

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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.

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

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMAR CASH	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN E. WETZEL, et al.	:	NO. 16-3758

REPORT AND RECOMMENDATION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: 10/30/2019

This is a counseled petition for writ of habeas corpus filed pursuant to 28 U.S.C. §2254 by an individual currently serving a sentence of life imprisonment at the Pennsylvania State Correctional Facility at Greene. For the reasons that follow, I recommend that the petition be denied.

I. Factual and Procedural Background

A. The Events of May 11 and 12, 2008

As set forth by the Court of Common Pleas of Bucks County, the evidence which emerged at Cash's trial included the following:

[S]hortly before midnight on May 11, 2008, Edgar Perez Rosas-Gutierrez (hereinafter "Edgar") and MCDA (collectively sometimes referred to as "the victims"), proceeded to Jalapeño Joe's [a nightclub located in northeast Philadelphia, also called "the Nightclub"] in a black Buick sedan which belonged to Edgar's uncle, Rene Gutierrez. Edgar parked the car in an adjoining parking lot near the Nightclub. The two victims then entered the Nightclub and spent several hours dancing and socializing. At approximately 3:30 a.m. on May 11, 2008, the victims left the Nightclub. Upon exiting the Nightclub, the victims walked to Edgar's car. ... Petitioner [Cash] at this time was loitering in the area of the parking lot After seeing the victims enter the Buick, Petitioner entered the victims' vehicle by way of the rear driver's side door. Petitioner pulled out a handgun, pointed it at Edgar's head, and began shouting. Petitioner instructed Edgar to begin driving. Edgar turned the vehicle on and quickly drove away from the Nightclub traveling northbound on Castor Avenue. The Petitioner, at this time, took the victims hostage.

While driving and pointing the handgun at each of the victim's head, Petitioner demanded the victims take him to a hotel. At gunpoint, Petitioner robbed Edgar of his identification papers and MCDA of \$400 in her purse. Thereafter, Petitioner and the victims proceeded northbound onto Roosevelt Boulevard. Using Edgar as his interpreter because MCDA did not speak English, Petitioner directed that MCDA climb into the back seat with him. She complied. Once MCDA was in the back seat, Petitioner proceeded to remove MCDA's clothes and rape her at gunpoint.

After the rape, Petitioner continued to demand that the victims take him to a hotel. Eventually, the victims pulled into the Sunrise Inn located on U.S. Route 1 in Bensalem Township, Bucks County. Edgar parked the vehicle alongside the building. Once parked, Petitioner demanded Edgar's wallet at gunpoint. Edgar complied. Petitioner removed the cash and threw the wallet back at Edgar. At the same time, Petitioner demanded MCDA put her clothes back on and return to the front passenger seat. Petitioner then demanded Edgar drive away from the Sunrise Inn.

Upon leaving the Sunrise Inn, Petitioner and the victims proceeded onto the exit ramp from northbound Roosevelt Boulevard leading to the eastbound direction of Street Road in Bucks County, Pennsylvania. At gunpoint, Petitioner directed Edgar to pull over and stop the car. Petitioner exited the vehicle and approached the driver's side door. Petitioner then pointed the gun at Edgar, grabbed him around the neck, and physically removed him from the vehicle. While Petitioner held Edgar at gunpoint, the two men walked toward an embankment alongside the roadway. Near the top of this embankment, Petitioner shot Edgar execution style in the back of the head, severing Edgar's brain stem and killing him instantly. Petitioner then returned to the vehicle, entered the driver's side door, and drove away. At approximately 1:45 p.m., on May 11, 2008, the body of Edgar was discovered by a passing motorist. The motorist called the police who quickly responded to the scene.

After killing Edgar, Petitioner ... drove MCDA toward an area that was most likely Philadelphia Park on Street Road in Bensalem Township, Bucks County. Petitioner exited the car, grabbed MCDA by her hair and forced her out of the vehicle. Petitioner then held MCDA down onto the hood of the car and raped her again. Fearing for her life, MCDA attempted to run away. Petitioner ran after her, grabbed her arm, and forcibly pulled her back into the car. Once inside, Petitioner fastened MCDA's seatbelt and drove away in the direction of Central New Jersey. While driving, Petitioner kept his left hand on the steering wheel while holding the gun with his right hand pointed at MCDA.

Petitioner proceeded toward New York, making his next stop at a Comfort Inn on U.S. Route 1 in Lawrence Township at approximately 5:30 a.m. Petitioner took MCDA by the arm and walked inside the hotel. Once inside, using identification from an "Elbert Small," Petitioner was able to book room number 410.

After checking into the hotel, Petitioner took MCDA by the arm and escorted her to the hotel room. Once inside, Petitioner once again raped MCDA in the bedroom. A short time later, Petitioner and MCDA went down to the hotel lobby whereupon MCDA ran

from Petitioner out the front door. Petitioner gave chase, whereupon he grabbed MCDA's shoulder with both arms managing to rip MCDA's purse from her. MCDA broke free from Petitioner's grasp, ran back inside the hotel screaming and jumped behind the check-in counter. The hotel clerk, realizing MCDA was in severe distress, called the police. Before police arrived, Petitioner fled the scene. MCDA was then taken to a hospital where she was examined.

Commonwealth v. Cash, CP-09-CR-3526-2008 (C.C.P. Bucks, March 8, 2018), attached to the Commonwealth's Answer in Opposition to Second Amendment to Petition for Writ of Habeas Corpus, as Exhibit I, at 1-4.

On May 13, 2008, Cash was arrested by New York City Police Officers in connection with the theft of a car. Id. at 5. Bucks County Detective Daniel Nieves traveled to New York to interrogate Cash. Notes of Testimony, August 13, 2009 at 130. After Cash was read his rights under Miranda v. Arizona, 384 U.S. 436 (1966), Cash told Detective Nieves "I don't want to talk about no murder." Id. at 138. Detective Nieves told Cash that was "fine." Id.

Cash was later extradited to Pennsylvania. According to Cash, when he got there on August 4, 2008, Philadelphia County police detectives attempted to question him, but he told them he would not speak without an attorney present. Transcript of May 17, 2010, at 18. Nevertheless, shortly after that, Detective Nieves spoke to Cash. Transcript of August 13, 2010, at 46. According to Detective Nieves, Cash did not attempt to terminate the conversation or invoke his right to counsel, although there were certain topics he refused to discuss. Id. at 209, 212, 220.

B. Pre-Trial Motions

At some point, it became known that MCDA worked as a prostitute, including earlier on the evening of May 11, 2008. Transcript of August 14, 2009, at 15. On September 18, 2009, however, the trial court granted the Commonwealth's Motion in Limine to exclude evidence of MCDA's prior sexual conduct pursuant to Pennsylvania's Rape Shield Law, although it did

permit Cash to “elicit evidence that MCDA’s vaginal injuries may have been the result of engaging in prior sexual acts within the period of time in question, rather than the result of force from the alleged rape.” Commonwealth v. Cash, No. 3526/08 (C.C.P. February 17, 2011), attached to the Commonwealth’s Response of August 18, 2016, as Exhibit C, at 33.

Also on September 18, 2009, the trial court denied Cash’s motion to suppress statements he had made to law enforcement personnel on May 14, 2008, and August 4, 2008. Id. The trial court found that Legal Aid counsel from New York had told the Pennsylvania police of Cash’s decision to remain silent, but that Cash had ignored that advice and spoken with Detective Nieves voluntarily, waiving his right to counsel. Id. at 26-27. Alternatively, the court concluded that the admission of statements made to the Bensalem Township Police had a *de minimis* prejudicial effect on Cash’s trial and would constitute harmless error. Id. at 31.

In another pre-trial hearing, on November 4, 2009, the trial court granted Cash’s request for leave to represent himself at trial, with standby counsel. Criminal Docket, attached to Commonwealth’s Answer to Second Amendment to Petition for Writ of Habeas Corpus, as Exhibit A, at 25. Initially, the Office of the Public Defender was appointed as standby counsel, but the Defender was soon replaced by Michael S. Goodwin, Esq. Id. at 27.

On January 8, 2010, Goodwin advised the trial court that Cash no longer wished to appear *pro se* and had asked that Goodwin proceed as trial counsel. Commonwealth v. Cash, No. 3526/08, Transcript of January 8, 2010, at 2. After Cash was questioned in court by the judge, Goodwin, and the prosecutor, the judge permitted Cash to proceed to trial represented by Goodwin. Id. at 9. Cash was also permitted a second attorney, as was the custom in Bucks County in capital trials. Id.

B. Evidence Concerning the County's Immigration Assistance to MCDA

At hearings on August 13, and November 4, 2009, defense counsel asked the trial court to ensure that the Commonwealth disclose to the defense information regarding MCDA's immigration status. He argued that if the Commonwealth was assisting MCDA in an immigration matter, it might show bias on her part. Transcript of August 13, 2009, at 21-22; Transcript of November 4, 2009, at 64, 69.

At both of those hearings, prosecutor Marc Furber stated that he did not have information as to MCDA's status, but that he believed she was legally in the country at the time of the crime. Transcript of August 13, 2009, at 24; Transcript of November 4, 2009, at 69-70. Mr. Furber said he would disclose further evidence when he got it. Transcript of August 13, 2009, at 24.

However, it appears that this was not followed by any further disclosure of information. On April 30, 2010, Cash filed a motion to compel discovery regarding MCDA's immigration status.

On May 3, 2010, immediately prior to jury selection, the court considered Cash's motion to compel. Transcript of May 3, 2010, at 11. It emerged that Bucks County David Nieves had signed a form in support of MCDA's application for a U-visa.¹ This form was later identified as a "Schedule B" form. Detective Nieves testified:

I was mailed a form by an immigration attorney, which I believe I've done this on maybe two or three other occasions where a victim in a case that I may be investigating applies for citizenship, so I received the form, they asked for details of the incident which we couldn't disclose, so I signed the form and mailed that in.

Transcript of May 3, 2010, at 15.

¹ The U nonimmigrant status (U visa) is set aside for victims of certain crimes who have suffered mental or physical abuse and are helpful to law enforcement or government officials in the investigation or prosecution of criminal activity. <https://www.uscis.gov/humanitarian/victims-human-trafficking-other-crimes/victims-criminal-activity-u-nonimmigrant-status/victims-criminal-activity-u-nonimmigrant-status>.

Nieves testified that the purpose of the form he completed was “to keep her [MCDA] in the country legally.” Id. at 20. He stated that it sought “information from any prosecution or police investigation as to her cooperation as a victim, witness, in any prosecution.” Id. at 21. Later, when asked the nature of the form that he completed, he replied: “I believe it’s a U Visa. I don’t know the exact name.” Id. at 23. He maintained that, although he knew MCDA was not a United States citizen, he did not know whether or not she was in the country legally, and that the form he signed did not specify. Id. at 20-21. Detective Nieves further testified that he had told Furber, the prosecutor, that he had signed this form, but did not remember when he told him. Id. at 17. When Detective Nieves sent the form back to the immigration attorney, he did not retain a copy of it, nor did he make a report reflecting that he had signed it. Id. at 19.

The Commonwealth was able to make all of this known to the jury. At trial, defense attorney Charles Jonas suggested in his opening statement to the jury that MCDA was testifying dishonestly in order to obtain a visa:

[T]here’s a few things about [MCDA] that Mr. Furber didn’t tell you. During jury selection he made it clear to you that she’s in this country illegally, but what he didn’t tell you is that by being a witness she has actually gotten a visa. Detective Nieves has helped her get a visa and change her citizen – not citizen, but residency status in this country. So that’s one thing you can consider when you’re hearing her testimony.

Regarding that, Detective Nieves will tell you that he didn’t know what her status was when he was helping her go through that visa process, and that’s something you can consider. Obviously, if he didn’t know, why would he be helping her? That goes to police bias

Transcript of May 17, 2010, 38-39.

MCDA testified upon direct examination that, at the time of the crime, she was in the country illegally, but that in April, 2010, she obtained “a card saying that I can work here.”

Transcript of May 21, 2010, at 21. The prosecutor asked her: “And did you receive any help, any assistance from Detective Nieves in terms of obtaining that green card or that working

permit?” Id. She responded: “Yes.” Id. He asked: “Do you know if he filled out a paper?” Id. Again, she said “yes.” Id.

The following exchange then occurred:

PROSECUTOR: Did you change your testimony in any way? Did you change your recollection of this based upon your hopes of your receipt of a working permit?

MCDA: No.

Id. at 124.

On cross-examination, defense counsel asked:

COUNSEL: Detective Nieves helped you get this visa and he did that last summer, right?

MCDA: He sign a paper for me.

COUNSEL: He did that last summer?

MCDA: Last year.

COUNSEL: And that was because you were the victim of a crime, right?

MCDA: A friend of mine came to me and told me that I had the right to have a document because I was a victim.

COUNSEL: So that’s a yes?

MCDA: Yes.

Id. at 130-131.

Detective Nieves also testified at trial. He told the jury that he had completed “what’s referred to as a U-visa application” in August or September of 2009. Transcript of May 25, 2010, at 72. He explained:

I believe it had the highlighted space for me to fill out, who the victim is, the date of the crime, what the crime was. It asks for details of the crime and to attach a report, and at that point I couldn’t because it was an open investigation, so I couldn’t include a report,

but I did, in fact, state that, yeah, there was and I confirmed there was, in fact, a criminal investigation involving [MCDA].

Id. at 73.

As at the hearing, Nieves testified at trial that he had filled out the same form in three or four other cases. Id. at 74. He stated: “I usually ask a supervisor if it’s okay to fill it out, there was no problem, I’ve done it in the past without even thinking about it.” Id. at 74-5. He confirmed on cross-examination that he did not prepare a report about having filled out and returned this form at the time he did it. Id. at 101. He prepared a report only on May 19, 2010, during trial. Id. at 102. In the report, Nieves stated that he had been advised by “immigration” that they received the MCDA’s application on October 28, 2009, and that it had been approved in April, 2010. Id.

Mr. Jonas spent considerable time in his closing argument impeaching MCDA’s credibility on the basis that she had received assistance from the Commonwealth:

One of the things that Mr. Cash had told Detective Nieves – and Detective Nieves tells you – is that this case all comes down to [MCDA], and it does. Now last week, when I spoke to you I told you that one of the benefits she got from cooperating with the police was that she has now gotten a visa. Now she can’t be deported.

Mr. Furber addressed you before I did. He didn’t bring that up. I brought that up. Detective Nieves took the stand and he told you that last August is when he filled out this paperwork, and then in November of last year we had a Court hearing, that was one of the issues that was brought to the Judge’s attention and Detective Nieves didn’t say anything about, you know, that is the steps we’ve taken to help this person get a visa. He said it was only May 3d when we started this case and he was on the stand and I was asking him questions, that’s the first time that he had told anybody representing Mr. Cash what they’ve done to help this person get a visa.

The other thing that’s important is last August when he did this he didn’t make a report about it, and he told you how important his police reports are, right? He said he jots down anything that’s important, because oftentimes he’ll be testifying about something months after it happens, and in this case it’s years after it happened. He makes his reports accurate. He jots down everything that’s important. Not only did he tell you how important his police reports are to you, he showed you yesterday. When he testified nine times during his testimony he looked at his reports because he didn’t remember. He had

to look to his reports and yet he is helping somebody who is the only witness he has in this case, he's helping that person to get a visa, to stay in this country legally, and that's not important to put in a police report?

When is the first time he makes a police report about it? After I bring it to your attention, within the last week now Detective Nieves has this police report. Oh, these are the steps we've taken to help this person get a visa. So don't let the prosecutor tell you that's not important, 'cause if it is – if it isn't, why didn't they tell us about it before?

Transcript of May 26, 2010, at 27-8.

C. Cash's Testimony

Cash testified at trial in his own defense. He testified that his friend, who was a pimp, brought MCDA to meet him at the New Jersey hotel, and that they had consensual sex there for which Cash paid. Exhibit C to Commonwealth's First Answer at 35-36, citing Testimony of May 25, 2010, at 128-133.

D. Cash's Conviction and Sentencing

On May 27, 2010, following a seven-day jury trial, Cash was convicted of numerous counts including first-degree murder, two counts of rape, and kidnapping. Criminal Docket, supra, at 5-14. The jury was not able to reach a unanimous decision as to whether or not to impose a death sentence. Commonwealth v. Cash, No. 3526/08, Transcript of June 2, 2010, at 2-5. The trial judge therefore sentenced Cash to life imprisonment without the possibility of parole in the murder conviction, and a number of concurrent and consecutive sentences on the other charges. Id. at 14-17.

E. Cash's Appeals

After the denial of his post-trial motions, Cash filed a direct appeal. In his appeal, he argued that (1) the trial court erred in failing to suppress statements he made to the Bensalem Police on August 4, 2008; (2) the trial court abused its discretion in permitting into evidence two statements he made to Bensalem Police on May 14, 2008: one referring to another case pending against him in another jurisdiction, thus alerting the jury to the fact that he was accused of other crimes; and another about efforts to serve a Philadelphia warrant upon him, which highlighted the fact that he was accused of another serious offense; and (3) the trial court erred in deciding that Cash could not introduce evidence that the female victim worked as a prostitute, and that the male murder victim drove her to assignments. Commonwealth v. Cash, No. 3173 EDA 2010 (Pa. Super. December 14, 2011), attached to Commonwealth's Response of August 18, 2016, as Exhibit E, at 2-4.

The Superior Court denied relief on December 14, 2011, adopting the trial court's opinion as its own. Id. The Pennsylvania Superior Court denied *allocatur* on May 31, 2012. Commonwealth v. Cash, 49 MAL 2012, attached to Commonwealth's Response of August 18, 2016, as Exhibit F, at 3.

On August 15, 2012, Cash filed a timely petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. C.S. §9541, *et seq.* After numerous amendments to the petition, requests for discovery, changes of mind about whether to appear *pro se*, and four hearings, the PCRA court denied relief on February 5, 2015. Commonwealth v. Cash, No. CP-09-CR-3526-2008 (C.C.P. Bucks, April 24, 2015), attached to Commonwealth's Response of August 18, 2016, as Exhibit N, at 1-11.

Cash appealed the denial of his first PCRA petition. In his PCRA appeal, Cash argued that (1) trial counsel was ineffective in coercing him or inducing him to waive his right to self-representation; and that (2) counsel was ineffective in failing to argue, at trial and on direct appeal, a claim under Brady v. Maryland, 373 U.S. 83 (1963), that the Commonwealth suppressed evidence regarding MCDA's immigration status, specifically her application for a U-Visa. Commonwealth v. Cash, No. 478 EDA 2015, 2015 WL 9584932 (Pa. Super. Dec. 28, 2015) at *3. Cash claimed the U-visa application evidenced a benefit provided to MCDA in exchange for her testimony, which he could have used to explore the issue of bias. Id. at *5.

The Pennsylvania Superior Court affirmed the PCRA court's action on December 28, 2015. Id. The Pennsylvania Supreme Court denied *allocatur* on June 29, 2016. Commonwealth v. Cash, 141 A.3d 478 (Table) (Pa. 2016).

Cash filed a second PCRA petition on June 12, 2017. Since this took place during the pendency of the present habeas corpus petition, it will be discussed in more detail below.

F. This Habeas Corpus Petition

On July 11, 2016, Cash filed a *pro se* petition in this Court seeking habeas corpus relief. In his original petition, Cash argued that (1) trial counsel denied his right to self-representation; (2) the Commonwealth violated his rights under Brady by withholding and misrepresenting evidence regarding the benefits MCDA "was expecting and received" in exchange for her testimony, specifically with regard to her application for a U-visa, by (a) concealing the existence of a form completed in support of that application by a Bucks County detective, David Nieves; (b) failing to obtain a copy of the form Detective Nieves signed and disclose it to Cash; and (c) eliciting false testimony about the U-visa from MCDA. Habeas Corpus Petition at Attachments 1 and 2.

On August 30, 2016, this Court appointed the Federal Defender's Office to represent Cash. On December 22, 2016, Cash filed a motion for discovery. In it, Cash sought permission to seek MCDA's "alien file" from the Department of Homeland Security, ("DHS"), to clarify the extent to which the Commonwealth may have "downplayed and obfuscated the nature of the assistance it provided to MCDA in exchange for her cooperation" in Cash's prosecution. Memorandum in Support of Motion for Discovery, filed in this matter as Document 11, at 8.

In his discovery motion, Cash also argued that MCDA might have lied in her visa application about whether she was a sex worker "creating a strong motive for her to lie about whether her sexual encounter with Cash was an act of consensual prostitution, as he maintained." Id. In other words, she could only obtain a visa by being a crime victim, so she was motivated to lie about the sexual assault.

On January 18, 2017, I granted Cash's motion to seek discovery from DHS. Order of January 18, 2017, docketed in this matter as Document 17. My Order contained the following language: "In granting this Motion, the undersigned has taken into consideration the fact that the conviction challenged in this action was the lone aggravator in a separate murder case in the Philadelphia Court of Common Pleas, which resulted in a death sentence." Id. Thus, although this is not a capital habeas, it merits special attention to the Cash's rights.

By letter dated February 22, 2017, DHS refused to provide a file for MCDA or even to confirm that one existed. Memorandum in Support of Motion to Compel Production of Documents, docketed in this case as Document No. 20, at 3. Cash then filed in this court a Motion to Compel Production of Documents from DHS. Id.

I proceeded on this Motion to Compel by Report and Recommendation, recommending that the motion be denied. Report and Recommendation of May 24, 2017, docketed in this matter as Document No. 30. Cash filed objections, to which DHS filed a response. Cash's Objections, docketed in this case as Document No. 31; DHS's Response, docketed in this case as Document No. 33.

On June 23, 2017, before any ruling on his discovery motion, Cash filed a First Amended Petition for Writ of Habeas Corpus with permission of this Court. Petition, docketed in this case as Document 35. In it, Cash added a claim that his Fifth Amendment right against self-incrimination was violated when the trial court permitted the introduction of statements he made to police after he invoked his rights to an attorney, and to remain silent. First Amended Petition for Writ of Habeas Corpus, supra at 1-4. He also added a claim of cumulative error. Id. at 4-5.

Also on June 23, 2017, Cash filed a Motion to Stay, pending the outcome of a second PCRA petition which he had filed in the Bucks County Court of Common Pleas on June 12, 2017. Motion to Stay, docketed in this case as Document No. 36. I granted Cash's Motion to Stay. Order of July 18, 2017, docketed in this matter as Document No. 40.

In his second PCRA petition, which was filed *pro se*, Cash argued that the untimeliness of the petition should be forgiven under the Pennsylvania rules, because the Commonwealth had interfered with his ability to obtain evidence regarding MCDA's immigration status.

Commonwealth v. Cash, CP-09-CR-3526-2008 (C.C.P. Bucks, Mar. 9, 2018), attached to Commonwealth's Response to Second Amended Petition of August 2, 2019, as Exhibit I. Cash also argued that his second PCRA petition was based on newly discovered evidence, in the form of "the possible non-existence of MCDA's U-visa." Id. at 20.

Aside from these timeliness arguments, Cash argued that the Commonwealth interfered with his right to obtain exculpatory evidence by (a) failing to retain a copy of the Schedule B form signed by Detective Nieves; (b) permitting Detective Nieves to testify concerning his practice in other cases involving U-visa applications; and (c) failing to permit Cash to call MCDA's interpreter as a witness to question her as to whether the U-visa application existed. Id. at 25. Cash also argued that the Commonwealth's failure to retain a copy of the U-visa document signed by Detective Nieves caused him to involuntarily waive his right to self-representation, because he would not have permitted counsel to act for him if he had known counsel could not obtain MCDA's file with DHS. Id. at 28-9.

By order dated December 4, 2017, the PCRA court denied Cash's second PCRA petition as time barred, under 42 P.C.A. §9545(b). In its Rule 1925 opinion, it also discussed the merits of Cash's claims, finding that they did not provide a basis for relief. Criminal Docket, supra, at 73; Commonwealth's Exhibit I, supra.

Cash appealed the denial of his second PCRA petition to the Pennsylvania Superior Court. On October 2, 2018, however, the Superior Court affirmed the PCRA court's holding that the second PCRA petition was time barred. Commonwealth v. Cash, No. 122 EDA 2018 (Pa. Super. Oct. 2, 2018), attached to Commonwealth's Response to Second Amended Petition of August 2, 2019, as Exhibit L. Cash did not appeal this decision to the Pennsylvania Supreme Court.

On November 1, 2018, Cash filed a motion to reactivate the habeas proceeding in this court. Motion, docketed in this case as Document 44. The case was removed from civil suspense. Order of December 13, 2018, docketed in this case as Document No. 47.

On March 7, 2019, Cash filed a counseled motion to withdraw his motion to compel discovery from DHS. Motion, docketed in this case as Document No. 49. At the same time, he sought leave to file a second amendment to his petition for writ of habeas corpus, attaching the proposed amendment as an exhibit to his motion. Motion, docketed in this case as Document No. 50. Both motions were granted by the District Court, which also ordered that Cash's proposed amendment be deemed filed. Order of the Honorable Gene E.K. Pratter, docketed in this case as Document 51.

In Cash's Second Amended Habeas Corpus Petition, he specifically reincorporates all claims for relief in his original petition, and first amended petition. Second Amendment to Petition for Writ of Habeas Corpus, filed in this case as Document No. 54 at 1.

Cash also supplements the Brady claim he originally filed by arguing that (a) MCDA and Detective Nieves testified falsely at trial by describing a U-visa as a "work permit;" (b) Detective Nieves was not authorized to sign the Schedule B form; (c) the Commonwealth aided MCDA "in her circumvention of the U-visa process by precluding disclosure of her history of prostitution... which would have precluded her participation in the U nonimmigrant process." Second Amended Petition at ¶51; (d) even if the Commonwealth did not knowingly withhold the Schedule B form, its inadvertent withholding of a document it constructively possessed violated Brady.

Additionally, Cash has made another due process claim, arguing that the Commonwealth "knowingly and intentionally subverted the court process" and "maliciously abused the federal U-visa process." Id. at ¶¶ 93-124.

Based on the same facts, Cash also argues that he was deprived of his right to counsel on November 4, 2009, and of the right to self-representation later, on January 8, 2010, when he permitted Mr. Goodwin to represent him, because he would not have waived his right to represent himself had he known that counsel could not obtain MCDA's DHS file. *Id.* at ¶¶125-132. Finally, Cash asserts a claim of cumulative error. *Id.* at ¶133.

Thus, now before the court is a petition for habeas relief asserting: (1) a Brady claim based on the prosecution's withholding of exculpatory evidence pertaining to its assistance to MCDA with respect to her immigration status; (2) a separate due process claim of prosecutorial misconduct based on essentially the same facts, which Cash calls an intentional "subver[sion] of the Court Process" and "malicious abuse" of the U-visa process; (3) denial by the trial court of the right to self-representation; (4) violation of the right against self-incrimination and the right to counsel; (5) the deprivation of the right to counsel *and* the right to self-representation as a result of prosecutorial misconduct; and (6) a claim of cumulative error.

The Commonwealth has responded to Cash's Second Amended Petition. Cash filed a reply on August 2, 2019.

II. Relevant Law

A. Habeas Corpus Standard of Review

Under the federal habeas corpus statute, where an issue was adjudicated on the merits in a state court, the federal court can only grant relief where the state court adjudication resulted in a decision that was either (1) contrary to, or involved an unreasonable application of clearly established federal law; or (2) based on an unreasonable determination of the facts in light of the evidence. 28 U.S.C. § 2254(d).

B. Exhaustion and Procedural Default

A federal court will not address the merits of claims presented in a habeas corpus petition unless “the applicant has exhausted the remedies available in the courts of the State.” 28 U.S.C. § 2254(b)(1)(A); Carter v. Vaughn, 62 F.3d 591, 594 (3d Cir. 1995); Story v. Kindt, 26 F.3d 402, 405 (3d Cir. 1994). The exhaustion requirement is not a mere formality, but is based on rules of comity between state and federal courts. O’Sullivan v. Boerckel, 526 U.S. 838, 844 (1999).

Further, if a claim was presented to the Commonwealth courts, but those courts deemed it defaulted under an independent and adequate state rule, it is considered procedurally defaulted for purposes of habeas corpus review, and will not be reviewed by a federal court. Coleman v. Thompson, 501 U.S. 722, 729 (1991).

To survive procedural default in an action for habeas corpus, a petitioner must demonstrate either (a) cause for the default and actual prejudice arising from the alleged violation of federal law, or (b) that failure to consider the claims will result in a fundamental miscarriage of justice. Coleman, *supra* at 501 U.S. 750. To establish a fundamental miscarriage of justice, the petitioner must demonstrate actual innocence. Schlup v. Delo, 513 U.S. 298 (1995).

III. Discussion

A. All New Allegations in Cash’s Second PCRA Petition are Procedurally Defaulted

As discussed above, the Pennsylvania courts decided that Cash’s Second PCRA petition was time barred under 42 Pa. C.S.A. §9545(b). Any allegations that Cash made there are therefore procedurally defaulted. Coleman, *supra*; and see Peterson v. Brennan, 196 Fed. Appx. 135, 142 (3d Cir. 2006); Jordan v. Bledsoe, Civ. A. No. 11-3091, 2012 WL 310420 at *3 (E.D.

Pa. July 27, 2012); Ball v. Lamas, Civ. A. No. 09-1918, 2012 WL 1622664 at *12 (April 18, 2012), adopted 2012 WL 1624155 (E.D. Pa. May 9, 2012).

Cash argues that his procedural default should be excused. He has not demonstrated actual innocence, so he can not show a fundamental miscarriage of justice. He argues, however, that his default was caused by the government's concealment of the fact that Detective Nieves did not have the authority to complete MCDA's certification form. Cash points to language preceding the signature space on the Schedule B form in which the signer certifies: "I am the head of the agency listed in Part 2 or I am the person in the agency who has been specifically designated by the head of the agency to issue U nonimmigrant status certification on behalf of the agency." Detective Nieves testified on August 10, 2017, that there was no "specific person that strictly deals with U-Visas" at the Bensalem Police Department. Id. at ¶ 38 and at Exhibit F.

However, as above, Cash found out at the May 3, 2010, hearing that Detective Nieves had signed a form in support of MCDA's application for what he believed was called a U-visa. Cash has conceded this well-documented fact. Id. at ¶9. Cash and his attorneys could have investigated the nature of the form submitted by law enforcement in support of a U-visa application at any time after this, and seen the language in the signature section of the Schedule B form. Therefore, Cash could have made the same argument he is making now at any time after May 3, 2010.

Contrary to Cash's representation, there is no evidence that this was a fact concealed by the Commonwealth until the hearing on his second PCRA petition. (This leaves to the side the question of whether Detective Nieves committed any wrongdoing in signing the form). Thus, Cash has not shown government concealment which would warrant excuse of his procedural default.

A claim under Brady based on the Commonwealth's assistance to MCDA in obtaining a U-visa was in this case before Cash filed his second amended habeas petition. However, the arguments regarding the Brady claim which were raised for the first time in Cash's second PCRA petition cannot be considered here.

B. The Brady Claim

To prove a Brady violation, a claimant must show that (1) the government withheld evidence, either willfully or inadvertently; (2) the evidence at issue was favorable to the accused, either because it was exculpatory or of impeachment value; and (3) the withheld evidence was material, so that the failure to produce it caused prejudice. Strickler v. Greene, 527 U.S. 263, 281-2 (1999); Lambert v. Blackwell, 37 F.3d 210, 252 (3d Cir. 2004).

Initially, it is not clear that Cash ever exhausted a direct Brady claim. In his first PCRA petition, he argued that his trial counsel was ineffective for failing to raise a Brady claim. However, in deciding the ineffectiveness claim, the Pennsylvania Superior Court analyzed the direct Brady claim in detail, and looked at the PCRA court's analysis of it. Exhibit Q attached to Commonwealth's Response of August 18, 2016, supra, at 10-12. In these circumstances, courts have at times found that a direct claim was exhausted. Gee v. Kerestes, 722 F. Supp.2d 617, 623-4 (E.D. Pa. 2010); Veal v. Myers, 326 F. Supp.2d 612, (E.D. Pa. 2004).

Assuming that the Brady claim was exhausted, it still provides no basis for relief because it has no merit. Citing Pennsylvania precedent, the Pennsylvania Superior Court concluded that the Commonwealth had no obligation to provide the form to Cash because it was not in the Commonwealth's possession or control. 2015 WL 9584932, supra, at *5. The Superior Court also decided that Cash could not show that the Commonwealth's inability to produce the form

prejudiced him, because the jury heard extensive testimony about MCDA's receipt of a U-visa.

Id.

The Superior Court cited the opinion of the PCRA court on this point:

[E]ven if the Commonwealth did possess the U-visa application, the failure to disclose the actual form used by MCDA was not prejudicial to Appellant because he was aware of the substance of the executed form. MCDA's U-visa status was exhaustively covered at trial. Through extensive testimony of both MCDA and Detective Nieves at trial, the jury was 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. The fact that Appellant was not in physical possession of a form establishing MCDA's citizenship status had no prejudicial impact at trial because Appellant was aware, and therefore able to cross-examine MCDA, regarding her citizenship and any benefits she had received in exchange for her testimony. For these reasons, it is our belief that Appellant cannot establish that he was prejudiced in not receiving a copy of said application, and as such, his Brady claim fails.

Id. at **5-6, quoting Exhibit N attached to Commonwealth's Response of August 18, 2016, supra, at 21.

As above, this Court can only disturb the Superior Court's finding if it resulted in a decision that was either (1) contrary to, or involved an unreasonable application of, clearly established federal law; or (2) based on an unreasonable determination of the facts in light of the evidence. 28 U.S.C. § 2254(d).

Here, the Superior Court did not apply law which was contrary to, or involved an unreasonable application of, Brady. Cash argues that the fact that the police did not retain a copy of the U-visa certification form does not protect it from culpability under Brady, because it had constructive possession of the form: "The Commonwealth cannot evade its duty of disclosure under Brady based on a failure to adequately maintain its own files." Second Amended Petition at ¶ 56.

The “constructive possession” concept is not, however, applicable here. A prosecutor has constructive possession of evidence if, although he has no actual knowledge of it, he should have known that it existed. Maynard v. Government of Virgin Islands, 392 Fed. Appx. 105, 113 (3d Cir. 2010), citing U.S. v. Pelullo, (“Pelullo II”, 399 F.3d 197, 218 (3d 2005)). In other words, “constructive possession” imputes knowledge of evidence to the prosecution if it should have known of the evidence. Maynard, supra (“Thus, under Brady, the government must take the minimal steps necessary to acquire ... information ‘of which he prosecution should be aware, even if it lacks knowledge of the material at the time the defendant requests disclosure’”), citing United States v. Risha, 445 F.3d 298, 307 (3d Cir. 2006). This is not a factor here, where the prosecution revealed the existence of the Schedule B form and its contents prior to trial.

It is also abundantly clear that the Superior Court’s determination that Cash’s Brady claim failed in the absence of prejudice was consistent with clearly established federal law, which does require that prejudice be shown. Strickler, supra.

Nor was the Superior Court’s conclusion that Cash was not prejudiced based on an unreasonable determination of the facts in this case. As described above, Cash’s defense counsel had sufficient information about the Commonwealth’s assistance to MCDA regarding her immigration status to cross-examine both MCDA and Detective Nieves on this issue. The defense was able to argue in both its opening and closing statements that MCDA was biased and prevaricating.

Cash argues that new facts which emerged after trial show that the Commonwealth’s concealment went further than was previously known. In fact, however, the evidence to which he points does not significantly change the scenario addressed by the Pennsylvania Superior Court in its affirmance of the denial of his first PCRA petition.

First, Cash argues that the Commonwealth concealed the true nature of a U-visa, and the identity of the form Detective Nieves signed, by failing to correct MCDA's testimony that it was a "work visa." Second Amended Habeas Corpus Petition at ¶25. She had testified at trial that she received "a card saying she can work here." *Id.* at ¶11. According to Cash, he only found out more when MCDA's immigration lawyer testified at an April 22, 2014, hearing in his first PCRA petition. *Id.* at ¶¶31-33. He claims this was the first date upon which he knew that MCDA was obligated to cooperate with the prosecution to obtain her visa. *Id.* at 33.

However, as set forth above, Detective Nieves testified at the May 3, 2010, hearing that the form he signed was "to keep her [MCDA] in the country legally," and that it sought "information from any prosecution or police investigation as to her cooperation as a victim, witness, in any prosecution." *Id.* at 20-21. He even stated: "I believe it's a U Visa." *Id.* at 23.

Further, as was also discussed above, Cash's attorney told the jury in his opening address that "by being a witness [MCDA] has actually gotten a visa." Thus, he already knew that her visa was conditioned upon her being "a witness" – at least, that is what he told the jury. Whether that visa was or was not technically a "work visa" is irrelevant.

Cash also maintains that the February 22, 2017, response of DHS to his motion for discovery "introduced the possibility that MCDA's alien file may not exist." Second Amended Habeas Corpus Petition at ¶36. He argues that this "possibility of the non-existence of MCDA's alien file" constituted new evidence.

This argument is based on a fallacy. The letter from the DHS stated: "In accordance with established federal law, DHS/USCIS declines to ... confirm the existence or non-existence of an Alien file for [MCDA]." Motion to Compel Production of Documents, docketed as Document No. 20, at Exhibit A. It did not "introduce" any "possibility." It simply told Cash

nothing. It could also be noted that Cash has not explained how the non-existence of a DHS file would be exculpatory, or what possible motive MCDA, the prosecution, police, and MCDA's immigration attorney would have to fabricate a U-visa story.

Finally, as in his argument regarding excuse of his procedural default, Cash alleges that he only discovered on August 10, 2017, during the hearing on his second PCRA petition, that Detective Nieves' signing of the U-visa form was "improper." Second Amended Habeas Corpus Petition at ¶ 38. Indeed, he argues that "the Commonwealth suppressed the fact that Nieves improperly endorsed" the form. *Id.*

In arguing that he was prejudiced by this, Cash claims that, if he had known before trial that Detective Nieves was not "specifically designated" as required by the form, he would have portrayed Detective Nieves to the jury as a liar. *Id.* at ¶62. He also maintains that, because MCDA *may* have falsely denied engaging in prostitution in her U-Visa application, or because Bucks County did not charge her with the crime of prostitution, he could have argued to the jury that "Nieves and MCDA were in a position in which they must safeguard each other's illegal actions." *Id.* at ¶63.

Aside from being distinctly far-fetched, these arguments rely on a showing that Detective Nieves' wrongdoing in signing the form (if indeed it was wrong) was an intentional evasion of the directions on the form. On the contrary, Detective Nieves' testimony that his supervisors had permitted him to sign such forms in the past is un rebutted. Thus, at worst, the evidence shows that the Bensalem Police Department took a haphazard approach to the Schedule B directions. Needless to say, without any evidence that MCDA made misrepresentations in her U-visa application, the argument about "safeguarding each other's illegal actions" could not have been made to the jury.

In sum, even in light of what Cash has called “new evidence,” the Pennsylvania Superior Court’s decision that Cash was not prejudiced by the absence of a copy of the actual form signed by Detective Nieves remains consistent with the facts of this case. As the PCRA court expressed it, “MCDA’s U-Visa status was exhaustively covered at trial.” 2015 WL 958432 at *5.

To recapitulate, the defense was able to – and did – tell the jury that (a) MCDA was not a United States citizen; (b) Detective Nieves submitted a form in connection with MCDA’s U-visa application; (c) the U-visa is given to non-citizens who cooperate in criminal prosecutions; and that (d) MCDA obtained the U-visa.

C. Prosecutorial Misconduct: Subversion of the Court Process

Cash has made a separate due process claim supported by the same facts which he alleged in his Brady claim, in which he alleges that the Commonwealth intentionally subverted the court process and the U-visa process. This claim was not raised before the Commonwealth and is, therefore, unexhausted and procedurally defaulted. Further, if considered on its merits, this claim would fail. It is inescapable that, even if Cash could prove that the Commonwealth’s delay and lack of clarity in providing the facts surrounding MCDA’s immigration status was the result of a nefarious plan, he was not prejudiced because he knew prior to trial that Detective Nieves had aided MCDA in obtaining a U-visa.

Indeed, Cash offers the following prejudice argument:

The established agreement between MCDA, Detective Nieves and ADA Furber via the improperly endorsed Supplement B form would have provided the defense an opportunity to effectively cross-examine MCDA and Nieves as to this quid pro quo, giving the jury an opportunity to assess the reliability and credibility of the Commonwealth’s star witness and lead detective and properly weigh the testimony in conjunction with their self-interest in the prosecution of Petitioner.

Second Amended Habeas Petition at ¶120. As discussed above, however, this is exactly what *did* occur at trial.

D. Denial of the Right to Self-Representation

In his first petition for habeas corpus relief, Cash argued that he was denied his right to self-representation. He maintains that, on January 8, 2010, when he waived his right to proceed *pro se*, he had been led by Michael Goodwin, his counsel, to believe that Mr. Goodwin would “conduct all the necessary investigation and preparations for an effective defense presentation with respect to the guilt phase in the capacity of lead counsel.” Original Petition for Habeas Corpus Relief, docketed as Document 1, at ¶38. He believed that the second attorney who was appointed at that hearing would take charge of the penalty phase, in the event one was needed.

Id.

On the contrary, Cash argues, after Mr. Goodwin was reappointed, he ceded the guilt phase preparation to Charles Jonas, the second appointed attorney. Id. at ¶39. According to Cash, he was abandoned at the guilt phase of his trial, in terms of trial preparation and presentation. Id. at 43. If he had known this would be the case, he would not have waived his right to proceed *pro se*.

This argument was exhausted in Cash’s first PCRA petition. However, it was rejected by the Pennsylvania Superior Court, which wrote:

Appellant conflates his decision to waive his right to self-representation, which the record clearly establishes was voluntary, intelligent and knowing, with his dissatisfaction with counsel’s overall performance. As noted by the PCRA court, Appellant fully understood the ramifications of self-representation and had been permitted to proceed *pro se*. Trial Court Opinion 4/27/15 at 18-19. Accordingly, “[s]uch a right was not denied Appellant in his own case. In fact, it was Appellant himself who requested that Mr. Goodwin serve as counsel at trial, rather than functioning only as stand-by counsel.” Id. at 18. As further recognized by the PCRA court, “Appellant offered no evidence which would support an inference that trial counsel’s strategy prejudiced him in any way.” Id. Appellant includes no explanation of what his guilt phase strategy was or how it differed from counsels’, much less, how that difference prejudiced him. During trial, appellant did not seek to reassert his right to self-representation or express dissatisfaction with the conduct of counsel at trial. Appellant’s attempt to recast his disappointment with the

outcome of the trial into one concerning the voluntariness of his decision to accept counsel is unavailing.

2105 WL 9584932 at *4.

The Superior Court's handling of this matter is not inconsistent with federal law. Indeed, the Superior Court cited Buel v. Cooksey, 233 F.3d 783, 800 (3d Cir. 2000), where the Third Circuit Court of Appeals wrote: "It is well established that a defendant can waive the right of self-representation after asserting it." Id. at *5. It also cited Wilson v. Walker, 204 F.3d 33, 38 (2d Cir. 2000), a Second Circuit case in which a petitioner was found to have abandoned his initial request to proceed *pro se* where he never reasserted the right, even at the two subsequent hearings at which substitute counsel was appointed. Id.

At the January 8, 2010, hearing, Cash was subjected to a thorough colloquy by the Court, Mr. Goodwin, and the prosecutor before his waiver of his right to self-representation was accepted. Cash has not made any complaint with regard to this colloquy.

The state court's decision was also consistent with the facts in this case. Even here, Cash has not pointed to any flaw in his trial council's representation. Instead, he relies exclusively on an ambiguous passage of transcript testimony from his PCRA hearing:

ATTORNEY: And if you could, when you went to those meetings to see him in Philadelphia, is it fair to say you went over strategy for the case and discovery that you had and other issues associated with the guilt phase of the case?

MR. JONAS: Yes.

ATTORNEY: And is it fair to say that your focus primarily right up until right before trial in speaking with the defendant had been the guilt phase of the case and how he wanted to pursue his claim of innocence?

MR. JONAS: Yes. He knew that we were working for the penalty phase, but his focus with us was mostly on the initial guilt phase.

Original Petition at ¶40, citing Notes of Testimony of March 14, 2013, at 46.

Cash portrays this as an “open admission” by Jonas that counsel were working *exclusively* for the penalty phase. *Id.* at ¶¶41, 43. However, it seems more likely that it means that counsel were working on both phases of trial, particularly when taken together with the statement that counsel “went over” the guilt phase every time they visited Cash. It is too slim a reed to bear the whole case for a deprivation of a right to counsel.

E. Statements Made by Cash to Bensalem Law Enforcement

In his First Amended Petition for Writ of Habeas Corpus, Cash argued that the admission at trial of statements he made on August 4, 2008, after invoking his Sixth Amendment right to remain silent, and his Fifth Amendment right to the presence of counsel, violated his rights under those Amendments. Although Cash claims that Detective Nieves “elicited several incriminating statements,” he points to only one: according to Detective Nieves, Cash said “the Spanish girl was our whole case.” First Amended Petition for Writ of Habeas Corpus at ¶¶ 14-15, citing Notes of Testimony, May 25, 2010, at 49. He also identified himself in pictures made from surveillance footage which was introduced to the jury. *Id.* at ¶15.

This is a claim which Cash exhausted in his direct appeal. It was discussed by the trial judge in his Opinion of February 17, 2011. Exhibit C to Commonwealth’s Response of August 18, 2016, at 20-31. The reasoning of that trial court opinion was adopted by the Superior Court of Pennsylvania upon appeal. Exhibit E to Commonwealth’s Response of August 18, 2016.

As above, the trial court concluded that Cash’s rights had not been violated because he ignored his counsel’s advice to remain silent, and waived his right to counsel during questioning. The trial court also found that Cash was not significantly prejudiced by these statements. Exhibit C, supra, at 26-27, 31.

Without entering into the details of Cash's interactions with Bensalem law enforcement, it is sufficient to say that the trial court (and therefore the Superior Court) was clearly correct in finding harmless error, at least as it pertains to the one statement identified here by Cash. The fact that the statement suggested that Cash knew MCDA was "Spanish" is not significant, in light of the fact that Cash himself testified at trial that he had encountered MCDA on the night in question. Similarly, Cash does not explain why his identification of himself in convenience store video prejudiced him, given that he testified at trial that he had traveled from Philadelphia to New Jersey for what he portrayed as a consensual liaison with MCDA.

F. Denial of the Rights to Representation and to Appear Pro Se Due to Brady Violations

Cash maintains that he elected to forego his *pro se* status at trial because of the statement of his counsel, Michael Goodwin, Esq., that Mr. Goodwin "would help Petitioner gain information about MCDA's immigration status." Second Amended Habeas Petition at ¶129. He argues that his waiver of the right to appear *pro se* was involuntary and unknowing because he would not have waived it if he had known that his counsel could not obtain the Schedule B form signed by Detective Nieves. *Id.* at ¶ 130-131.

This argument was raised for the first time in Cash's Second PCRA Petition. It is, therefore, procedurally defaulted. (In his first PCRA Petition, Cash argued that he was induced by counsel to waive his right to *pro se* representation by a false promise that counsel would "adopt [his] guilt phase defense strategy." 2015 WL 9584932 at *4).

In any event, as mentioned above, Cash was subjected to a thorough colloquy by the judge, Mr. Goodwin, and the prosecutor at the time that he waived his right to appear *pro se*. He has not criticized this colloquy in any way. Further, Cash did not condition his waiver on the

production of immigration evidence, nor did he mention this issue at all at the hearing.

Commonwealth v. Cash, supra, Transcript of January 8, 2010.

Interestingly, Cash also argues that the same facts he has alleged with respect to the Brady claim resulted in the deprivation of his right to counsel. He maintains:

[A]t the time he elected to proceed *pro se* Petitioner was not aware of the Commonwealth's prosecutorial misconduct detailed above Because [neither] Petitioner nor his counsel was informed of the Commonwealth's prosecutorial misconduct, his waiver of counsel (at a critical stage) was unknowing and therefore involuntary

Second Amended Habeas Petition at ¶¶ 127-8.

This argument was never raised before the Commonwealth. It is unexhausted and procedurally defaulted. It is also incoherent, because Cash does not explain how knowing any of the facts surrounding the Brady claim would have affected his request to appear *pro se*. Needless to say, this argument is also inconsistent with his argument that he would have proceeded *pro se* if he had known that counsel would be unable to obtain a copy of the Schedule B form.

F. Cumulative Error

Finally, Cash maintains that, even if he was not significantly prejudiced by any one error, the cumulative effect of all the errors alleged in his petition for habeas corpus relief caused him cumulative prejudice. This claim cannot succeed. With respect to Cash's claim regarding the admission of the statements he made to Detective Nieves on August 4, 2008, the Commonwealth courts conceded he may have suffered *de minimis* prejudice. However, because Cash has not shown wrongdoing with respect to his other claims (many of which are, in any case, defaulted) there is no other prejudice to raise this above a *de minimis* level.

IV. Conclusion

Based on the foregoing, I make the following:

RECOMMENDATION

AND NOW, this 30th day of October, 2019, IT IS RESPECTFULLY
RECOMMENDED that the petition for writ of habeas corpus be DENIED. There is no basis for
the issuance of a certificate of appealability.

BY THE COURT

/s/Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OMAR CASH	:	CIVIL ACTION
	:	
v.	:	
	:	
JOHN E. WETZEL, et al.	:	NO. 16-3758

ORDER

GENE E.K. PRATTER, J.

AND NOW, this day of , 20 , upon careful and independent consideration of the petition for writ of habeas corpus, and after review of the Report and Recommendation of the United States Magistrate Judge Jacob P. Hart, it is ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED;
2. The petition for writ of habeas corpus is DENIED.
3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

GENE E.K. PRATTER, J.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

11/1/19

RE: CASH v. WETZEL, ET AL.,
16-CV-3758

NOTICE

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Hart on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

KATE BARKMAN
Clerk of Court

By: s/James Deitz _____
James Deitz, Deputy Clerk

cc All Counsel

Courtroom Deputy to Judge Pratter
civ623.frm(11/07)

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

OMAR SHARIFF CASH,
Petitioner

v.

JOHN E. WETZEL *et al.*,
Respondents

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CIVIL ACTION

No. 16-3758

MEMORANDUM

PRATTER, J.

MARCH 10, 2021

Omar Shariff Cash is serving a life sentence for the kidnapping of Edgar Perez Rosas-Gutierrez and MCDA,¹ the murder of Mr. Rosas-Gutierrez, and the repeated rape of MCDA. Mr. Cash petitioned for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Magistrate Judge Jacob P. Hart issued a Report and Recommendation recommending that Mr. Cash's Petition be denied. (Doc. No. 59.) For the reasons that follow, the Report and Recommendation is adopted in full.

BACKGROUND

I. Factual Background

At trial, the following evidence was introduced, as summarized by the Bucks County Court of Common Pleas:

On May 10, 2010, shortly before midnight, victims Edgar Perez Rosas-Gutierrez and MCDA proceeded to Jalapeño Joe's nightclub in a black Buick sedan belonging to Mr. Gutierrez' uncle, Renee Gutierrez. Mr. Rosas-Gutierrez parked the vehicle in an adjoining parking lot some distance from the club. The two victims entered Jalapeño Joe's and spent several hours inside dancing and socializing with various members of Mr. Rosas-Gutierrez's family. At approximately 3:30 a.m., when the club was almost empty, the victims left. They walked alone to the dimly lit area where their car was parked. When they arrived at the car, Mr. Rosas-Gutierrez hugged and kissed MCDA and then opened the passenger side door for her. She got inside and lit a cigarette. Mr. Rosas-Gutierrez

¹ MCDA's true name has been redacted out of a concern for her privacy.

then walked around the back of the car and got into the driver's seat. Thereupon, [Mr. Cash], who had been loitering in the area of the parking lot . . . entered the victims' vehicle by way of the back door on the driver's side. He pulled out a handgun, pointed it at the head of Mr. Rosas-Gutierrez and began shouting.

MCDA, who speaks Portuguese and is not fluent in English, could not understand what [Mr. Cash] was saying. Mr. Rosas-Gutierrez, however, had some knowledge of English, and was able to converse with [Mr. Cash]. Apparently at [Mr. Cash's] direction, Mr. Rosas-Gutierrez turned on the ignition and quickly drove away from Jalapeño Joe's northbound on Castor Avenue. In an "ugly" and menacing tone of voice, [Mr. Cash] told the victims to take him to a hotel, alternately pointing his handgun at their heads. At gunpoint, [Mr. Cash] robbed Mr. Rosas-Gutierrez of his identification papers, and MCDA of \$400.00 in cash from her purse. Thereafter, [Mr. Cash] and his hostages proceeded northbound in the vehicle on Roosevelt Boulevard. At that time, using Mr. Rosas-Gutierrez as his interpreter, [Mr. Cash] directed that MCDA climb into the back seat with him. She complied and [MCDA] proceeded to remove her clothes and rape her at gunpoint while the car was in motion. . . . In between his threats and criminal acts, [Mr. Cash] laughed. After the rape, [Mr. Cash] pushed MCDA aside on the back seat and told her to put her clothes back on. He continued to demand that the victims take him to a hotel. Eventually, they pulled into the Sunrise Inn located on Route One in Bensalem Township, Bucks County, and parked the vehicle along side of the building. While parked, [Mr. Cash] demanded Mr. Rosas-Gutierrez's wallet at gunpoint. When it was handed over, [Mr. Cash] removed the cash and threw the wallet at Mr. Rosas-Gutierrez. In the meantime, MCDA had put her clothes back on while the car was parked. [Mr. Cash] then directed that she return to the front passenger seat. At gunpoint, he told Mr. Rosas-Gutierrez to drive away from the premises. . . . At trial, the jury was shown a surveillance video depicting the victim's car at the Sunrise Inn parking lot.

Upon leaving the Sunrise Inn, [Mr. Cash] and his victims proceeded onto the exit ramp from northbound Roosevelt Boulevard leading to eastbound Street Road in Bucks County. The exit ramp was poorly lighted and surrounded by woods on both sides. At gunpoint, [Mr. Cash] directed Mr. Rosas-Gutierrez to pull over and stop the car. [Mr. Cash] got out of the back seat of the car and approached the driver's door. He pointed his handgun at Mr. Rosas-Gutierrez, grabbed him around the neck and removed him from the car. [Mr. Cash] walked Mr. Rosas-Gutierrez up an embankment [alongside] of the roadway at gunpoint. Near the top of the embankment he shot Mr. Rosas-Gutierrez point blank in the back of the head, severing his brain stem and killing him instantly. MCDA heard the gun shot and then observed [Mr. Cash] quickly return to the vehicle. As she was calling out for "Edgar", [Mr. Cash] got into the driver's seat and fastened her seatbelt while holding the gun. [Mr. Cash] was laughing as he pulled away from the scene, leaving tire marks on the shoulder of the road as he quickly accelerated. A night clerk at the Sunrise Inn heard the gunshot at approximately 4:30 a.m. on May 11, 2008.

[Mr. Cash] and MCDA next stopped at a "7-Eleven" convenience store located a short distance from the murder scene, where he purchased a beverage. They then left and [Mr. Cash], acting happy, was singing and moving to the music playing on the car radio as he drove. Shortly thereafter, [Mr. Cash] pulled into a parking lot near a large building with

an expansive lawn, most likely Philadelphia Park on Street Road in Bensalem Township. He got out of the car, grabbed MCDA by her hair and pulled her out of the vehicle. At gunpoint, he forced her to take off her pants and pushed her onto the hood of the car. Thereupon he held her down and [r]aped her. [Mr. Cash] kept the gun in his hand during the sexual assault. After the rape, MCDA put on her clothes and she was led by [Mr. Cash] toward a small lake. Fearing for her life, she ran away toward[s a] building and tried to get inside, but was not able to gain entry or make contact with anyone. [Mr. Cash] came after her, took hold of her arm and pulled her back to the car. He put her in the front passenger seat, fastened her seatbelt, and drove off in the direction of central New Jersey. [Mr. Cash] drove with his left hand and kept the gun in his right hand aimed at MCDA. As he was driving, [Mr. Cash] appeared happy and began singing the tune "New York, New York". He laughed as he commented on how beautiful it is there. [Mr. Cash] proceeded toward New York and made his next stop at a Comfort Inn on U.S. Route One in Lawrence Township, New Jersey. He and MCDA arrived there at approximately 5:30 a.m., whereupon he removed her from the car by taking her arm. They then entered the lobby and [Mr. Cash] directed her to sit in a waiting area while he approached the check-in counter. Using identification that belonged to an individual by the name of "Elbert Small" from the state of Delaware, [Mr. Cash] booked room number 410. While he was checking in, MCDA attempted to draw the attention of the clerk by gesturing that [Mr. Cash] had a gun, but the clerk did not respond.

After checking in, [Mr. Cash] took MCDA by the arm and escorted her to the hotel elevator. They proceeded to the fourth floor and entered room 410. Once inside, [Mr. Cash again raped MCDA] After[wards, Mr. Cash] impatiently told MCDA to get dressed. She did so and they went down to the lobby, whereupon MCDA ran from [Mr. Cash] out the front door. He followed and grabbed her shoulders with both arms and ripped off her purse. MCDA then ran back inside screaming for help, jumped over the four-foot check-in counter and hid behind the clerk. After the clerk realized that she was in great distress, he telephoned the police. By the time police responded, [Mr. Cash] had fled the scene. MCDA was taken by New Jersey authorities for a sexual assault examination. A video surveillance tape showing the common areas of the Comfort Inn was viewed by the jury at trial. The video depicted the victim running from the lobby followed by [Mr. Cash], and then running back into the lobby and climbing over the front desk to escape [Mr. Cash]. The video showed the [Mr. Cash] wearing the same tan slacks and shirt and black baseball cap that he was observed in earlier that morning.

(Doc. No. 7-2 at 45-47; Doc. No. 7-3 at 4-5.)

Mr. Cash then drove to New York City, where he was arrested for possession of marijuana on March 11, 2007. (Doc. No. 7-3 at 5.) After giving the police a false name and address, Mr. Cash was released pending a court appearance. *Id.* at 6. The next day, Mr. Cash stole a vehicle. *Id.* On March 13, 2008, police noticed the stolen SUV double parked at a bus stop on Broadway and 136th

Street in Manhattan. *Id.* The officers stopped the vehicle after Mr. Cash attempted to move it. *Id.* Mr. Cash became aggressive and combative, and was arrested. *Id.*

While Mr. Cash was in custody, Bucks County Detective Daniel Nieves traveled to New York to meet with him. *Id.* at 8. After the detective read to Mr. Cash his *Miranda* rights, Mr. Cash told Detective Nieves: “I don’t want to talk about no murder.” (Doc. No. 59 at 3.) However, Mr. Cash did observe that law enforcement from Bucks County probably had a better case against him than those from Philadelphia. (Doc. No. 7-3 at 8.)

Mr. Cash subsequently was extradited to Pennsylvania. Mr. Cash testified at trial that on August 4, 2008, Philadelphia County police detectives attempted to question him, but he told them that he would not speak without an attorney present. *Id.* But, nevertheless, he did later speak to Detective Nieves. *Id.* According to Detective Nieves, Mr. Cash refused to discuss certain topics, but did not attempt to end the conversation or invoke his right to counsel. *Id.* During this conversation, he stated that the entire case against him rested on the “Spanish girl.”

II. Mr. Cash’s Trial

A. Pre-trial Motions

Mr. Cash filed several pre-trial motions. The first relevant motion sought to suppress statements he had made to law enforcement on May 14, 2008 and August 4, 2008. (*See* Doc. No. 59 at 4.) The trial court denied the motion, holding that Mr. Cash had ignored his counsel’s recommendation to remain silent, and had spoken voluntarily. *Id.* Alternately, the court held that admission of the statements constituted harmless error. *Id.*

Second, the trial court granted Mr. Cash’s request to represent himself at trial with standby counsel. *Id.* Approximately two months later, stand-by-counsel informed the court that Mr. Cash no longer wished to proceed pro se. *Id.* After Mr. Cash was questioned by the judge, stand-by

counsel, and the prosecutor, the judge allowed counsel to represent Mr. Cash. *Id.* Mr. Cash was also assigned a second attorney. *Id.*

The third set of motions all related to information about MCDA's immigration status. At hearings conducted on August 13 and November 4, 2009, defense counsel argued that if the Commonwealth was assisting MCDA with her immigration status, evidence of that assistance might be exculpatory. *Id.* at 5. The prosecutor responded that he did not have information about MCDA's status, but believed that she was in the country legally. *Id.* The Commonwealth did not produce any information about MCDA's immigration status, and Mr. Cash filed a motion to compel discovery on April 30, 2010. *Id.* On the day before jury selection, the court considered his motion to compel. *Id.* During that hearing, Detective Nieves testified that he had signed a form supporting MCDA's application for a U Visa. *Id.* He testified that the purpose of the form was "to keep [MCDA] in the country legally," and that the visa sought "information from any prosecution or police investigation as to her cooperation as a victim, witness, in any prosecution." *Id.* at 6. When he was asked about the nature of the form he signed, he answered: "I believe it's a U Visa. I don't know the exact name." *Id.* Detective Nieves further testified that he knew MCDA was not a United States citizen but was unsure whether she was in the country legally, and that he sent the form back to MCDA's immigration attorney without retaining a copy. *Id.*

B. Trial

At trial, both parties discussed MCDA's immigration status at length. Defense counsel's opening statement suggested that MCDA was testifying dishonestly in order to obtain a visa, and that Detective Nieves' choice to sign the form was evidence of "police bias." *Id.* at 6. MCDA testified on direct examination that at the time of the crime she was in the country illegally, but that in April 2010 she had received "a card saying that I can work here." *Id.* 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.* at 6-7. She replied “yes.” *Id.* at 7. The prosecutor then asked: “Do you know if he filled out a paper?” *Id.* Again, she replied “yes.” *Id.* However, MCDA also testified that she did not alter her testimony to increase her chances of receiving “a working permit.” *Id.*

Detective Nieves also testified that he had completed “what’s referred to as a U-visa application” on behalf of MCDA. *Id.* He also described the form he filled out in some detail. *Id.* at 7-8. He also testified that this was the fourth or fifth such form that he had filled out for various witnesses, and that he usually asked a supervisor for permission before filling one out. *Id.* at 8. He stated that doing so was “no problem, I’ve done it in the past without even thinking about it.” *Id.* He testified that he had not prepared a report about filling out the form at the time, and only did so during trial after Mr. Cash’s attorney asked about the form. *Id.*

Mr. Cash’s counsel’s closing argument attempted to impeach MCDA’s credibility by pointing to the assistance she had received from the Commonwealth. *Id.* He noted that MCDA could no longer be deported, and that information about MCDA’s immigration status came up only shortly before trial. He also attempted to impeach Detective Nieves’ testimony by pointing out that he said that he writes reports about “everything that’s important,” but had failed to make a report about signing the U visa certification until during trial. *Id.* at 8-9.

C. Conviction and Sentencing

After a seven-day jury trial, Mr. Cash was convicted of a variety of counts, including first-degree murder, two counts of rape, and kidnapping. *Id.* at 9. The jury did not come to a unanimous decision on the death sentence, so the trial judge sentenced Mr. Cash to life imprisonment without the possibility of parole. *Id.*

III. Mr. Cash's Post-trial Filings

A. Direct Appeal

Mr. Cash filed a variety of post-trial motions which were denied, and Mr. Cash filed a direct appeal. *See id.* at 10. In his appeal, he made three arguments: (1) the trial court erred in failing to suppress statements he made to the Bensalem Police on August 4, 2007; (2) the trial court abused its discretion by admitting into evidence two statements he made to Bensalem Police on May 14, 2008, which alerted the jury to the fact that Mr. Cash was accused of other crimes; and (3) that the trial court erred in prohibiting Mr. Cash from introducing evidence that MCDA worked as a prostitute, and that Mr. Rosas-Gutierrez drove her to assignments. (Doc. No. 7-3 at 36-60; Doc. No. 7-4 at 4-23.)

The Superior Court denied Mr. Cash's appeal, adopting the trial court's opinion as its own. (Doc. No. 7-4 at 71.) The Pennsylvania Supreme Court denied his petition for allowance of appeal. (Doc. No. 7-5 7.)

B. First PCRA Petition

On August 12, 2012, Mr. Cash filed his first petition under Pennsylvania's Post-Conviction Relief Act ("PCRA"). After a protracted set of proceedings, the PCRA court denied Mr. Cash's petition. (Doc. No. 7-9 at 34-58.) Mr. Cash then appealed. In his appeal, Mr. Cash argued that that trial counsel was ineffective by (1) coercing or inducing him to waive his right to self-representation, and (2) by failing to argue a *Brady* claim at trial and on direct appeal regarding MCDA's immigration status. The Superior Court affirmed the PCRA court's decision. (Doc. No. 7-11 at 4-16.) Mr. Cash petitioned the Pennsylvania Supreme Court for allowance of appeal, and his petition was denied. (*See* Doc. No. 7-11 at 20.)

C. Habeas Petition

On July 11, 2016, Mr. Cash filed a petition for a writ of habeas corpus. In this petition, he argued that (1) his trial counsel denied his right to self-representation, and (2) the Commonwealth violated his *Brady* rights by withholding and misrepresenting information about MCDA's immigration status. On his second claim, Mr. Cash argued that this obfuscation was accomplished by concealing information about the form completed by Detective Nieves, failing to retain and disclose a copy of the form Detective Nieves signed, and by eliciting false testimony about the U visa from MCDA. (*See* Doc. No. 1-2 at 5-31; Doc. No. 1-3 at 1-25.)

On August 30, 2016, the Court appointed the Federal Defender's Office to represent Mr. Cash. On December 22, 2016, Mr. Cash filed a motion for discovery. (Doc. No. 11.) In it, Mr. Cash sought MCDA's "Alien File" or "A File" from the Department of Homeland Security. He argued that this information may show that the Commonwealth "downplayed and obfuscated the nature of the assistance it provided to MCDA in exchange for her cooperation." (Doc. No. 11-1 at 8.) He also argued that MCDA may have lied in her visa application about whether she had engaged in prostitution, "creating a strong motive for her to lie about whether her sexual encounter was an act of consensual prostitution, as he maintained." *Id.* Magistrate Judge Hart granted Mr. Cash's motion to seek discovery. (Doc. No. 17.)

In a letter memorandum dated February 22, 2017, the DHS refused to provide or confirm the existence of MCDA's A File. (Doc. No. 20-2 at 3.) Mr. Cash then filed a motion to compel production of the documents. (Doc. No. 20.) Magistrate Judge Hart filed a report and recommendation, which recommended that the motion be denied. (Doc. No. 30.)

Before this Court had ruled on Mr. Cash's motion to compel, Mr. Cash sought and obtained this Court's permission to file a First Amended Petition for Writ of Habeas Corpus. In this petition, Mr. Cash added a claim that his Fifth Amendment rights were violated when the trial court

introduced evidence of statements he made to the police after he invoked his right to an attorney, and his right to remain silent. (Doc. No. 35 at 1-4.) He also added a claim of cumulative error. *Id.* at 4-5.

Mr. Cash also filed a motion to stay, pending resolution of his second PCRA petition, which had been filed on June 12, 2017. *Id.* at 13. Magistrate Judge Hart granted that motion. (Doc. No. 40.)

D. Second PCRA Petition

Mr. Cash filed a second PCRA petition in the Bucks County Court of Common Pleas. (Doc. No. 36.) In this petition, Mr. Cash argued that untimeliness should be forgiven because the Commonwealth had interfered with his ability to obtain evidence about MCDA's immigration status, and that he had newly discovered evidence in the form of "the possible non-existence of MCDA's U-visa." (Doc. No. 55-2 at 6-7.) He largely repeated issues already litigated in his first PCRA petition, but also added two claims: (1) a *Brady* violation premised on the DHS's memorandum, and (2) denial of the right to self-representation. In this second claim, Mr. Cash argued that Detective Neives's failure to retain a copy of the U visa certification he signed violated Mr. Cash's right to self-representation, because he would not have allowed counsel to represent him if he had known that counsel would be unable to obtain MCDA's A file. *Id.* at 28-9.

On December 4, 2017, the PCRA court denied his PCRA petition as time-barred. It also held that Mr. Cash's claims were without merit. (Doc. No. 55-5 at 47-76.) Mr. Cash appealed that denial to the Pennsylvania Superior Court. The Superior Court affirmed the PCRA court. (Doc. No. 55-6 at 68-71.) Mr. Cash did not appeal that decision to the Pennsylvania Supreme Court.

E. Second Amended Habeas Petition

Mr. Cash then filed a motion to remove this case from suspense. (Doc. No. 44.) The Court granted his motion. (Doc. No. 47.) Mr. Cash then filed for leave to file a second amended habeas

petition. (Doc. No. 50.) The Court granted that motion as well. (Doc. No. 52.) Mr. Cash's second amended habeas petition realleges all claims for relief contained in his original and first amended petition, but also adds to his *Brady* claim by arguing that: (1) the Commonwealth permitted MCDA and Detective Nieves to testify falsely by describing the U visa as a "work permit;" (2) Detective Nieves was not permitted to sign the U visa certification; (3) the "Commonwealth assist[ed] MCDA in her circumvention of the U-Visa process by precluding disclosure of her history of prostitution, which she had admitted to [Detective] Nieves"; and (4) that even if the Commonwealth did not knowingly withhold the U visa certification, it constructively possessed the form such that failure to produce it violated *Brady*. (Doc. No. 54 at 14.) Mr. Cash also added a due process claim, arguing that the Commonwealth "knowingly and intentionally subverted the court process" and "maliciously abused the federal U-visa process." *Id.* at 26-34. Next, Mr. Cash added an argument that he was deprived of the right to counsel as well as his right to self-representation. *Id.* at 34-36. Finally, Mr. Cash added a cumulative error claim. *Id.* at 36.

LEGAL STANDARD

Federal courts can only grant a writ of habeas corpus if a claim "was 'adjudicated on the merits' in state court." *Bennett v. Superintendent Graterford SCI*, 886 F.3d 268, 281 (3d Cir. 2018) (citing 28 U.S.C. § 2254(d)). And if the claim was adjudicated on the merits in state court, habeas relief can only issue if adjudication of the claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1)-(2).

“If a claim was not adjudicated on the merits in state court, [the court] review[s] legal questions and mixed questions of law and fact *de novo*.” *Id.* (citing *Cone v. Bell*, 556 U.S. 449, 472 (2009)). In that case, the state court’s factual determinations are presumed to be correct which may be rebutted by clear and convincing evidence. *Id.* at 282 (citing *Appel v. Horn*, 250 F.3d 203, 210 (2001)).

“As a general rule, federal courts may exercise the power to consider habeas applications only where ‘it appears that the applicant has exhausted the remedies available in the courts of the State.’” *McCandless v. Vaughn*, 172 F.3d 255, 260 (3d Cir. 1999) (quoting *Walker v. Vaughn*, 53 F.3d 609, 614 (3d Cir.1995)). This “exhaustion rule” requires a petitioner to “fairly present” federal claims in state court before bringing them in federal court. *Id.* (citing *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Lambert v. Blackwell*, 134 F.3d 506, 513 (3d Cir. 1997)). “When a claim is not exhausted because it has not been ‘fairly presented’ to the state courts, but state procedural rules bar the applicant from seeking further relief in state courts, the exhaustion requirement is satisfied because there is ‘an absence of available State corrective process.’” *Id.* (citing 28 U.S.C. § 2254(b)). In that case, a petitioner has procedurally defaulted his or her claims and the federal court may not consider the merits of the claim unless the petitioner “establishes ‘cause and prejudice’ or a ‘fundamental miscarriage of justice’ to excuse his or her default.” *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

DISCUSSION

IV. Brady Claim

Mr. Cash’s *Brady* claim can be distilled into three parts: (1) the Commonwealth failed to produce the U-Visa Certification that Detective Nieves signed; (2) the Commonwealth concealed

information about MCDA's immigration status; and (3) failing to disclose the possibility that the DHS/USCIS did not possess MCDA's A file.

There is a preliminary problem with Mr. Cash's *Brady* claims. He never presented a direct *Brady* claim below. Rather, he only argued that his trial counsel was ineffective for failing to raise a *Brady* claim during his direct appeal. (See Doc. No. 7-11 at 14-16.) However, as Magistrate Judge Hart noted, the Pennsylvania Superior Court nevertheless analyzed his *Brady* claim in detail, which some courts have held exhausts the direct claim. See *Gee v. Kerestes*, 722 F. Supp. 2d 617, 623-24 (E.D. Pa. 2010); *Veal v. Myers*, 326 F. Supp. 2d 612, (E.D. Pa. 2004). Thus, the Court will assume, as did Magistrate Judge Hart, that the *Brady* claims were exhausted.²

A. Failure to Produce the U-Visa Certification

Mr. Cash argues that he did not learn that Detective Nieves had improperly signed MCDA's U-Visa Certification until after he filed his Second PCRA petition. (See Doc. No. 54 at 11.) In a pretrial proceeding, Detective Nieves testified that he had not been designated by the Bensalem Police Department to fill out U-Visa certifications. See *id.* Mr. Cash argues that the Commonwealth should have produced this U-Visa certification, and failure to do so constitutes a *Brady* violation.

The first problem with this argument is that it is untimely. On May 3, 2010—before trial had begun—Detective Nieves testified that he had signed a form to support MCDA's application for a visa that he believed was called a U-Visa. Mr. Cash and his attorneys could have investigated the nature of this certification, found the publicly available Schedule B form, and seen the language in the signature section which required the signer be the head of the agency, or be specifically

² As noted below, there is an additional exhaustion problem with Mr. Cash's *Brady* claim premised on Detective Nieves's allegedly improper certification of MCDA's U visa. The Court does not assume that this claim was exhausted.

designated to issue U visa certifications. And this possibility is not a mere hypothetical. Mr. Cash's attorney testified at trial that he did, in fact, obtain the relevant form before trial. Thus, any time after May 3, 2010, all of the information Mr. Cash alleges was withheld was available to him. His failure to raise the argument until his Second Amended Habeas Petition renders this argument untimely.

This argument is also procedurally defaulted. Before a writ of habeas corpus can be granted, a petitioner must present the claim to the state courts. *See* 28 U.S.C. § 2254; *Landano v. Rafferty*, 897 F.2d 661, 669 (3d Cir. 1990). In doing so, it is not sufficient for the petitioner to merely attempt to argue the issue to the state court; the petitioner must also comply with state procedural rules. *See Lines v. Larkins*, 208 F.3d 153, 159 (3d Cir. 2000) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)) (“[W]e ask not only whether a prisoner has exhausted his state remedies, but also whether he has *properly* exhausted those remedies, *i.e.*, whether he has fairly presented his claims to the state courts. . . .”). This claim is procedurally defaulted because none of Mr. Cash's PCRA petitions included the allegation that Detective Nieves improperly signed the U visa certification. *See Commonwealth v. Rigg*, 84 A.3d 1080, 1084 (Pa. 2014) (claims not included in the PCRA petition are waived).

To excuse procedural default, a petitioner must show cause, or “some objective factor external to the defense [that] impeded counsel's efforts to comply with the State's procedural rule.” *Bentley v. Harlow*, No. CV 11-2423, 2015 WL 10487721, at *6 (E.D. Pa. Oct. 20, 2015) (quoting *Murray v. Carrier*, 477 U.S. 478, 488 (1986)). Mr. Cash argues that there is cause for his procedural default because he did not learn that the Commonwealth “knew of, but kept back” this exculpatory evidence until after he had filed his second PCRA petition. (Doc. No. 58 at 13-15.) Even crediting Mr. Cash's characterization of events (which this Court is not yet aware would be

even remotely appropriate), this did not prevent him from complying with the Commonwealth's procedural rule by amending his petition: indeed, Mr. Cash had previously, successfully amended his first PCRA petition. (*See* Doc. No. 7-7 at 16-53, Doc. No. 7-8 at 4-34.)

Even if this argument was not untimely and procedurally defaulted, it is without merit. The Superior Court's finding was not "contrary to, or involved an unreasonable application of, clearly established Federal law," nor did it "result[] in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Mr. Cash admits that the Commonwealth did not have a copy of the U visa certification, but argues that they were obligated to disclose it because they had constructive possession of the form. But the Commonwealth did not constructively possess the U visa certification. "[T]he Third Circuit has 'held that "possession" in the *Brady* context extends to material not within the prosecutor's actual knowledge or possession, provided that the evidence is either (a) known to some other "arm of the state," or (b) "known to others acting on the government's behalf in the case."'" *United States v. Munchak*, No. 3:CR-10-75, 2014 WL 3557176, at *14 (M.D. Pa. July 17, 2014), *aff'd*, 648 F. App'x 195 (3d Cir. 2016) (quoting *Strohl v. Grace*, 354 F. App'x 650, 654 (3d Cir. 2009)). Said another way, "the entity charged with constructive possession [must have] 'ready access' to the evidence." *Id.* (quoting *United States v. Risha*, 445 F.3d 298, 303 (3d Cir. 2006)). Here, there not such a close relationship between the Department of Homeland Security and the Bensalem Police Department/Detective Nieves to give the police "ready access" to the signed U visa certification. To the contrary, the relationship between Detective Nieves and DHS could hardly be more tenuous. The record shows that Detective Nieves never interacted with DHS, but rather received a form from MCDA's immigration lawyer, signed it, and mailed it on to the proper destination. Because the

Commonwealth did not actually or constructively possess the U visa certification, there can be no *Brady* violation.

Finally, even if the Commonwealth could be said to have possession of the form, Mr. Cash was not prejudiced. Mr. Cash argues that this evidence “questions the integrity, credibility, and objectivity of the entire investigation of this case.” *Id.* He even argues that this improper certification was evidence of a conspiracy by Detective Nieves and the Bensalem Police Department to conceal MCDA’s history of prosecution from the Federal Government in exchange for her cooperation in testifying at trial, and criticizes the Bensalem Police Department for not arresting MCDA when they learned that she had engaged in prostitution. (*See id.* at 19 (“Nieves and MCDA were in a position in which they must safeguard each other’s illegal actions.”); *id.* at 31 (“The fact that Detective Nieves [improperly] signed the Supplement B form . . . suggests a level of *quid pro quo* between Nieves and MCDA, first and foremost.”); Doc. No. 65 at 18 (“The Commonwealth knew that MCDA had been involved in prostitution But she was never charged with any crime.”)); Doc. No. 58 at 14 (“Detective Nieves permanently suppressed the improperly endorsed U visa Certification, I-918 Supplement B, maliciously abusing the Federal U-Nonimmigrant process in exchange for evidence (MCDA’s testimony)”).

But in order for the “suppressed” evidence to be material, there must be a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *United States v. Isaac*, 22 F. Supp. 3d 426, 433 (E.D. Pa. 2014), *aff’d*, 627 F. App’x 160 (3d Cir. 2015) (quoting *Kyles v. Whitley*, 514 U.S. 419, 437 (1995)). And a “[r]easonable probability is “a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

The Commonwealth's failure to produce information about the U visa certification does not undermine confidence in the outcome of Mr. Cash's trial for two reasons. First, Mr. Cash already possessed equivalent information to what was in the signed form; receiving the signed form would not have told him anything new. Mr. Cash's attorneys already knew the name of the visa MCDA possessed (a "U visa"), had enough information from Detective Nieves's testimony to ascertain what form he had signed, and knew that Detective Nieves had signed it. Indeed, Mr. Cash's attorneys did in fact find copies of the exact form in question. Thus, Mr. Cash's argument that he did not and could not have found out what kind of visa MCDA received, or the level of cooperation required of her to receive the U visa certification, is without factual basis.³

Second, Mr. Cash's argument is simply too farfetched to even begin to undermine confidence in the outcome of Mr. Cash's trial. He argues that the improperly signed form is evidence of a conspiracy between MCDA and Detective Nieves to frame Mr. Cash. These claims are not only fantastical, but also contrary to the unrebutted evidence that Detective Nieves had not intentionally evaded the directions on the form. Detective Nieves's supervisors had allowed him

³ For these reasons, the case cited in Mr. Cash's notice of supplemental authority is inapposite. See *Commonwealth v. Bagnall*, 235 A.3d 1075 (Pa. 2020). In *Bagnall*, the only witness to the shooting "explicitly denied the existence of any agreement with the prosecution." *Id.* at 1087. The "defense counsel, in attacking [the witness's] credibility, [was forced to] stat[e] that his motive for lying [was] unknown." *Id.* The Attorney General's Office also took no steps to learn of the agreement from the DA's Office (who had negotiated the agreement with the witness). Here, while 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. Finally, in *Bagnall*, the information was constructively possessed because the Attorney General's Office and the DA were a part of the same government organization, whereas here the signed form was only possessed by the federal government.

to sign such forms in the past, which as Magistrate Judge Hart noted, “at worst shows that the Bensalem Police Department took a haphazard approach to the Schedule B directions.” (Doc. No. 59 at 23.)⁴ The Court notes, however, that it is making no such observation as to the Department.

B. Concealment MCDA’s immigration status

Mr. Cash next argues that the Commonwealth concealed information about MCDA’s immigration status. Mr. Cash faults MCDA’s testimony at trial that she had received a “work visa.” At trial, she stated that she had received “a card saying she can work here.” (Doc. No. 59 at 22.) Mr. Cash argued that, as a result of this testimony, he did not realize that MCDA had to cooperate with the Commonwealth to obtain her visa until her immigration lawyer so testified during a hearing for Mr. Cash’s first PCRA petition. *Id.*

But as Magistrate Judge Hart noted, Mr. Cash knew what visa MCDA had received, and that it required her cooperation with the investigation. Detective Nieves testified in a pretrial hearing that the form he signed was “to keep [MCDA] in the country legally,” that the visa was premised on “her cooperation as a victim, witness, in any prosecution,” and that he “believe[d] it’s a U Visa.” Indeed, Mr. Cash’s attorney argued to the jury that MCDA was biased because “by being a witness [MCDA] has actually gotten a visa.” 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.

⁴ In his objections to the Report and Recommendation, Mr. Cash also argues that Magistrate Judge Hart erred in claiming that Mr. Cash’s petition alleged that the Commonwealth “concealed the *existence* of any form,” because his argument was actually about concealment of “the *identity* of this form.” (Doc. No. 65 at 10-11.) This argument takes a single sentence out of context. Magistrate Judge Hart’s Report and Recommendation properly considered and rejected Mr. Cash’s argument that he was unable to discover the identity of the form that Detective Nieves signed, as discussed above.

C. The Possibility That MCDA's Alien File Does Not Exist

Finally, Mr. Cash argues that the DHS's memorandum—in which the DHS refused to produce or acknowledge the existence of MCDA's Alien File—“introduced the possibility that MCDA's Alien File may not exist.” (Doc. No. 54 at 10.)

To begin with, it is not at all clear how this evidence is exculpatory. As Magistrate Judge Hart noted, “[Mr.] Cash has not explained . . . what possible motive MCDA, the prosecution, police, and MCDA's immigration attorney would have to fabricate a U-visa story.” (Doc. No. 59 at 23.) Indeed, Mr. Cash seized on the existence of a U visa to argue at trial that MCDA had a motive to lie about Mr. Cash's actions—it is implausible that these parties would conspire to lie in a way that would help Mr. Cash's case.

Moreover, as Magistrate Judge Hart also noted, Mr. Cash's argument is “based on a fallacy.” The DHS's Memorandum “did not ‘introduce’ any ‘possibility.’ It simply told [Mr.] Cash nothing.” *Id.* at 22-23. In his objections to Magistrate Judge Hart's Report and Recommendation, Mr. Cash does not respond to these defects in his argument. Accordingly, there is no *Brady* violation, and Mr. Cash was not prejudiced by not possessing this “information” at trial.

V. Subversion of the Court Process

Mr. Cash also makes a due process claim supported by the same allegations that underly his *Brady* claim. As Magistrate Judge Hart notes, these claims were not raised in either of his PCRA petitions, and are therefore unexhausted and procedurally defaulted. They also fail for the same reasons as discussed above in relation to Mr. Cash's *Brady* claims. Mr. Cash does not list any objections to this portion of Magistrate Judge Hart's opinion. Thus, this claim also fails.

VI. Denial of the Right to Counsel

Mr. Cash argues that he was deprived of the right to self-representation, or in the alternate, the right to counsel, in three ways.

First, Mr. Cash argues that his November 4, 2009 decision to proceed *pro se* was unknowing and invalid because at the time he decided to proceed *pro se* he did not know that the Commonwealth had committed *Brady* violations. Magistrate Judge Hart ably discussed the numerous deficiencies in this argument. First, it was never presented in Mr. Cash's two PCRA petitions, and is therefore unexhausted and procedurally defaulted. (*See* Doc. No. 59 at 29.) "It is also incoherent, because Cash does not explain how knowing any of the facts surrounding the *Brady* claim would have affected his request to appear *pro se*." *Id.* Mr. Cash's objections to the Report and Recommendation do not respond to these points.

Second, Mr. Cash argues his later decision to forego the right to represent himself was not knowing, intelligent, and voluntary. After deciding to represent himself, stand-by counsel visited Mr. Cash to try and convince him to let counsel represent him at trial. Mr. Cash alleges that during this conversation, counsel claimed he would be able to obtain information about MCDA's immigration status. Mr. Cash argues that had he known that counsel would be unable "to obtain any documents regarding MCDA, including but not limited to the improperly endorsed Supplement B form," he would not have waived his right to proceed *pro se*. (Doc. No. 54 at 36.)

As Magistrate Judge Hart noted, this argument was raised for the first time in Mr. Cash's second PCRA petition, and is therefore procedurally defaulted. Moreover, Mr. Cash was subjected to a thorough colloquy when he waived his right to appear *pro se*, and never conditioned his waiver on the production of immigration evidence, or even mention immigration evidence at the hearing at all. (*See* Doc. No. 59 at 29-30.)

Mr. Cash's third argument is that he was denied the right to represent himself because he believed that his two lawyers would represent him during both the guilt and penalty phases of trial, but the lawyers' focus was only on the penalty phase, (*see* Doc. No. 1-2 at 12-13), which left Mr. Cash effectively "abandoned at the guilt phase of [] trial, in terms of trial preparation and presentation," (Doc. No. 59 at 25.) Mr. Cash bases this argument on one ambiguous portion of the testimony of Charles Jonas from Mr. Cash's first PCRA hearing:

Attorney: And if you could, when you went to those meetings to see him in Philadelphia, is it fair to say you went over strategy for the case and discovery that you had and other issues associated with the guilt phase of the case?

Mr. Jonas: Yes.

Attorney: And is it fair to say that your focus primarily almost up until right before trial in speaking with the defendant had been the guilt phase of the case and how he wanted to pursue his claim of innocence?

Mr. Jonas: Yes. He knew that we were working for the penalty phase, but his focus with us was mostly on the initial guilt phase.

(Doc. No. 1-2 at 13.) Mr. Cash argues that part of the last sentence—"we were working for the penalty phase"—shows that counsel never prepared a defense for the guilt phase, and that counsel was therefore unprepared for the guilt phase and "abandoned" Mr. Cash.

As Magistrate Judge Hart noted, there are two problems with this argument. The first is that it takes the sentence out of context. Read in context, counsel was saying that he and his co-counsel talked with Mr. Cash about both the guilt and penalty phases of trial. The second problem with this argument is that it is completely without any evidence that counsel was unprepared for the guilt phase of trial. Mr. Cash never objected to the quality of his representation during the guilt phase at any point, much less at trial. As the Pennsylvania Superior Court wrote about this argument, "[Mr. Cash's] did not seek to reassert his right to self-representation or express dissatisfaction with the conduct of counsel at trial. [Mr. Cash's] attempt to recast his

disappointment with the outcome of the trial into one concerning the voluntariness of his decision to accept counsel is unavailing.” *Commonwealth v. Cash*, No. 478 EDA 2015, 2015 WL 9584932, at *4 (Pa. Super. Ct. Dec. 28, 2015). Because there is no evidence that Mr. Cash’s waiver of the right to represent himself was involuntary, or that Mr. Cash was “abandoned” by his counsel during the guilt phase of trial, the Superior Court’s decision was not inconsistent with federal law.

VII. Introduction of Mr. Cash’s Statements to Bensalem Police

Mr. Cash argued in his First Amended Complaint that introduction at trial of certain statements that he made on August 4, 2008 after invoking the right to remain silent violated his Sixth Amendment right to the presence of counsel and his Fifth Amendment right to remain silent. Mr. Cash exhausted this argument on his direct appeal. The trial court concluded that Mr. Cash ignored his counsel’s advice to remain silent, and that he waived his right to have counsel present. (Doc. No. 7-3 at 18-19, 23-24.) The trial court also concluded that even if Mr. Cash’s rights had been violated, he was not prejudiced by introduction of these statements. *See id.*

After reviewing the statements at issue, the Court agrees with Magistrate Judge Hart that “the trial court (and therefore the Superior Court) was clearly correct in finding harmless error.” (Doc. No. 59 at 28.) Mr. Cash only identified two pieces of evidence as prejudicial: his statement to police where he identified MCDA as “the Spanish girl,” (Doc. No. 37 at 3), and his statement to police that he was the person in a convenience store video that was later played to the jury. *See id.* But as Magistrate Judge Hart points out, Mr. Cash never explains how these statements prejudiced him. He testified at trial that he had traveled from Philadelphia to New Jersey to meet with MCDA, and that he had a consensual liaison with her on the night in question, which is consistent with his knowledge of MCDA’s ethnicity, as well as his being at the convenience store in question. Therefore, even assuming that introduction of these statements violated Mr. Cash’s constitutional rights, it was not reversible error.

VIII. Cumulative Error

Lastly, Mr. Cash argues that even if he was not significantly prejudiced by any error in isolation, “he is entitled to relief because of the cumulative prejudicial effect of all of the errors” alleged. (Doc. No. 54 at 36.) But as Magistrate Judge Hart correctly noted, the only claim that he has suffered even *de minimis* prejudice for is admission of statements made to police. Because Mr. Cash’s other claims are all either entirely without merit or unambiguously defaulted, he cannot demonstrate cumulative error.

CONCLUSION

For the foregoing reasons, the Court denies Mr. Cash’s Petition for Writ of Habeas Corpus. Magistrate Judge Hart’s Report and Recommendation is adopted in full. Because Mr. Cash has not made “a substantial showing of the denial of a constitutional right,” a certificate of appealability will not issue for these claims. 28 U.S.C. § 2253(c)(2). An appropriate order follows.

BY THE COURT:



GENE E.K. PRATTER

UNITED STATES DISTRICT JUDGE

DLD-075

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **21-2124**

OMAR SHARIFF CASH, Appellant

VS.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; ET AL.

(E.D. Pa. Civ. No. 2-16-cv-03758)

Present: KRAUSE, MATEY, and PHIPPS, Circuit Judges

Submitted are:

- (1) Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1);
 - (2) Appellant's motion to file an overlength application for a certificate of appealability;
 - (3) Appellees' response in opposition to the application for a certificate of appealability; and
 - (4) Appellant's reply brief
- in the above-captioned case.

Respectfully,

Clerk

ORDER

(Continued)

OMAR SHARIFF CASH, Appellant

VS.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS; ET AL.

C.A. No. 21-2124

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Appellant's motion for leave to file an overlength application for a certificate of appealability is granted. The foregoing application for a certificate of appealability is denied. Jurists of reason would not debate that Appellant's claim that the U-Nonimmigrant Status Certification I-918 Form, Supplement B ("Supplement B"), was certified by an unauthorized official is procedurally defaulted, and he has not shown cause and prejudice or a fundamental miscarriage of justice sufficient to overcome the default. See Coleman v. Thompson, 501 U.S. 722, 750 (1991). Nor would jurists of reason debate the District Court's decision to deny Appellant's habeas petition. See Miller-El v. Cockrell, 537 U.S. 322, 338 (2003) (citing Slack v. McDaniel, 529 U.S. 473, 484 (2000)). After careful review of the record, we agree with the District Court that Appellant has failed to make a substantial showing that his rights under Brady v. Maryland, 373 U.S. 83 (1963), were violated. See 28 U.S.C. § 2253(c); see also Dennis v. Sec'y, Pa. Dep't of Corrs., 834 F.3d 263, 284-85 (3d Cir. 2016) (en banc) (setting out the elements of a Brady claim). For substantially the reasons provided by the District Court, Appellant has not shown that he was prejudiced by the Commonwealth's failure to turn over a copy of the victim's Supplement B form, particularly where the defense was aware of the substance of the form

at trial. See Strickler v. Greene, 527 U.S. 263, 280 (1999); see generally United States v. Johnson, 816 F.2d 918, 924 (3d Cir. 1987) (recognizing that “[w]here the government makes Brady evidence available during the course of a trial in such a way that a defendant is able effectively to use it, due process is not violated and Brady is not contravened.”).

By the Court,

s/ Paul B. Matey
Circuit Judge

Dated: March 4, 2022

kr/cc: Andrew R. Childers, Esq.
Kerry G. Levy, Esq.
Jill M. Graziano, Esq.
Eugene Tsvilik, Esq.
Ronald Eisenberg, Esq.



A True Copy:

Patricia A. Dodszeit

Patricia S. Dodszeit, Clerk
Certified Order Issued in Lieu of Mandate

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 21-2124

OMAR SHARIFF CASH,
Appellant

v.

SECRETARY PENNSYLVANIA DEPARTMENT OF CORRECTIONS;
SUPERINTENDENT GREENE SCI; DISTRICT ATTORNEY BUCKS COUNTY;
ATTORNEY GENERAL PENNSYLVANIA

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(E.D. Pa. Civ. No. 2-16-cv-03758)
District Judge: Honorable Gene E.K. Pratter

PETITION FOR REHEARING

BEFORE: CHAGARES, *Chief Judge*, and MCKEE, AMBRO, JORDAN, HARDIMAN,
GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY,
and PHIPPS, *Circuit Judges*

The petition for rehearing filed by appellant Omar Shariff Cash in the above-captioned matter has been submitted to the judges who participated in the decision of this Court and to all other available circuit judges of the Court in regular active service. No judge who concurred in the decision asked for rehearing, and a majority of the circuit judges of the Court in regular active service who are not disqualified did not vote for

rehearing by the Court. It is now hereby **ORDERED** that the petition for rehearing is **DENIED**.

BY THE COURT,

s/ Paul B. Matey
Circuit Judge

Dated: April 20, 2022

kr/cc: Andrew R. Childers, Esq.
Kerry G. Levy, Esq.
Jill M. Graziano, Esq.
Eugene Tsvilik, Esq.
Ronald Eisenberg, Esq.