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### **MONTGOMERY COUNTY DISTRICT ATTORNEY'S OFFICE FILES APPEAL TO U.S. SUPREME COURT IN *COMMONWEALTH V. COSBY***

NORRISTOWN, Pa. (Nov. 29, 2021) — The Montgomery County District's Office filed a petition for writ of certiorari with the United States Supreme Court seeking review of the opinion by the Pennsylvania Supreme Court in the case of *Commonwealth v. William H. Cosby Jr.*

The judgment for which review is sought found that a press release issued by a previous Montgomery County District Attorney announcing that his office would not file sexual assault charges, in effect granted immunity to Cosby, and therefore his due process rights were violated when he was subsequently prosecuted for the aggravated sexual assault of Andrea Constand in his Cheltenham, Pa. home in February 2004.

The question presented to the Court is: "*Where 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?*"

The Constitutional issue involved is the 14<sup>th</sup> Amendment, which states, in relevant part, "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

Montgomery County District Attorney Kevin Steele said: "Petitioning to ask the High Court for review was the right thing to do because of the precedent set in this case by the majority opinion of Pennsylvania Supreme Court that prosecutors' statements in press releases now seemingly create immunity. This decision as it stands will have far-reaching negative consequences beyond Montgomery County and Pennsylvania. The U.S. Supreme Court can right what we believe is a grievous wrong."

The Concurring and Dissenting Opinion by PA Supreme Court Justice Kevin Dougherty points out the danger in the majority's opinion. He wrote:

"District attorneys in this Commonwealth are constitutionally elected officers. See PA. CONST. art. IX, §4. However, the Constitution 'is altogether

silent on the question of the district attorney's powers and duties.' *Commonwealth v. Schab*, 383 A.2d 819, 830 (Pa. 1978) (Pomeroy, J.). Instead these duties and powers are set by statute. See 16 P.S. §1402(a) ('The district attorney shall sign all bills of indictment and conduct in court all criminal and other prosecutions, in the name of the Commonwealth . . . and perform all the duties which, prior to May 3, 1850, were performed by deputy attorneys general.'). Significantly, none of this authority or our case law interpreting it remotely purports to grant to district attorneys the power to impose on their successors — in perpetuity, no less — the kind of general non-prosecution agreement that Castor sought to convey to Cosby. It's not difficult to imagine why: If district attorneys had the power to dole out irrevocable get-out-of-jail-free cards at will and without any judicial oversight, it would invite a host of abuses. And it would 'effectively assign pardon power to District Attorneys, something this Court has already rejected as unconstitutional.' Attorney General's Brief at 30, citing *Commonwealth v. Brown*, 196 A.3d 130, 144 n.5 (Pa. 2018) (pardon 'can be granted only by the authority in which the pardoning power resides[,] i.e., the Governor). So, not only is it plain that Castor's view is wrong as a matter of law; it's also dangerous to even implicitly suggest otherwise. For that reason, unlike the majority, I would expressly reject it here and now."

Montgomery County's filing argues similarly:

"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 them 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."

The Montgomery County petition for writ of certiorari was e-filed and mailed to the U.S. Supreme Court on Nov. 24, 2021, ahead of the Nov. 29, 2021 deadline established by the High Court. After a three-day security scan of the Commonwealth's

filing, it will be reviewed for compliance and if accepted, the Clerk of the Supreme Court is expected to post the filing online.

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