amendment rights. *Id.* at 1138. (App.89a-90a)

Ignoring the actual holding of the court, the Commonwealth persists that the *Cosby* decision "has paved the road for thousands of other defendants to raise this issue and seek similar windfalls." (Pet.14-15) The Commonwealth would have this Court believe that the *Cosby* decision will lead to thousands of guilty defendants avoiding criminal responsibility by creatively arranging ways to "detrimentally rely" on prosecutors' public announcements declining to charge them.

The Commonwealth's hysteria is baseless. While the Pennsylvania Supreme Court emphasized that a prosecutor's discretion in charging decisions is not exempt from basic principles of fundamental fairness, it also held:

That is not to say that each and every exercise of prosecutorial discretion with regard to a charging decision invites a due process challenge. Charging decisions inhere with

the vast discretion afforded to prosecutors and are generally subject to review only for arbitrary abuses. A prosecutor can choose to prosecute, or not. A prosecutor can select the charges to pursue, and omit from a complaint or bill of information those charges that he or she does not believe are warranted or viable on the facts of the case. A prosecutor can also condition his or her decision not to prosecute a defendant. . . . Generally, no due process violation arises from these species of discretionary decision-making, and a defendant is without recourse to seek the enforcement of any assurances under such circumstances.⁴

In other words, the *Cosby* decision blesses a proper use of prosecutorial discretion. Prosecutors need only avoid making unconditional promises to suspects with the intent of inducing them to waive cherished constitutional guarantees and/or refrain from breaking those promises to prevent the scenario that played out in this case.⁵ One would hope that irrespective of

⁴ Inappropriately, the Commonwealth continues to urge an illogical interpretation of a cherry-picked sentence from Castor's press release wherein Castor stated that he would "reconsider" his choice to refrain from publicly speaking about his decision not to prosecute if necessary. *Cosby*, 252 A.3d at 1137-1138, n.25. (App.87a-88a) Ripping the sentence from its context and fully ignoring Castor's testimony on the point, the Commonwealth insists that Castor really meant that he would reconsider his decision not to prosecute *Cosby* if the need arose. The Pennsylvania Supreme Court flatly rejected this unreasonable interpretation. *Id.*

⁵ To demonstrate how a prosecuting agency can publicly announce a declination of charges without making a binding unconditional

the *Cosby* decision, prosecutors would, as a rule, avoid engaging in this type of conduct.

In sum, the Commonwealth presents a question that is not raised by the *Cosby* decision. Apart from the name of the defendant who received the remedy, there is nothing contentious about the Pennsylvania's Supreme Court's narrowly tailored holding that a prosecutor who makes an unconditional promise not to prosecute to induce a suspect's waiver of his Fifth Amendment guarantee is bound by that promise. Notwithstanding the Commonwealth's warning of imminent catastrophic consequences, the *Cosby* holding will likely be confined to its own "rare, if not entirely unique" set of circumstances, making review by this Court particularly unjustified.

promise not to prosecute, this Court need only review the press releases cited by the Commonwealth in its petition. For example, in the press release published by the Cook County State's Attorney's Office, (Pet.20, n.7), the office stated "[a]fter a thorough review of the information presented to us by the police, we concluded that the evidence was insufficient to meet our burden of proof to file murder charges at this time . . . The Cook County State's Attorney's Office is committed to seeking justice for victims and will continue to work with the Chicago Police Department as they further investigate this crime." Notably, this press release contained conditional language suggesting that the office could later bring charges and did not express an intent to induce the suspect to participate in an anticipated civil lawsuit wherein he would be expected to waive his Fifth Amendment right against self-incrimination.

II. THE PENNSYLVANIA SUPREME COURT'S FACT-INTENSIVE DECISION DOES NOT CONFLICT WITH ANY DECISIONS FROM THIS OR ANY OTHER COURT.

The Commonwealth suggests that the *Cosby* holding amounts to an unfair expansion of the federal due process clause but fails to identify any federal or state court case with which the *Cosby* decision conflicts. To contrive a conflict, the Commonwealth argues that the Pennsylvania Supreme Court “misapplied” *Santobello v. New York*, 404 U.S. 257 (1971) to the factual circumstances of this case.

The *Cosby* court did not pin its decision on *Santobello*, or any one case. In fact, the *Cosby* court acknowledged that because the circumstances of the case were “rare, if not entirely unique,” no case was dispositive of the issue before it. The *Cosby* court relied on various decisions from state and federal courts, including *Santobello*, for the general proposition that courts are obligated “to hold prosecutors to their word, to enforce promises, to ensure that defendants’ decisions are made with a full understanding of the circumstances, and to prevent fraudulent inducements of waivers of one or more constitutional rights.” *Cosby*, 252 A.3d at 1134. (App.81a)

The foregoing tenets are undebatable. And the Commonwealth identifies no authority that quarrels with these principles, including *Santobello*. Even if the *Cosby* court “misapplied” *Santobello* (it did not), review would be unwarranted. As United States Supreme Court Rule 10 states, “a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misap-

plication of a properly stated rule of law.” (emphasis added)

The Commonwealth’s petition dissolves into a long-winded rant about Castor’s intent and the meaning behind the words in his press release. These factual issues were debated below, and the Pennsylvania Supreme Court expressly deferred to the trial court’s findings before concluding that as a matter of law, Castor made an unconditional decision not to prosecute, which was absolute and final, and, consistent with Castor’s intent to induce Cosby to act in reliance thereupon. *Id.* at 1135. (App.35a) Review by this Court is not justified solely to correct alleged erroneous factual findings.

Instead of identifying any cases with which the *Cosby* decision conflicts, the Commonwealth inexplicably relies on several cases that are consistent with the *Cosby* holding. For example, in *State v. Johnson*, 360 S.W. 3d 104 (Ark. 2010), a case arguably most akin to the *Cosby* case, the state supreme court reached the same conclusion that the *Cosby* court did when it enforced a prosecutorial promise to divert a case. Like the holding in *Cosby*, the Arkansas Supreme Court held that “where the State has entered into an agreement not to prosecute with a prospective defendant and the defendant has performed and acted to his detriment or prejudice in reliance upon that agreement, the government must be required to honor such an agreement.” *Id.* at 115.

Despite its best efforts, the Commonwealth can find no compelling reason for this Court to grant review. There is none. The narrowly tailored decision of the *Cosby* court is not at odds with any other case and is so factually unique that it fails to present any

question that is likely to arise in the future with any regularity.



CONCLUSION

For the foregoing reasons, this Court should deny the Petitioner's Petition for a Writ of Certiorari.

Respectfully submitted,

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