

Table of Contents:  
 Score One for Due Process: When a Defendant Relies on the DA's Decision not to  
 Prosecute and a New DA Prosecutes Him Anyway  
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| Title  | Page |  |
|--|------|--|
| Cosby's Convictions Overturned                     | 2    |  |
| Trial Court Rules Cosby's EBT Testimony Admissible | 2    |  |
| Trial # 1: Hung Jury                               | 4    |  |
| Trial # 2: More Prior Bad Act Evidence             | 4    |  |
| The Other Alleged Victims                          | 5    |  |
| Cosby and Constand                                 | 6    |  |
| Trial Court Proceedings                            | 7    |  |
| Intermediate Appellate Court Decision              | 7    |  |
| PA Supreme Court Analysis                          | 8    |  |
| DA's Have Tremendous Discretion                    | 9    |  |
| Plea Bargaining                                    | 9    |  |
| DA Discretionary Decisions and Due Process         | 9    |  |
| Reasonable Reliance                                | 11   |  |
| What Remedy?                                       | 11   |  |
| Final Thought                                      | 12   |  |

SCORE ONE FOR DUE PROCESS:

WHEN A DEFENDANT RELIES ON THE DA'S DECISION NOT TO PROSECUTE AND A NEW DA PROSECUTES HIM ANYWAY.

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INTRODUCTION:

COSBY'S CONVICTIONS OVERTURNED:

On June 30th 2021, seventeen years after allegedly sexually assaulting Andrea Constand in his home near Philadelphia PA, disgraced comedian Bill Cosby was released from custody after the Supreme Court of Pennsylvania, (Middle District), reversed and dismissed his convictions on Due Process grounds.

In 2018, Cosby, (known in the 1980's as "America's Dad" aka Cliff Huxtable on the wildly popular Cosby Show), was found guilty by a jury of three counts of Indecent Sexual Assault and sentenced to three-to-ten years in prison.

In a 79-page decision, the Court reversed the Pennsylvania Superior Court's decision which affirmed the trial court (Court of Common Plea's) ruling to permit the prosecution of Cosby (initiated in 2014 by a new District Attorney [DA#2]), notwithstanding a decision by the former prosecutor (DA#1), made public in a signed press release in 2005, NOT to prosecute the Constand case for what DA#1 determined was a lack of credible and admissible evidence to support a conviction beyond a reasonable doubt.

TRIAL COURT RULES COSBY'S EBT TESTIMONY ADMISSIBLE:

The trial court had also ruled that Commonwealth prosecutors could introduce sworn testimony that Cosby had given in four depositions held in connection with a civil case that was brought by Constand's attorneys shortly after DA #1 passed on criminal prosecution. In addition to acknowledging sexual contact with Constand (which he claimed was consensual), and giving her some Benadryl (to relax her), Cosby also admitted in the EBT'S that on past occasions, he had given Quaaludes to other women with whom he wanted to have sexual relations.

At no time during the depositions did Cosby invoke his privilege against self incrimination with respect to Constand or any other woman about whom he was questioned. As the Supreme Court gleaned from DA#1's own testimony at a hearing before the trial court in 2016, that was precisely what he intended by publicly declining to prosecute.

As DA#1 explained, by removing the specter of criminal prosecution of the Constand matter "for all time," Cosby would have no legal (i.e. constitutional) basis to prevent inquiry into his conduct in that case by invoking his privilege against self incrimination. Therefore, he would have to answer all relevant questions at depositions held in connection with the civil complaint and that,

in DA#1's estimation, would strengthen Constand's civil case and increase her chances of achieving monetary justice for the abuse she claimed to have suffered (from being drugged and fondled by Cosby).

As it would turn out, Cosby (after unsuccessfully offering to finance her further education by setting up a trust when he realized that she was coming after him legally), settled the case for 3.5 million dollars. As part of that settlement, Constand, through her attorneys, (who testified to having no knowledge of or playing any part in DA#1's "no-prosecution" decision), agreed that she would not participate in any criminal prosecution of Cosby.

Interestingly, other than the signed press release, there was never any formal promise or agreement, written or otherwise, between DA#1 and Cosby's attorneys to forego criminal prosecution. As the trial court determined (and the Supreme Court agreed), DA#1's announcement reflected a UNILATERAL AND UNCONDITIONAL decision without any consideration.

While DA#1's decision was not intended to apply to other possible cases or victims who may come forward (or to a possible perjury prosecution if Cosby demonstrably lied under oath at depositions), Cosby was asked under oath about other cases/victims and remarkably, did not invoke the privilege, apparently believing he was in the clear criminally (or not realizing that he could be subject to other possible prosecutions).

#### DA#2 PURSUES PROSECUTION:

In any event, once DA#2 took office and obtained transcripts of the civil proceedings, she decided that she was not bound by her predecessor's decision because there was no written or on-the-record agreement, nor was there any formal grant of immunity to Cosby which, according to Pennsylvania law, could only come from an appropriate court, upon request from the District Attorney. (The same is true in New York [see CPL 50.20], except that a witness who testifies without waiving immunity in writing in a grand jury automatically receives immunity [CPL 190.40(2)(a) and 190.45]).

DA#2 was apparently unmoved by email communications from DA#1 in 2015 wherein he explained his decision not to prosecute in order to enhance Constand's position in the civil case (her only realistic chance at justice in DA#1's view), by eliminating any opportunity for Cosby to plead the 5th and, thereby allowing him to be subject to unfettered interrogation about what transpired between him and Constand.

In a police interview in his New York City Office in January 2005 with his attorney's present during DA#1's investigation, Cosby admitted to having consensual sexual contact with Constand on his couch after giving her what he claimed was Benadryl ("to relax her"), which she took voluntarily (but not knowing what it was). When she asked him later what he had given her, he promised to tell her but never did. Constand's mother (the first person Constand informed of the alleged abuse in early 2005) also asked Cosby what he'd given her daughter but he would not say. (He explained to police that he didn't want her to think that he was some old pervert who had drugged her daughter in order to have sex with her).

DA#2 inquired of DA#1 about any written agreements and DA#1 referred her to his press release, saying, "I decided to create the best possible environment for the plaintiff to prevail and be compensated." In the absence of any written agreement, bargained-for exchange or formal grant of immunity, DA#2 did not see herself as being bound by DA#1's exercise of discretion.

While there's no reason to doubt the sincerity of DA#1's concern for the victim obtaining the full measure of justice in the civil realm (after expressing concern, inter alia, over her waiting a full year before contacting authorities, continuing to have telephone and in-person contact with Cosby after the alleged abuse, and the absence of any corroborating forensic evidence), it was evident (from his warning that he would reconsider his decision to refrain from detailed public comment which could cast both parties in an unflattering light if they publicly complained), that he was seeking to minimize criticism for taking a pass in a very serious, high-profile case.

DA#1 testified that he had "set up the dominoes in such a way that Cosby would be required to testify," and he wanted the lawyers on both sides of the civil cases to not say anything publicly that would require him to defend his decision (in a manner that could be damaging to both sides).

For its part, the trial court ruled that since there was never any agreement not to prosecute (only a discretionary decision to forego prosecution), there was, at best, a failed attempt at immunity which never came to fruition (contrary to DA#1's belief that he had "sovereign" authority to confer it under the common law). Consequently, in the trial court's view, there was no bar to prosecution.

The trial court also concluded that there was no promise of non-prosecution upon which the defendant detrimentally relied such that he could credibly claim that the Commonwealth should be estopped from going forward based on DA#1's representations ten years earlier. In the trial courts view, " the press release, signed or not, was LEGALLY INSUFFICIENT to form the basis of an enforceable promise not to prosecute."

The trial court also noted that Cosby had already given up his 5th Amendment right when he spoke to police (although not admitting any criminal wrongdoing), and there was no reason to believe that he would invoke it in a civil case so as to require the remedy (i.e. no criminal prosecution) that DA#1 purported to provide in his press release.

#### TRIAL # ONE: HUNG JURY:

The trial court also ruled that the prosecution could introduce into evidence in their case in chief a prior similar uncharged sexual act by Cosby involving another woman as evidence of common scheme or plan. The case resulted in a HUNG JURY and resulted in a MISTRIAL in June 2017.

#### TRIAL # TWO: MORE PRIOR BAD ACT EVIDENCE:

Before the second trial, the prosecution received a more generous 404(b) ruling from the trial court which allowed them to introduce FIVE PRIOR ACTS (out of 19 incidents proffered), of alleged sexual abuse by Cosby involving different (and much younger) women (models/aspiring actresses) whom Cosby had reportedly incapacitated with drugs or alcohol at hotels or guest houses from 1982 to 1989.

The court noted that these incidents were remote in time but concluded, in light of Cosby's admission of having used Quaaludes as a sex-facilitator in the past encounters, that their strikingly similar nature rendered them more probative (e.g. of common scheme or plan, intent, absence of mistake, non-consent), than unfairly prejudicial.

This was as clear of an example as any of how Cosby's own words, compelled at depositions, would later be used against him at a criminal trial after DA#1 publicly declared his intention that Cosby would not be prosecuted for what happened to Andrea Constand. While those other incidents did not involve her, they were clearly used to bolster the credibility of her story (which DA#1 had originally deemed insufficient to sustain a conviction on its own).

Had the Constand incident occurred more recently (e.g. after the conviction of Harvey Weinstein in February 2020), perhaps DA#1 would have taken a more credulous view of her complaint, knowing that he probably could have called an expert witness (as did the Weinstein prosecutors) to explain some of the seemingly counter-intuitive victim behaviors (e.g. continued contact and communication with the alleged abuser, delayed reporting), that often give prosecutors pause and might otherwise cause jurors to disbelieve them.

#### THE OTHER ALLEGED VICTIMS:

The other incidents that the trial court allowed (the propriety of which the Supreme Court did not rule upon in light of its decision on the Due Process issue), involved:

1. a 24-year-old casino employee whom Cosby invited in 1982 to what turned out to be an "intimate" party where he gave her a beer and a pill (possibly Quaalude) which caused her to pass out. When she came to, her pants were unzipped and her shirt was undone and there was Cosby sitting next to her and fondling her. She woke up the next morning naked in bed beside Cosby who was also in a state of undress.
2. a 22-year-old aspiring actress to whom Cosby reached out upon a claimed desire to help with her career. He flew her out to Lake Tahoe where, after meeting for dinner, she complained of not feeling well. He invited her to his hotel room "to discuss her career" and gave her a pill to help her feel better. After she took the pill, he proceeded to get on top of her and have sex with her. She said she could not resist because she was physically incapacitated. She woke up the next morning naked from the waist down, with semen on her legs and feeling pain in her back side.
3. a 27-year-old model/aspiring actress whom Cosby's agent declared he was hoping to "mentor." He arranged for her to meet him at a ranch house in Reno Nevada for "acting lessons," which included him instructing her to act like she was intoxicated. When she said that she did not drink, Cosby gave her some wine which she drank and then passed out. She woke up with Cosby's penis in her mouth. She passed out again and woke up later feeling sick.
4. a 17-year-old model whom Cosby arranged to meet in Las Vegas purportedly to help her career and get "better photographs" of her. He gave her a pill "to help her with her cold," and two shots of liquor. As she was laid out on the couch, unable to move, Cosby fondled her breasts and rubbed his penis on her legs to conclusion.
5. a 23-year-old model who described Cosby as a "mentor and a father-figure" until he rendered her helpless with a shot of something and then had her sit on his lap. She woke up at home two days later, not knowing how she got there.

## COSBY AND CONSTAND:

Andrea Constand, a former professional basketball player from Canada, testified that she met Cosby in the Fall of 2002 at Temple University where she was Director of Basketball Operations, and where Cosby held an honorary degree (since rescinded). Per his deposition testimony, he had amorous intentions from the start and she saw him, eventually, as a friend and mentor who appeared to be interested in helping her pursue a career in sports broadcasting.

On the first occasion at his house, after she had dinner, Cosby put his hand on her thigh which, while not bothersome to her, did not inspire a response in kind. She left with no particular ill feeling.

On the second such occasion, while discussing her career ambitions (on the couch), Cosby tried to undo her pants but she leaned forward to stop him because she had no interest in a sexual relationship with the then 64-year-old, married comedian.

In late 2003, they met at a Casino in Connecticut where they had dinner after which Cosby invited her to his room for “dessert.” She sat on the edge of his bed discussing sports and broadcasting while he reclined. Though nothing overtly sexual took place, she construed the situation as an “invitation” which she declined.

In January 2004, Constand returned to Cosby’s Pennsylvania house to discuss her impending decision to leave Temple and return to Canada (where she later took a job as a masseuse). As they sat in the kitchen, Cosby offered her wine which she did not want to drink on an empty stomach, but did anyway. Cosby then offered her three pills to “take the edge off.” She complied whereupon she began to feel very dizzy. Her vision became blurred and her speech slurred.

Cosby escorted her to the couch where she sat down and slipped in and out of consciousness. When she came around, she noticed that Cosby was fondling her breasts and touching her vagina. She woke up the next morning on the couch with her brassiere askew and pants unzipped. She got up and stumbled to the kitchen where Cosby, as if nothing untoward had happened, offered her tea and a muffin. She took a sip and left.

After this incident, Constand and Cosby continued to talk about her impending move. They met for dinner in March 2004 and though she intended to confront him about the pills he’d given her, she did not do so. (She later asked him about it in a phone conversation from Canada but he was evasive and unresponsive).

Constand kept silent about the January 2004 incident until one year later when she told her mother, who in turn, reached out to Canadian regional police. They later made several more phone calls to Cosby (some of which they tape recorded), during which they inquired about the pills he’d given Constand. He feigned ignorance but promised to find out what they were and report back on the matter which he never did. (They also had conversations in which Cosby invited them to his upcoming shows, including one in Toronto. The mother, who had attended some of his shows by invitation in the recent past, expressed interest).

Shortly after Constand had filed a police report (which was later referred to police in Philadelphia), she received calls from Cosby associates, inviting her to an upcoming show in

Miami, and from his lawyers advising of Cosby's interest in setting up a trust fund to finance her continued education. She did not return those calls.

Constand returned to the U.S. and spoke with Pennsylvania detectives in late January 2005. DA#1, apparently no stranger to the media, publicly announced that his office was investigating Cosby for alleged sexual assault. In his interview with police, Cosby admitted that he gave Constand some pills (Benadryl, he claimed) which he had used to help him sleep when on the road, and she took them willingly. They then "kissed and touched each other" consensually but did not have sexual intercourse.

In February 2005, DA#1 became concerned about several perceived obstacles to successful prosecution including: the delayed reporting, several inconsistencies in Constand's story, the absence of any incriminating evidence recovered pursuant to a search warrant executed at Cosby's home, no forensic evidence, Constand's having retained civil attorneys (possibly before calling the police), her continued contact with Cosby in person and by phone (including taped calls that were "likely illegal").

Consequently, DA#1 devised a stratagem whereby he would publicly decline to prosecute and thereby compel Cosby to testify (and likely incriminate himself) without the benefit of Fifth Amendment protection because his statements could not be used against him in a criminal trial. DA#1 concluded that this was Constand's "best option" for justice in the civil realm (and likely DA#1'S best option for minimizing public blow-back over his decision to decline prosecution.

#### TRIAL COURT PROCEEDINGS:

After the hearing on the defendant's motion to quash the criminal charges (or, at least to preclude the introduction of the defendant's EBT testimony), the trial court found DA#1's testimony to be inconsistent and equivocal. The court concluded, as noted above, that since there was never any formalized promise or agreement between DA#1 and Cosby to forego prosecution, and no grant of immunity had been legally conferred upon Cosby, the criminal case could go forward, which it did.

#### INTERMEDIATE APPELLATE COURT DECISION:

The PA Superior Court unanimously affirmed Cosby's convictions, (224 A3d 372 [Pa Sup 2019]), ruling, as did the lower court, that there was: no immunity, no evidence of any reasonable reliance by the defendant (who was represented by several attorneys) on DA#1'S press announcement or that the defendant ever did (or intended to) assert his privilege against self-incrimination (based on any promise by or agreement with DA#1).

The court also noted that one of the conditions of the civil settlement was that Constand would not seek to initiate or participate in any criminal prosecution of Cosby (which, in the court's view, would not have been necessary if they were truly relying on the DA#1'S decision to decline prosecution when they allowed Cosby to testify without invoking his 5th Amendment right).

The Superior Court was unpersuaded by the defendant's reliance on Commonwealth v Stipetich 652 A3d 1294 (Pa Super 1995]) where the court suppressed incriminating statements that the defendants had made to police with respect to the sources of drugs found in their home on the promise (made by the police), that they would not be charged in exchange for their cooperation.

The DA went ahead and charged them anyway because (as the court later agreed), the police had no authority to bind the DA with a discretionary decision that only a prosecutor could make.

The decision not to prosecute Cosby, by contrast, WAS MADE BY A PROSECUTOR and since DA#1 himself testified that, his press release notwithstanding, there was never any agreement with or quid-pro-quo from Cosby in exchange for that decision, it could not be said that there was any reasonable reliance.

The Superior Court also held that the trial court properly admitted evidence of the prior incidents of alleged sexual abuse because they reflected a signature pattern of repetitive and similar conduct that was indicative of Cosby's "sexual assault playbook." (id at 403). The court also noted that the trial court judiciously limited the prior bad acts to five out of 19 relevant incidents and gave appropriate curative instructions.

With respect to the Quaalude testimony that Cosby gave at the depositions, the Superior Court found that it was probative of Cosby's knowledge of CNS depressants (and its debilitating effects) which was essential to help the jury get passed the "he said-she said" nature of the case.

#### PA SUPREME COURT ANALYSIS:

The Supreme Court framed the issue thusly: whether, where DA#1 agreed that Cosby would not be prosecuted in order to force his testimony at a deposition in a civil action, and made a formal public statement to that effect, and the defendant reasonably relied on such statements by giving deposition testimony in the civil action, thus forfeiting his right against self-incrimination, did the Superior Court panel err in affirming the trial court's decision to allow the criminal prosecution of Cosby and to admit the deposition testimony against him at trial?

The Supreme Court did not quarrel with the trial court's factual and credibility findings but reached a different conclusion on the law i.e. that even though there was no agreement between DA#1 and the defendant but rather, a unilateral decision of discretionary forbearance, that "(non) charging decision" was one upon which the defendant DETRIMENTALLY RELIED by giving up a constitutional right (to not incriminate himself), thereby implicating DUE PROCESS OF LAW.

In doing so, he provided (as DA#1 intended all along), damning evidence (that he otherwise could have legally withheld) that not only resulted in a costly civil settlement, but ended up being used to convict him anyway in a prosecution that the Commonwealth had publicly represented it would not bring. In the court's view, this type of discretionary prosecutorial decision (unlike many which are beyond judicial review), is significant enough to survive a change-over in District Attorneys.

As the court observed, "when a DA makes an unconditional promise of no-prosecution and the defendant relies on that guarantee to the detriment of his constitutional right to testify, the principle of FUNDAMENTAL FAIRNESS that undergirds DUE PROCESS OF LAW in our criminal justice system DEMANDS that such promise be enforced."

## DA'S HAVE TREMENDOUS DISCRETION:

Citing then US Attorney Robert H Jackson's 1940 address to his attorneys that "the prosecutor has more control over life, liberty and reputation than any other person in America, (Fed Pros 31 Am Inst Crim L/Criminology 3 [1940], the Court noted the vast array of powers vested in DA'S as officers of the court, victim advocates and ministers of justice including, inter alia, decisions whether to: initiate criminal proceedings, select what charges to bring, negotiate plea bargains, condition plea offers and withdraw charges.

## PLEA BARGAINING:

In the context of plea bargaining, the court stated that in light of prosecutors' enormous power, their assurances carry special weight and must be carried out where defendants rely on them as inducements to pleas of guilty. (citing Santobello v NY 404 US 262, [1971]).

For example, in Commonwealth v Zuber 353 A2d 441 (Pa Super 1976), where the prosecutor and defendant agreed that the Commonwealth would recommend that his sentence (of 7-14 years) would run concurrently with his "back time" owed to parole (an illegal sentence in Pa as in NY), the court held that where the defendant clearly relied on this representation as an inducement to the plea, he was, under principle of fundamental fairness, entitled to the benefit of the bargain.

Consequently, the court, rather than countenance an illegal sentence, lowered the minimum range of his sentence so that he would serve the actual amount of time that was originally contemplated by both sides. (Another option would have been to have allowed the defendant to withdraw his guilty plea because it was based on an illegal promise, but the defendant in Zuber appeared to have been satisfied with receiving the sentence that he bargained for.

In some circumstances, the Court stated, DA promises (e.g. favorable plea offer later rescinded or complicated by additional conditions not originally imposed), may be enforced under principles of equity and Due Process even though they may not result in a disposition, where defendant's rely to their detriment (e.g. by making harmful admissions or implicating others). (citing Gov't of Virgin Islands v Scotland 614 F2d 360 [3d Circ. 1980]). As the Court observed:

"DA'S can (also) be bound by their assurances and decisions under Contract Law or by application of fundamental fairness considerations that inform and (underpin) Due Process of Law. The law is clear that based on their UNIQUE ROLE in the criminal justice system, DA's generally are bound by their assurances, especially when defendants rely to their detriment upon those guarantees."

## DA DISCRETIONARY DECISIONS AND DUE PROCESS:

Acknowledging that promises made during plea negotiations (or in connection with completed plea deals), differ from unilateral decisions not to prosecute, (i.e. the latter are not per se enforceable), the Court cautioned that such exercises of discretion are NOT EXEMPT FROM BASIC PRINCIPLES OF FUNDAMENTAL FAIRNESS. At a minimum, as the Court saw it, when a defendant RELIES TO HIS DETRIMENT upon the acts (or words) of a prosecutor, his DUE PROCESS RIGHTS ARE IMPLICATED. (citing Commonwealth v Sims 919 A2d 931 [2007]).

Referencing *Commonwealth v Kansas* 764 A2d 20 (2001), the Court stated that the inquiry in such situations as whether the challenged action is “so rooted in the traditions and conscience of our People as to be ranked as fundamental and that defines the community’s sense of fair play and decency.”

While many (if not most) discretionary decisions made by DA’S, as noted above, do not require or invite Due Process inquiry, where as here, the Court held, a decision not to prosecute is UNCONDITIONAL, and PRESENTED AS ABSOLUTE AND FINAL, or is ANNOUNCED IN SUCH A WAY as to INDUCE A DEFENDANT TO ACT IN DETRIMENTAL RELIANCE thereon, DUE PROCESS MAY (and here did) REQUIRE that prosecution be PRECLUDED. (citing *State v Francis* 424 P3d 160 [Utah 2017]).

While the lower courts focused their inquiry on the absence of an agreement between the Commonwealth and the defendant that there would be no criminal prosecution, the Supreme Court was influenced more by DA#1’s express intent to induce Cosby’s reliance on his decision (coupled with Cosby’s actual reliance thereon by testifying four times at depositions without once invoking his right against self-incrimination).

The Court was also satisfied (unlike the trial court), from reading the entire press release in full context, that DA#1’s claim that he might reconsider his decision pertained to the decision to not speak publicly about the details underlying his decision not to prosecute rather than the decision not to prosecute at all.

The Court then focused on the 5th Amendment noting that the right of the individual to not “testify against him/herself” applies in any legal proceeding in which he/she participates, and the courts must be vigilant that such right is protected against government intrusion or abuse. (citing, *inter alia*, *Grunewald v US* 353 US 391 [1957]) and *Commonwealth v Taylor* 230 A3d 1050 [2020]).

The Court noted that absent the DA’S public declination, no court could have forced Cosby to testify in any proceeding with respect to the Constand matter. Yet, that is what happened over the course of four depositions in which he (in addition to claiming consent), admitted to having used drugs in the past to ply women into sexual complicity (which was used against him in the subsequent criminal trial).

In the Supreme Court’s view, the trial court had no basis beyond surmise to conclude that Cosby would not have invoked his 5th Amendment right just because he had previously spoken to police (and claimed consent) in the presence of counsel without doing so. More to the point, that Cosby did not assert such right during the police interview was of no moment because had DA#1 not made his public pronouncement, he WOULD HAVE BEEN AT LIBERTY to invoke his Fifth Amendment right at will. Moreover, to assume that he implicitly waived such right (rather than rely on DA#1’S representations) would, in the Court’s estimation, constitute an abdication of the judicial obligation to safeguard a citizen’s constitutional rights. (citing *Commonwealth v Taylor supra* at p.1064).

Bottom line, according to the Supreme Court, the only reasonable conclusion to be drawn was that Cosby did not invoke the 5th Amendment because he was operating under the reasonable belief that that DA#1’s decision not to prosecute him meant that the potential for criminal exposure no longer existed. (*id* at 1064).

## REASONABLE RELIANCE;

Having concluded that Cosby acted in reliance on DA#1'S decision, the Court also concluded that such reliance was reasonable. In view of DA#1'S publicly stated intention to decline prosecution precisely so that Cosby would have to testify (in the civil case) without the ability to "plead the Fifth," it was reasonable for him to expect that Cosby (whose attorneys agreed with the DA'S analysis), would do exactly what was intended. And, the absence of a formal agreement to that effect between DA#1 and Cosby did NOT, in the Court's estimation, take it beyond the reach of constitutional (i.e. Due Process) scrutiny.

The Court was unmoved by the lower court's pre-occupation with the absence of a formal agreement (or promise), or that Cosby, an educated person, who was represented by several top-notch attorneys who let him speak to the police without immunity, testified several times at depositions without "pleading the Fifth" (where he clearly buried himself with admissions of drugging several other subjects of his sexual desires).

While Cosby's lawyers clearly should have obtained a written promise from DA#1 (and made clear and sure that he retained his right to invoke the 5th Amendment if questioned about other alleged victims or bad acts), in the Supreme Court's analysis, there was nothing unreasonable about his reliance on DA#1's representations.

As the Court observed, "knowing that his decision INDUCED Cosby's reliance and that his decision not to prosecute was DESIGNED to do just that, (DA#1) made no attempt for 10 years to remedy any misperception or to stop the defendant from openly and detrimentally relying on that decision." Consequently, as far as the Supreme Court was concerned, the decision by the successor DA to prosecute VIOLATED THE DEFENDANT'S DUE PROCESS RIGHTS.

## WHAT REMEDY?:

The Court determined that unlike in *Commonwealth v Stipetich supra* (where the promise not to prosecute was made by police rather than a prosecutor), mere suppression of the evidence (obtained pursuant to such promise), was INSUFFICIENT to remedy the infringement of Cosby's right to due process.

Rather, specific performance of DA#1'S public commitment not to prosecute Cosby was the only recourse that could place him in the position that he enjoyed before DA#2 decided ten years later (whether due to discovery of other victims, perceived changes in the law, relaxing of the rules of evidence with respect to the admissibility of prior bad acts in sex abuse cases, and/or public pressure), to disregard her predecessor's decision and forge ahead with a prosecution.

The Court also noted that because of the prosecutor's deliberate efforts to force him to be a witness against himself, Cosby ended up paying out a substantial sum in civil damages only to be subject thereafter to the very jeopardy that he was led to believe would be avoided. Under such circumstances, the Court saw the prospect of yet a third criminal trial (with or without the use of his deposition testimony and additional ammunition in the testimony of other victims) to be no remedy at all.

As the Court observed, "the discretion vested in prosecutors, however vast, does NOT mean that its exercise is free of the constraints of due process. WHEN AN UNCONDITIONAL CHARGING DECISION IS MADE PUBLICLY AND WITH INTENT TO INDUCE ACTION AND

RELIANCE BY THE DEFENDANT, AND WHEN HE/SHE DOES SO TO HIS/HER DETRIMENT, DENYING HIM/HER THE BENEFIT OF THAT DECISION IS AN AFFRONT TO FUNDAMENTAL JUSTICE, PARTICULARLY WHEN IT RESULTS IN A CRIMINAL PROSECUTION THAT WAS FOREGONE FOR MORE THAN A DECADE. NO MERE CHANGING OF THE GUARD STRIPS THE CIRCUMSTANCE OF ITS INEQUITY.” (citing State v Myers 513 SE2d 676 [W Va 1998]).

A contrary result, in the Court’s opinion, would be patently “untenable and ...antithetical ...to the integrity and functionality of the Criminal Justice System...”

#### FINAL THOUGHT:

This case not only sheds light on the enormous power of prosecutors in making decisions that significantly affect peoples’ lives but underscores the IMPORTANCE of obtaining promises with respect to prosecutions (or decisions not to prosecute) or pleas (and any conditions attendant thereto) IN WRITING and/or ON THE RECORD so that they cannot be taken back for no good reason (or because a new DA has taken office or assumed responsibility for a particular file). This is especially true in the lower courts where personnel changeover can be fast and frequent.

As an old saying goes, “a plea/prosecution promise may only be as good as the paper (or record) that it’s printed on.”