CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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OMAR SHARIFF CASH,
*Petitioner*,

v.

GEORGE LITTLE, Acting Secretary, Pennsylvania Department of Corrections; JAMIE SORBER, Superintendent of the State Correctional Institution at Phoenix; MATTHEW WEINTRAUB, District Attorney of the Count of Bucks; JOSH SHAPIRO, Attorney General of the State of Pennsylvania,
*Respondents*.

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On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Third Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Should this Court resolve the division among the Courts of Appeals and determine the appropriate standard for a court to apply in determining whether suppressed impeachment evidence is non-cumulative and material where the witness was impeached by different evidence at trial?

## RELATED PROCEEDINGS

United States Court of Appeals for Third Circuit:

> *Omar Shariff Cash v. Sec'y PA Dept. of Corr.*, No. 21-2124 (Order denying a certificate of appealability on March 4, 2022; Order denying Petition for Rehearing on April 20, 2022)

United States District Court for the Eastern District of Pennsylvania:

> *Omar Shariff Cash v. Wetzel, et. al.*, No. 16-4320 (Magistrate's Report and Recommendation filed on October 31, 2019; Opinion filed on March 10, 2021; Order denying Motion to Alter Judgment filed on May 11, 2021)

Pennsylvania Supreme Court:

*Commonwealth v. Omar Shariff Cash,* No. 123 MAL 2016 (Order denying Petition for Allowance of Appeal on June 29, 2016)

Pennsylvania Superior Court:

> *Commonwealth v. Omar Shariff Cash,* No. 3173 EDA 2010 (Direct Appeal Opinion filed on December 14, 2011)
>
> *Commonwealth v. Omar Shariff Cash,* No. 478 EDA 2015 (Post-Conviction Appeal Opinion filed on December 28, 2015)
>
> *Commonwealth v. Omar Shariff Cash,* No. 122 EDA 2018 (Second Post-Conviction Appeal Opinion filed on October 2, 2018)

Court of Common Pleas, Bucks County, Pennsylvania:

> *Commonwealth v. Omar Shariff Cash,* No. CP-09-CR-0003526-2008 (Direct Appeal Opinion filed on February 17, 2011; First PCRA Appeal Opinion filed on April 24, 2015; Second Post-Conviction Appeal filed on March 8, 2018)

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## OPINIONS BELOW

The order of the United States Court of Appeals for the Third Circuit denying a certificate of appealability was issued on March 4, 2022, is not reported, and appears in the appendix. An order denying a petition for rehearing was issued on April 20, 2022, is not reported, and appears in the appendix.

The opinion of the United States District Court for the Eastern District of Pennsylvania denying the petition for writ of habeas corpus, *Cash v. Wetzel*, 2021 WL 916926 (E.D. Pa. Mar. 10, 2021), is unreported and appears in the appendix. A2.

## JURISDICTION

The Court of Appeals denied Mr. Cash's application for a certificate of appealability on March 4, 2022, and denied Mr. Cash's petition for rehearing on April 20, 2022. On July 17, 2022, Justice Alito granted Mr. Cash's Motion for an Extension of Time to file this petition. This Court has jurisdiction under 28 U.S.C. § 1254.

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law.

## STATEMENT

Petitioner Omar Cash was charged with the first-degree murder of Edgar Rosas Gutierrez, which took place on May 11, 2008. At trial, the Commonwealth

argued that Petitioner had shot Mr. Gutierrez shortly after forcibly entering Mr. Gutierrez's car. Petitioner was convicted and sentenced to life imprisonment on June 2, 2010.

The sole Commonwealth witness to the alleged offense was MCDA,[1] an undocumented immigrant. Her credibility was a key issue at trial.

### A. Pretrial Proceedings

On May 3, 2010, prior to voir dire and pursuant to a defense motion to compel, lead investigator Detective David Nieves testified that in the summer or fall of 2009 he had been contacted by a translator on behalf of MCDA and asked to sign a Supplement B form related to a U-visa application for MCDA.[2] NT 5/3/10 at 15-20. The U-visa program offers temporary nonimmigrant status to victims of "substantial physical or mental abuse" resulting from certain offenses if a law enforcement agency certifies that the victim is aiding an investigation into the alleged offenses. 8 U.S.C. § 1101(a)(15)(U)(i), (iii); *id.* § 1184(p)(1), (4); 8 C.F.R. § 215.14(c)(2), (4)-(5). U-visa holders are generally entitled to four years of nonimmigrant status and may also apply for lawful permanent residence (a "green card") after three years. 8 U.S.C. §§ 1184(p)(6), 1255(m)(1)(A). The purpose of the Supplement B form, Detective Nieves explained, was "to keep [MCDA] in the country legally," and the visa application sought "information from any prosecution

[1] Throughout these proceedings, MCDA has been referred to by her initials to protect her identity.

or police investigation as to her cooperation as a victim, witness, in any prosecution." NT 5/3/10 at 20-21.

During this May 3, 2010, pretrial hearing, the assistant district attorney for the Commonwealth was asked by defense counsel and subsequently the trial court if MCDA was required to cooperate with the Commonwealth pursuant to the green card application, and the ADA stated he "did not know" because he "was not in possession of that information." *Id.* at 29.

MCDA had admitted in her May 11, 2008 statement to the Mercer County, New Jersey police that she was a sex worker. *See* ECF No. 54 at 50, 78-79.[3] MCDA also told Detective Nieves that she worked as a sex worker. *See* ECF No. 54 at 95-96. According to the statute governing the federal visa program, any alien who "has engaged in prostitution within 10 years of the date of application for a visa" is categorically ineligible for such a visa. 8 U.S.C. § 1182(a)(2)(D)(i).

This restriction should have made MCDA ineligible for a visa. But she was nevertheless able to obtain a visa, with the help of Detective Nieves, by failing to admit her history as a sex worker. With apparent disregard for this restriction, Detective Nieves—who was familiar with U-visa forms, having signed them on multiple prior occasions for witnesses in other criminal cases—testified that he signed and returned MCDA's form upon receiving it from MCDA's immigration

[3] ECF references are to the docket of the United States District Court case below. *See Cash v. Wetzel*, No. 2:16-cv-03758-GEKP (E.D. Pa.).

attorney. NT 5/3/10 at 15. Detective Nieves did not retain a copy of this form. *Id.* at 19.

### B. Trial Proceedings

At trial, the Commonwealth presented testimony from MCDA that Petitioner car-jacked the decedent's car, shot the decedent, and sexually assaulted MCDA. NT 5/21/10 at 32-79, 87-104. MCDA also testified that, at the time of the crime, she had been in the country illegally, but that in April 2010 she had received a "a card saying that I can work here." *Id.* at 121. The prosecutor asked, "And did you receive any help, any assistance from Detective Nieves in terms of obtaining that green card or that working permit?" *Id.* MCDA replied "yes." *Id.*

Although defense counsel was able to use MCDA's immigration benefits as impeachment material, suggesting that MCDA was testifying for the prosecution in order to obtain a visa, NT 5/26/10 at 25-26, the defense was unaware that MCDA was required to testify favorably for the Commonwealth and was permitted to falsify her work history on her U-visa application, rendering her permanently ineligible for legal immigrant status should the Commonwealth choose to reveal her fraudulent act to the federal government. *See* 8 U.S.C. § 1182(a)(6)(C)(i). Had these facts been disclosed, counsel could have used it to impeach MCDA by developing the extent of the Commonwealth's power over her, a potentially devastating line of inquiry.

This evidence of MCDA's required cooperation and falsification was suppressed by the Commonwealth. Detective Nieves knew that MCDA worked as a prostitute, *Cash v. Wetzel*, No. 16-3758, 2019 U.S. Dist. LEXIS 192807, at *7 (E.D.

Pa. Oct. 30, 2019), that MCDA would have been obligated to report whether she had ever "[e]ngaged in, or . . . intend[ed] to engage in, prostitution or procurement of prostitution," Petition for U Nonimmigrant Status, USCIS Form I-918 at 4 (Dec. 6, 2021), and that any alien who "has engaged in prostitution within 10 years of the date of application for a visa" would be categorically ineligible to receive a U-visa. 8 U.S.C. § 1182(a)(2)(D)(i). In improperly endorsing MCDA's Supplement B form, and then compounding that error by failing to report MCDA's falsification, or disclose it to the defense, the Commonwealth suppressed exculpatory impeachment evidence.

### C. Postconviction Proceedings

After exhausting his direct appeal, Petitioner filed a pro se PCRA petition in state court. In his amended state postconviction pleading, Petitioner raised a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), alleging that the Commonwealth had suppressed material exculpatory evidence tending to impeach MCDA's credibility, including evidence that MCDA was required to testify and cooperate with prosecution in the instant matter and had falsified her work history in her U-visa application. ECF No. 7-9 at 23-30.

Petitioner's initial PCRA petition was denied, and this denial was affirmed by the Pennsylvania Superior Court. *Commonwealth v. Cash*, No. 478 EDA 2015, 2015 WL 9584932 (Pa. Super. Ct. Dec. 28, 2015). Petitioner filed the instant habeas petition on July 11, 2016. ECF No. 1. Petitioner was granted discovery; however, after unsuccessfully attempting to obtain MCDA's Alien File, ECF No. 17, Petitioner returned to state court and filed a second pro se PCRA petition. During these proceedings, Detective Nieves testified for the first time that he is not and

was not a qualified certifying official, nor a person in a supervisory role specifically designated to issue U-visa certifications on behalf of the Bensalem Township Police Department. NT 8/10/17 at 32-33. Thus, for the first time, Petitioner obtained evidence that the Commonwealth suppressed the fact that Nieves improperly endorsed the Supplement B form on MCDA's behalf. The PCRA court again denied relief, and the Pennsylvania Superior Court affirmed on appeal. ECF No. 7-11 at 5-16.

Having exhausted all possible remedies in state court, Petitioner returned to the United States District Court for the Eastern District of Pennsylvania and, with that court's permission, ECF No. 52, filed a Second Amended Habeas Petition, ECF No. 54, amending and supplementing his initial pro se habeas, ECF No. 1, and First Amended Habeas Petition, ECF No. 37. In this petition, Petitioner again raised his *Brady* claim, reasserting that the State had failed to disclose material exculpatory evidence that MCDA had falsified her work history in her U-visa application, and now additionally asserting that the Commonwealth had also failed to disclose that Detective Nieves improperly endorsed MCDA's Supplement B form in relation to this application. ECF 54 at 14-15.

The Commonwealth filed a Response. ECF No. 58. The magistrate judge issued a report and recommendation to deny relief. ECF No. 59; A1. Petitioner filed Objections, the Commonwealth filed a Response to these objections, and Petitioner filed a Reply to this response. ECF Nos. 65, 66, 69. The district court entered an order approving the Magistrate's report and recommendation, ECF No. 73, and

issued its own memorandum opinion, ECF No. 72, on March 10, 2021. A2. Petitioner filed a motion to alter or amend judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure. ECF No. 74. The district court denied this motion, ECF No. 79, and Petitioner timely filed his notice of appeal. ECF No. 80.

Petitioner filed an application for a certificate of appealability, which the court of appeals denied. ECF No. 83; A3. Petitioner then filed a petition for panel rehearing and rehearing en banc, which the court of appeals also denied. A4. This timely petition follows.

## REASONS FOR GRANTING THE WRIT

### I. This Court Should Resolve a Circuit Split Concerning the Proper Application of *Banks v. Dretke*.

This Court has long held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In *Banks v. Dretke*, this Court reviewed a *Brady* claim in which the State failed to disclose that one of its key witnesses was a paid police informant. 540 U.S. 668, 674 (2004). Although the witness in question had been impeached regarding his "attempts to obtain drugs by fraud" and the fact that he had given false information as a police informant on a prior occasion, this Court rejected the State's argument that the witness's informant status was "merely cumulative" of his prior impeachments and therefore non-material. *Id.* at 702. Instead, this Court concluded that "one can hardly be confident

that Banks received a fair trial, given the jury's ignorance of Farr's true role in the investigation and trial of the case." *Id.*

Although the Third, Fifth, Sixth, Seventh, Tenth, and D.C. Circuits have retained the *Banks* materiality standard, the First, Second, and Eighth Circuits have restricted its scope. In doing so, the First, Second, and Eighth Circuits have found cumulative *any* evidence that would tend to impeach a witness already "heavily impeached at trial." *Id.* at 702. Despite this Court's efforts to provide guidance, this split remains.

### A. The Circuit Courts Are Split on the Correct Interpretation of *Banks v. Dretke*.

The First, Second, and Eighth Circuits have restricted the application of *Banks*. In *United States v. Paladin*, the First Circuit found suppressed impeachment evidence to be cumulative when "the defendant already had available to him evidence that would have allowed for impeachment on the same or similar topics." 748 F.3d 438, 447 (1st Cir. 2014). Because the suppressed evidence "would have permitted one additional avenue to accomplish the same objective," it was "necessarily . . . cumulative . . . [of] the same kind of evidence already in the record." *Id.*

Meanwhile, in *United States v. Persico*, the Second Circuit held that evidence that a witness had found $1.65 million "hidden in the vents of [her] home" and been allowed by the government to keep it tax-free was not material because "her testimony varied from one day to the next . . . on very critical things" and she was therefore "anything but a credible witness." 645 F.3d 85 (2d Cir. 2011) (internal

quotations omitted); *see also United States v. Sessa*, 711 F.3d 316 (2d Cir. 2013) (holding that evidence contradicting a criminal witness's testimony was cumulative in part because, "[a]s evidence to impeach [the witness's] credibility, it was cumulative of abundant other evidence").

The Eighth Circuit has held similarly. *See, e.g., United States v. Pendleton*, 832 F.3d 934 (8th Cir. 2016) (holding that evidence that a witness made inconsistent statements about whether the witness accompanied the defendant to sell drugs was cumulative of evidence that the witness had "cooperated with law enforcement in order to receive more favorable treatment in their own criminal proceedings" because "their credibility had been shaken"), and *United States v. Santisteban*, 501 F.3d 873, 878 (8th Cir. 2007) (holding that evidence of a witness's prior inconsistent statement was cumulative of evidence of the witness's criminal history, plea agreement, and "penchant for false statements" because "[t]he effect of one more piece of impeachment evidence on the jury's evaluation of [the witness's] credibility likely would have been slight").

The First, Second, and Eighth Circuits' approach to materiality (finding any non-disclosed evidence of an already impeached witness cumulative and therefore not material under *Brady*) is at odds with the other Courts of Appeals, which have followed this Court's holding in *Banks*. The Fifth Circuit has held, for example, that undisclosed impeachment evidence is non-cumulative when it "changes the tenor" of the witness's testimony, places the circumstances of their testimony "in context," and/or "provides an explanation" for any inconsistencies. *United States v. Sipe*, 388

F.3d 471, 489 (5th Cir. 2004); *see also LaCaze v. Warden La. Corr. Inst. for Women*, 645 F.3d 728, 737 (5th Cir. 2011) ("[T]he argument that relief should be denied simply because the jury knew one of two completely unrelated bases for [the witness] to lie cannot be sustained").

The First Circuit has adopted a similar approach, as have the Sixth, Seventh, Tenth, and D.C. Circuits. *See, e.g., Barton v. Warden, S. Ohio Corr. Facility*, 768 F.3d 450, 468 (6th Cir. 2015) (holding that suppressed impeachment evidence was non-cumulative because it went "to the heart of the State's theory of the case"); *Simpson v. Carpenter*, 912 F.3d 542, 572-73 (10th Cir. 2018) (holding that evidence that a witness was affiliated with a gang and had given nearly identical jailhouse statements regarding a defendant in an unrelated criminal trial was not cumulative of evidence presented at trial that he was "a liar, a drug dealer, and a criminal"); *United States v. Brodie*, 524 F.3d 259, 269 (D.C. Cir. 2008) (quoting *United States v. Cuffie*, 80 F.3d 514, 518 (D.C. Cir. 1996)) (holding that suppressed impeachment evidence was non-cumulative because it was "almost unique in its detrimental effect on [the witness's] credibility").

This Court's efforts to clarify the *Banks* standard have been insufficient to resolve this circuit split. In *Turner v. United States*, in holding that suppressed impeachment evidence was cumulative of impeachment evidence that touched upon similar topics (e.g., a witness's frequent PCP use or inconsistent statements), this Court wrote that "[w]e of course do not suggest that impeachment evidence is immaterial with respect to a witness who has already been impeached with other

evidence." 137 S. Ct. 1885, 1894-95 (2017). In doing so, this Court cited *Wearry v. Cain*, a case in which this Court found that, while the credibility of a key prosecution witness had been "already impugned by his many inconsistent stories," it "would have been further diminished had the jury learned that [the defendant] may have been physically incapable of performing the role [the witness] ascribed to him, that [the witness] had coached another inmate to lie about the murder and thereby enhance his chances to get out of jail, or that [the witness] may have implicated [the defendant] to settle a personal score." 577 U.S. 385, 393 (2016) (per curiam).

Neither *Turner* nor *Wearry* clearly resolve the split. Neither opinion goes further than *Banks*, which established that a witness that has been partially impeached may be more fully impeached by the introduction of suppressed evidence "directly relevant to [the witness's] part in [the defendant's] trial." *Banks,* 540 U.S. at 702. *Turner* held evidence to be cumulative on the grounds that it "added little more" to the defense's impeachment, 137 S. Ct. at 1896; *Wearry* found evidence non-cumulative on the grounds that it fully discredited a semi-credible witness, 577 U.S. at 393.

### B. This Case Is the Proper Vehicle to Resolve the Split.

This case provides an appropriate vehicle to resolve this split. Here, the prosecution suppressed evidence that MCDA, its star witness, was required to cooperate with the Commonwealth in order to obtain a U-visa, and subsequently had lied on her U-visa application by failing to report that she had been a sex worker — a falsification that could jeopardize her efforts to procure legal status. *See*

8 U.S.C. § 1182(a)(6)(C)(i) ("Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure . . . a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."). However, the jury had already been made aware that MCDA "was not a citizen of the United States and that Detective Nieves had filled out a U-visa application to allow MCDA to avoid deportation since she was the victim of a physical crime." *Cash v. Wetzel*, No. 16-3758, 2019 U.S. Dist. LEXIS 192807, at *31 (E.D. Pa. Oct. 30, 2019) (quoting *Commonwealth v. Cash*, 2015 Pa. Super. Unpub. LEXIS 4679, at *13-14).

Moreover, the evidence of MCDA's required cooperation and falsification was material to Mr. Cash's defense. "When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility could justify a new trial under *Brady*." *Giglio v. United States*, 405 U.S. 150, 154 (1972). Because MCDA was the sole witness to the alleged crimes, materiality depends on whether the "undisclosed impeachment evidence . . . was largely cumulative of impeachment evidence [the defense] already had and used at trial." *Turner*, 137 S. Ct. at 1894. The Commonwealth's failure to disclose the evidence affected Petitioner's entire pretrial preparation, as Petitioner was unable to pierce Pennsylvania's Rape Shield law during pretrial motions without this evidence of MCDA's bias and motive to lie or fabricate.[4] *See United States v. Bagley*, 473 U.S.

[4] The Pennsylvania Rape Shield law generally bars introduction in sex crime cases of an alleged victim's past sexual conduct. *See* Pa. Cons. Stat. §3104(a). The central purpose of the law is to prevent defendants from using a victim's promiscuousness

667, 683 (1985) (noting that for materiality, "the reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defendant's case" and "[t]he reviewing court should assess the possibility that such effect might have occurred in light of the totality of the circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.").

Although it is true that "the jury heard extensive testimony about MCDA's receipt of a U-visa," *Cash v. Wetzel*, No. 16-3758, 2019 U.S. Dist. LEXIS 192807, at *30 (E.D. Pa. Oct. 30, 2019), the jury would have been surprised to learn that the Commonwealth possessed, but had not yet exercised, the means to report MCDA to the federal government for fraud. Such a revelation would have revealed a Sword of Damocles hanging over her head and firmly demonstrated her motive to curry favor with the prosecution. This would have "changed the tenor" of MCDA's testimony and opened a fertile line of inquiry to undermine MCDA's credibility. Such impeachment evidence, placed within the context of the trial record, could "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Defense

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to bolster claims of consent. Despite the rape shield law, a defendant may be able to introduce a victim's sexual history where he can demonstrate that it directly exculpates him by providing evidence of, *inter alia*, "bias, hostility, (or) motive to lie or fabricate." *Id.*

counsel could have introduced evidence of MCDA's lies about her history as a sex worker to show the "disturbing" extent of "the government's control over the witness." *United States v. Sipe*, 388 F.3d 471, 489 (5th Cir. 2004). This impeachment could include, for instance, demonstrating the possibility that MCDA's falsification could permanently bar her access to *any* legal immigration status, her U-visa application notwithstanding. Because MCDA's reliance upon the government for legal status had already been disclosed, however, such impeachment would be deemed merely cumulative and therefore non-material under the First, Second, and Eighth Circuit's cases described above, barring Mr. Cash's *Brady* claim entirely.

The Third Circuit declined to issue a certificate of appealability, after the district court did not address the Commonwealth's suppression of MCDA's required cooperation and whether MCDA's lies about her employment status on her U-Visa application was material impeachment evidence. Instead, the district court, following the reasoning of the Second and Eighth Circuits, did not consider the additional *Brady* material raised by Mr. Cash since defense counsel had already attempted to impeach MCDA on her bias somewhat at trial. *See Cash*, 2021 WL 916926, at *9 ("Mr. Cash knew what visa MCDA had received, and that it required her cooperation with the investigation. . . . Thus, there is no *Brady* violation because Mr. Cash possessed the very information he alleges the Commonwealth 'concealed,' and any violation did not prejudice him because he made the very argument he argues he should have been able to make."); *see also id.* at 8 n.3 ("[W]hile the

prosecution at first did not know about the U visa, the information was later disclosed through Detective Nieves' testimony. And defense counsel was not forced to speculate about MCDA's testimony, but argued at length that her U-visa application gave her a motive to lie, so this alleged bias was put before the jury to consider in its deliberations.").

While this Court has endeavored to examine the way in which the lower courts are applying *Banks*, given the lingering splits among the Circuits and the factual distinctions between this case and *Banks*, this case is an appropriate vehicle for this Court to resolve the split and provide further guidance on these important issues.

## CONCLUSION

For these reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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Dated: August 18, 2022