

**THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION**

**Commonwealth of Pennsylvania,
Respondent**

v.

**Jose Medina,
Petitioner**

CP-51-CR-1210801-1991

OPINION OF THE COURT

**Re: Petition for Relief under the Post Conviction Relief Act
Asserting Newly Discovered Evidence and Requesting a New Trial**

**Judge Lisa M. Rau
Court of Common Pleas
First Judicial District
of Pennsylvania**

August 2, 2011

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IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	CP-51-CR-1210801-1991
	:	
Respondent,	:	PID: 0722587
	:	
v.	:	
	:	
JOSE MEDINA,	:	
	:	
Petitioner.	:	

OPINION

RAU, J.

I. Introduction and Overview¹

In November 1992, 19-year-old Jose Medina, Jr. was convicted of murder and sentenced to life without parole for the stabbing death of William Bogan. Jose Medina was convicted based on the emotional testimony of a 12-year-old boy named Michael Toro² who intermittently claimed that he witnessed and did not witness the stabbing.

¹ This Opinion is being filed simultaneously with this Court’s Order granting a new trial rather than the common procedure of waiting for the filing of an appeal in an effort to expedite the resolution of this matter. However, this Court may supplement the Opinion to fully address any issues that might be raised by one of the parties on appeal. Given the serious issues raised that this Court must address, coupled with the two decades of post trial proceedings, this Opinion is necessarily lengthy.

² This Court’s general practice is to refer to all individuals formally by their surnames but will deviate from this practice in this Opinion. Many witnesses have the surname of “Toro” or “Medina”. In addition, some prior court opinions have referred to the individuals by first name, probably due to their being children at the time of the trial. To avoid confusion and for ease of the reader, this Court will do the same. Michael (Marcos) Toro is sometimes referred to as “Marcos” in the record and sometimes spells his name “Marcus” or “Micheal.” This Court will consistently refer to him as “Michael” since this is the name his mother and brother use for him, July 19, 2010; PCRA Tr. 261:14-23, and he indicated no preference, PCRA Tr. 38:21-39:4; 164:20-23; 167:23-24, July 19, 2010; PCRA Tr. 75:10-76:5, July 20, 2010. The Court will refer to Petitioner as “Jose Medina” and will refer to Petitioner’s father as “Jose Medina, Sr.”

Michael's 11-year-old brother, Hector Toro, also testified at trial that when he was just 10 years old he had seen a drunken Jose Medina earlier in the evening of the murder, brandishing a knife and stating that he would kill someone that night. Jose Medina presented a defense that he was visiting the neighborhood from Reading in order to attend a friend's daughter's birthday party and presented evidence of his good character. The friend testified confirming the existence of his daughter's birthday and party. The police officer who arrested Jose Medina not long after the stabbing found him not drunk and in possession of a birthday card, a few dollars, and his white sweatshirt. No physical evidence was ever found linking Jose Medina to the crime, including the stolen wallet, the knife used in the stabbing or any blood stains on the white sweatshirt that Jose Medina was wearing. No evidence was presented of Jose Medina and William Bogan ever having met nor was there any evidence of a motive for the killing. Jose Medina had no prior convictions and has for nearly twenty years steadfastly maintained his innocence.

This PCRA petition asserts that there is newly discovered evidence that undermines the two children's trial testimony and warrants a new trial. The petition was supported by affidavits from Hector and Michael Toro recanting their trial testimony and claiming that a detective threatened them to testify at trial or risk being placed in a juvenile facility or foster care. This evidence, if true, would leave only the evidence of Jose Medina's presence along with many others in the neighborhood where the murder took place.

Lastly, Petitioner Jose Medina is sometimes referred to in court filings as "Jose Medina Aponte" or "Jose Aponte." "Aponte" is his mother's surname.

The lengthy post conviction procedural history has focused primarily on Michael Toro's testimony and the absence of a competency hearing that is required for child witnesses, and is relevant to the current procedural posture of the case. At the original trial in 1992, Michael testified that he did not know the difference between truth and a lie and that it was not a good thing to tell the truth. Michael's trial testimony fluctuated significantly depending upon who was doing the questioning.

In 1995, the Superior Court addressed Jose Medina's counsel's failure to challenge Michael's competency. It held that "[w]ith Michael as the only eyewitness to the stabbing, and the prejudice from his testimony being self-evidentIf counsel's assistance was ineffective . . . a new trial MUST be granted." Commonwealth v. Medina (Medina I), 668 A.2d 1194, No. 3885 Phila. 1993, slip op. at 22-24 (Pa. Super. Ct., Aug. 31, 1995) (emphasis provided). In reviewing Jose Medina's subsequent petition for habeas relief, the Third Circuit held, as had the District Court Judge and Magistrate Judge, that as a matter of clearly established federal law, "[t]rial counsel was ineffective in not requesting a judicial inquiry into competency." Medina v. Diguglielmo, 461 F.3d 417, 428 (3d Cir. 2006). See also Medina v. Diguglielmo, 373 F. Supp. 2d 526, 544-45, 550 (E.D. Pa. 2005) (the District Court held, "[t]here is a reasonable probability that...the trial court would have found Marcos incompetent. For the trial court to do otherwise could well have been an abuse of discretion"). However, when the Third Circuit analyzed the evidence "without the testimony of [Michael] Toro," it reversed the District Court's grant of a new trial, holding that there was no prejudice caused by the lawyer's ineffective performance because "Hector's testimony and the other circumstantial evidence presented by the Commonwealth support a reasonable

inference that Mr. Medina carried out his threat to kill someone that day” Id. at 430, 432-33.

The Third Circuit’s ruling on prejudice improperly overlooked the Superior Court’s prior holding that there was prejudice from Michael’s testimony. Medina I at 20. The Third Circuit could not reverse the prior state holding unless it was “contrary to, or an unreasonable application of, clearly established Federal law” or “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); Lam v. Kelchner, 304 F.3d 256, 263 (3d Cir. 2002). The Third Circuit made no such determination. The Third Circuit holding that counsel’s performance was ineffective, must be paired with the Superior Court’s finding that trial counsel’s performance prejudiced Jose Medina. The Superior Court’s mandate was that if counsel was found ineffective then Jose Medina must be granted a new trial. Thus, Jose Medina was entitled to a new trial when the Third Circuit found trial counsel ineffective in 2006. To this day, the Superior Court’s holding has never been acted upon and must be addressed. To ignore a federal court oversight of a controlling prior state court ruling would be a manifest injustice and violate established principles of federalism and comity.

Jose Medina filed this PCRA petition asserting newly discovered evidence in December 2006³ at the same time he was seeking review by the United States Supreme Court of the Third Circuit’s reversal of his grant of a new trial. This Court held a nine day evidentiary hearing and considered the parties’ post hearing briefs.

³ This PCRA petition was not assigned to this judge until August 2008.

This Court found that Hector Toro's PCRA testimony⁴ of both boys being taken by a detective late at night, after a murder, and isolated and threatened with removal from their grandmother's home unless they agreed to incriminate a man in a murder, was both credible and chilling. The Court also found Hector's testimony that the detective picked up the boys unbeknownst to their family on the way to school and threatened them to testify to events that Hector had not witnessed was credible. The Court found believable Hector's testimony that he had not seen Jose Medina drunk prior to the murder in a public restaurant with a knife saying he was going kill someone.

Hector Toro's testimony was corroborated by that of his mother, Maria Toro, who had learned of the detective's actions shortly after they occurred. It was also corroborated or consistent with other evidence. Most of Hector Toro's testimony was either conceded or un rebutted by the Commonwealth. Hector's testimony about the detective's coercion was un rebutted. The Commonwealth conceded that both boys were transported by an unknown law enforcement officer and questioned before and during trial without permission from, or the presence of, a relative or legal guardian. Indeed, it was uncontested that when 12-year-old Michael Toro broke down during his trial testimony and the trial judge directed someone to call for emergency medical intervention, no legal guardian or relative was present or ever called to come to his assistance. The Court found based on the credible evidence that Hector Toro lied at trial incriminating Jose Medina due to a detective's threats and efforts to procure false testimony.

⁴ After Michael Toro was found incompetent to testify about events occurring 19-20 years ago when he was a child, his testimony was excluded, unavailable to support Jose Medina's petition and not considered by this Court.

This Court found⁵ that this timely filed PCRA petition brought forward exculpatory newly discovered evidence that requires a new trial for several separate and independent reasons: Hector's recantation was credible and would have likely led to a different verdict; law enforcement failed to turn over favorable material evidence; law enforcement knowingly submitted false testimony; and the trial error of failing to test Hector and Michael's competency has renewed significance in light of this evidence. A new trial is also warranted due to the Superior Court's earlier ruling in Medina I that if counsel were ineffective in failing to challenge Michael's competency, as the Third Circuit found, Jose Medina must have a new trial.

It is this Court's hope that a new trial will have the procedural and substantive safeguards that the first trial lacked and will lead to a verdict, whatever it may be, that has the integrity that our system of justice demands. William Bogan's death was a tragedy. That tragedy was compounded when, in the middle of the night, a detective lacking any other evidence against Jose Medina took two young boys, already terrified after a murder in their neighborhood, coerced them and convinced at least one of them to provide false testimony against another man for a murder. Hector Toro was sentenced to a lifetime of guilt as Jose Medina serves a life sentence based on a trial that lacked the fairness that our system of justice has promised and demands.

⁵ Once the Third Circuit found that trial counsel performed below objectively reasonable standards in failing to challenge Michael Toro's competency, it analyzed the evidence "without the testimony of [Michael] Toro" to determine whether the lawyer's mistake prejudiced Jose Medina. Medina, 461 F.3d at 430. Arguably, the Third Circuit's ruling constrains this Court to analyze the newly discovered evidence in the absence of Michael's trial testimony since Jose Medina's trial counsel's error in violating clearly established law by not challenging Michael's competency has never been corrected. Medina, 461 F.3d at 429, 430, 432-433. The exclusion of Michael Toro's testimony is not necessary to this Court's decision since Hector's credible testimony of being pressured to lie at trial, with or without Michael's testimony, would likely result in a different verdict and mandate a new trial. This Court's finding would be the same whether or not Michael's trial testimony was considered in the analysis.

II. The Murder and Ensuing Trial

On October 18, 1991, William Bogan was stabbed and tragically killed on the street. His wallet was taken. The knife and his wallet were never recovered nor was any other physical evidence linking anyone to the crime. Trial. Tr. 37:2-21. Jose Medina, a 19-year-old visiting Philadelphia from his home in Reading, was arrested and charged in the murder. (See Ex. C-13/P-6.) He had no prior record of convictions. Id. at 221:22-222:1; 224:14-20; 226:19-22.

At trial, the evidence showed that William Bogan was stabbed near Mutter and Gurney Streets and was able to run for about two blocks before he collapsed at the intersection of Hope and Gurney Streets, leaving a trail of blood behind him. Id. at 150:9-25; 172:10-173:2; 189:16-190:23; 206:15-19; 212:3-20. The Commonwealth presented the testimony of Police Officers Harris, Feters and Grieco.

Officer Harris testified that he and his partner were patrolling at about 9:30 p.m. when a group of boys, including Hector and Michael Toro, approached them to report that a man was lying on the ground near Hope and Gurney. Trial Tr. 30:6-31:5. Officer Harris testified that there was a crowd of about fifteen to twenty people around the dead man. Id. at 35:13-20. The man, William Bogan, was lying on his stomach with his side pockets turned out, his license on the small of his back; he had no money and no wallet.⁶ Id. at 34:1-35:12. Police asked if anyone had seen the incident and no witnesses came forward. Id. at 35:24-36:1.

Officer Feters testified that he was working as a plain clothes officer on the night of the incident and he went to the intersection of Mutter and Cambria at approximately 9:34 p.m. because he had received a report of a “hospital case and a person with a

⁶ Timothy Bogan testified that his brother always carried a wallet. Trial Tr. 197:22-198:1.

knife,” and information regarding a person wearing a white sweat shirt. Id. at 167:2-5; 176:1-24. Officer Fetters said he saw Jose Medina wearing a white sweat shirt, standing on the corner of Mutter and Cambria and then crossing the street to join three other men. Id. at 168:10-24; 175:12-25. There was no one else at that location with a white sweat shirt. Id. at 176:5-7. Officer Fetters frisked Jose Medina and found no knife. Id. at 167:16-19. When Jose Medina asked why he was being searched, Officer Fetters informed him that they were “looking for a guy in a white sweat shirt.” Id. at 178:2-10. Jose Medina had a birthday card and explained to Officer Fetters that his friend’s daughter’s birthday was the following day and he was planning on putting money⁷ in the card and using the rest of the money at the bar. Id. at 183:5-13. In talking with and observing Jose Medina for about two minutes, Officer Fetters determined that Jose was not intoxicated. Id. at 168:18-169:14; 171:4-171:9. Because he had found no evidence corroborating the report, Officer Fetters stated that the report was “unfounded” and allowed Jose Medina to leave. Id. at 168:21-169:4; 171:10-172:7. In full view of Officer Fetters, Jose Medina walked into a bar at Mascher and Cambria. Id. at 168:25-169:4.

Thereafter Officer Fetters briefly spoke with a rescue team that was in the area and then proceeded to Hope and Gurney Streets. Id. at 171:10-21; 172:8-173:3. Other officers were already on the scene when Officer Fetters arrived at Hope and Gurney Streets where he saw William Bogan’s body lying in the street face down. Id. at 171:10-21; 172:8-173:3. Officer Fetters returned to the bar where he had just seen Jose Medina enter about six to ten minutes earlier and found him playing pool. Id. at 173:4-174:12; 178:16-23; 180:10-15. When Officer Fetters beckoned Jose Medina,

⁷ On redirect, the suggestion was that the amount of money Jose had was \$25. Trial Tr. 185:20.

who was dressed in a white T-shirt, Jose walked over carrying the white sweatshirt in his hand. Id. at 174:19-21; 179:24-180:9. Officer Fetters testified that the white sweatshirt had no blood on it. Id. at 181:3-4. Jose Medina was fully cooperative and offered no resistance. Id. at 178:2-180:9. He was then taken into custody. Id. at 174:25-175:2.

Officer Greico also arrived at Hope and Gurney Streets after getting a radio call. Trial Tr. 188:20-24; 191:12-24. After seeing the victim's body, Officer Greico searched the area for a weapon and any other evidence. Id. at 189:16-19. The knife and wallet were never found. Id. at 37:2-21. Officer Greico then encountered Michael and Hector Toro near Mutter and Gurney Streets. Id. at 191:20-23. Officer Greico said the boys showed him some of the blood on the street. Id. at 189:20-25. Officer Greico testified that he asked the boys whether they knew anything about the stabbing: Hector said he did not know anything but Michael said that he saw the stabbing. Id. at 190:1-191:7.

A medical examiner testified that William Bogan died because of a single stab wound that punctured his right ventricle and that there was no evidence of a struggle. Id. at 204:22-207:4; 213:3-14. He determined that the wound could have been caused by any single edged knife blade⁸ about 6 inches in length, and that the entire length of the blade had entered William Bogan's body. Id. at 207:16-208:2. He also testified that the wound would not necessarily have caused blood to spurt out. Id. at 211:10-212:2. Further, he would expect that a person with a wound like William Bogan's would be able "to run, to talk, to sit down, and perhaps go on for 10, 15 minutes" before dying. Id. at

⁸ The medical examiner testified that the knife used had to be a single sharp edged knife with a single dull edge. The single sharp edge could have been a serrated or a smooth edged knife. Trial Tr. 207, 214.

212:3-14. He testified that William Bogan had cocaine⁹ and alcohol in his system. The amount of alcohol was sufficient to make it illegal for him to drive a vehicle. Id. at 208:20-210:11. The Commonwealth presented evidence from a close friend of William Bogan who testified that William Bogan routinely went to Mutter and Cambria to buy drugs,¹⁰ had done so going back eight years and had lived in that neighborhood for a period of time. Id. at 192:16-195:1. There was no evidence of anyone ever seeing Jose Medina and William Bogan together prior to the actual stabbing incident.

The two main incriminating witnesses at Jose Medina's trial in November 1992 were Hector Toro, an 11-year-old, and his brother Michael Toro, a 12-year-old, who testified to events that happened a year earlier. The trial court never questioned either boy fully to determine whether they were competent witnesses. Both boys testified that because Jose Medina was a friend of their older brother, they had known Jose Medina for a number of years and saw him every day. Trial Tr. 42:2-6; 87:11-25.

Hector Toro, who was a 10-year-old on the night of the stabbing, testified that on the night of William Bogan's murder, he was playing arcade games with Michael in the Chinese restaurant on Cambria and Mutter. Id. at 42:22-44:7. He testified that at about 8:30 or 9:00 p.m. Jose Medina entered the store with a "Rambo" knife about 13 or 15 inches long, announced he was drunk and said, "Today I am going to kill somebody with this knife." Id. at 44:10-24; 46:10-16. Hector Toro said that Jose Medina appeared drunk and was stumbling in the Chinese restaurant. Id. at 46:10; 63:6-64:6. Hector testified that Jose Medina then ordered a cheeseburger and walked out. Id. at 46:13-

⁹ The medical examiner said that it was not possible to determine how much, and when, cocaine had been ingested because within two hours of cocaine being taken half of it is eliminated from the blood. Thus, all that could be determined was that cocaine was detected in his blood. Trial Tr. 210:2-11.

¹⁰ Officer Fetters confirmed that the area was a high drug neighborhood and usually had a lot of foot and vehicle traffic. Id. at 166:21-167:1; 186:9-20.

14. Hector said that he and Michael left the Chinese restaurant together after about fifteen minutes, and he never saw Jose Medina again that night. Id. at 46:20-24; 48:5-7.

Hector gave confusing and contradictory testimony regarding the boys' activities after leaving the Chinese restaurant and going back to their grandmother's house. He repeatedly said that he did not go inside his grandmother's house, but that his brother did. Trial Tr. at 51:5-23; 52:10-22; 55:13-56:20; 60:19-61:6. Then he said he did go inside the house. Id. at 65:14-67:17; 74:14-24. At one point Hector said he was inside the house and heard something outside but then conceded that it was his brother Michael, not he, who had this experience. Id. at 47:4-12; 52:24-53:12. He vacillated between various versions of the story: he ran versus rode his bicycle to Gurney Street where the victim's body was; he got there before his brother versus he arrived to see him already there. Id. at 47:11-14; 52:1; 61:7-23; 69:5-13; 75:18-25. He testified that other people were running toward Gurney Street as he was going there and police had already arrived when he got there. Id. at 69:25-70:1; 75:23-24. Hector was clear that he had not witnessed the stabbing. Id. at 48:8-9.

Michael Toro, who was an 11-year-old at the time of the murder, was the only witness who claimed to have seen Jose Medina stab William Bogan, or to have seen the two men together. During the direct and cross, Michael's testimony as to what he knew or had previously testified to, varied widely. Michael testified that he saw and did not see Jose Medina stab a "white" man. Trial Tr. 97:20-99:15; 110:3-112:21; 117:2-120:7; 125:2-126:23; 127:4-5. At one point, he said he saw the stabbing because his brother saw it and was just repeating what his brother said. Id. at 110:3-111:21; 125:23-126:6. Other times he said he and Hector both saw the stabbing. Id. at 119:15-121:21.

At times he said he saw the stabbing from inside the house and other times from outside. Id. at 115:15-18; 123:2-5; 124:4-25. Whether they walked, biked, or Hector ran and Michael biked to see the victim after he fell, was also unclear. Id. at 107:11-25; 112:13-21; 114:6-13. Michael testified that he did not hear anyone say anything before the stabbing but then said he heard the victim say, “I will pay you tomorrow. I will pay you tomorrow.” Id. at 97:20-100:1; 105:9-17; 127:21-128:4. He claimed to see Jose Medina go through the victim’s pockets after he fell but also said he had not seen anyone do this. Id. at 97:20-99:9; 106:4-10; 110:19-112:12. He also testified that Jose Medina showed him and his brother a 7-inch “Rambo” knife in the Chinese restaurant earlier in the evening, after initially denying that anyone other than his brother and store personnel were in the restaurant. Id. at 94:1-95:19.

The Commonwealth also presented Maria Caraballo who lived at 2931 North Morris Street, not far from where the Toro boys lived on 2922 Mutter Street. Id. at 146:23-149:1. Maria Caraballo testified that she was not Hector and Michael’s aunt, she was just a good friend, and had signed Michael’s statement¹¹ at the police station. Id. at 101:23-102:1; 147:4-5. Notably, Maria Caraballo testified that she was Jose Medina’s aunt.¹² Id. at 153:3-4.

Maria Caraballo testified that at about 9:15-9:30 p.m. on the night of the murder she was sitting on her steps sewing, apparently with a girlfriend,¹³ when she saw a white man clutching his chest run by her house up to Indiana Street. Id. at 150:7-151:14; 154:12-156:22. She said she did not see anyone chasing him. Id. at 156:12-

¹¹ Maria also signed Hector’s statement. See Ex. C-11.

¹² During closing arguments the assistant district attorney stated that Ms. Caraballo was just a friend of Jose Medina’s aunt. Trial Tr. at 276:13-14.

¹³ Maria Caraballo’s testimony suggests that a female friend of hers sat with her on the stairs that night. Id. at 150:9-13.

17. Maria Caraballo stated that she chased after the man but could not find him and returned home. Id. at 151:3-153:23. She also said that there were a lot of people out on the street. Id. at 158:8-16. She then testified that, after arriving at her house, she saw Jose Medina looking for something under a car near 2918 Mutter Street followed by a woman trying to hold Jose Medina down. Id. at 152:1-153:14. Maria Caraballo said that Jose Medina seemed mad and the woman, who was not from the neighborhood, was trying to talk to him. Id. at 162:10-18. Maria Caraballo initially testified that Jose “got loose from the lady” and walked away but later she said she did not recall whether he walked or ran. Id. at 154:1; 158:5-7; 162:1-5; 164:1-2. It was around that time “when the boy came and say that they found the guy in the corner. He was dead. . . . and I recognized him as the guy I was looking for.” Id. at 154:1-6.

The defense presented the testimony of Ephraim Torres who testified to Jose Medina’s good character and his reputation as a peaceful and law abiding citizen. Id. at 221:22-222:1; 224:14-20. Ephraim Torres testified that he invited his friend, Jose Medina, who had been living in Reading for approximately seven to eight months, to come to his daughter’s birthday party in Philadelphia on “Saturday the [1]9th of October” 1991.¹⁴ Id. at 222:9-22; 225:22-25. Ephraim testified that Jose Medina called asking to be picked up on the Friday he arrived in Philadelphia. Id. at 222:18-22. Finally, Ephraim Torres presented the birth certificate of his daughter, which showed that she was born on October 15, 1985. Id. at 224:4-10. There was a stipulation that

¹⁴ The trial transcript reads “Saturday the 9th of October” but October 9, 1991 was a Wednesday. Trial Tr. 222:9-11. October 19, 1991 was a Saturday and was the day after the murder. The testimony and questioning assume that reference is being made to October 19th. Id. at 222-224, 230-231. Indeed, the defense counsel’s closing argument references “October 19th.” Id. at 253:21-24. It is likely that the “9th of October” is typographical error in the transcript.

Jose Medina's mother also would have testified to Jose Medina's good reputation. Id. at 226:19-22.

On November 12, 1992, a jury convicted Jose Medina of first-degree murder and related charges stemming from the stabbing of William Bogan on October 18, 1991. The jury deadlocked on the issue of imposing the death penalty so the judge sentenced Jose Medina to life without parole.

III. Procedural History

A. Prior Procedural History

An understanding of this case's extensive procedural history and prior court rulings provides critical context to this Court's ruling. Nearly every court that has examined this case has expressed concern that Jose Medina was convicted based on the sole eye witness testimony of a child whose competency was never established. Specifically, the focus has been on whether trial counsel, Ed Daly, was ineffective for failing to request a competency hearing for Michael Toro who was only an 11-year-old at the time he claimed to see the stabbing. Jose Medina's sentence was vacated but reinstated, a new trial was recommended, a new trial was granted and then the retrial was vacated. The last court to rule on the issue was the Third Circuit which found that Jose Medina's trial counsel was ineffective for failing to request a competency hearing for Michael but that there was no prejudice based largely on the remaining testimony of another child witness, Michael's younger brother Hector, who provided circumstantial evidence that might have led to a conviction. Hector, like Michael, was never subjected to a competency evaluation either at the request of defense counsel or on the trial court's own initiative. Although Jose Medina raised the issue of Hector's competency

not having been established in post conviction filings, the issue was not focused on much by his lawyers or the courts.

Jose Medina filed a direct appeal, contesting the trial court's permitting the young boys' testimony without having determined their competency, and his trial counsel's failure to challenge their competency. Commonwealth v. Medina (Medina I), 668 A.2d 1194, No. 3885 Phila. 1993, slip op. at 1 (Pa. Super. Ct., Aug. 31, 1995). Jose Medina also challenged the sufficiency of the evidence. Id. at 19. The Pennsylvania Superior Court denied Jose Medina's sufficiency of the evidence claim. Id. The Superior Court's decision did not address the trial court's failure to hold a competency hearing for Hector or Michael nor the failure of trial counsel to challenge Hector's competency. Id. at 19, 1-24. However, the Superior Court agreed that there was "at least arguable merit to appellant's contention that his trial counsel was ineffective for failing to object to the competency of the juvenile, Michael [Marcos] Toro." Medina I, at 20.

To evaluate the claim, the Superior Court applied the two prong standard set forth by the Supreme Court in Strickland v. Washington which requires that a petitioner show his lawyer's performance was deficient or fell below "an objective standard of reasonableness," and prejudice such that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. 668, 687-88, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694. Pennsylvania law also requires that the petitioner establish that the claim has "arguable merit." Commonwealth v. Lesko, 15 A.3d 345, 372 (Pa. 2011).

The Superior Court stated after reviewing Michael's trial testimony:

“It is apparent from this [testimony] that whether the juvenile witness observed appellant [Medina] stab the victim depended on the identity of the questioner, with whom the young witness invariably sought to agree.

. . .

The testimony of Michael [Marcos] Toro varied from one extreme to the other, depending upon the party asking him questions. During the three times that he was questioned by the Commonwealth, he testified that he had seen appellant [Medina] stab Bogan. However, he contradicted this testimony during both cross and re-cross examination. On those occasions, he said he had not seen appellant stab the victim. The discrepancy resulted not only from defense counsel's impeachment of Michael with his preliminary hearing testimony, but also from Michael's testimony at trial. Michael asserted that at the preliminary hearing he truthfully had denied that he had seen the stabbing. He in essence provided two distinct accounts of what he actually had seen on the night of the stabbing.”

Medina I, at 15,19.

The Superior Court found that the law required that a child's competency be determined by the trial court and that such a determination had never been requested or done in this case. Id. at 21. Since 11-year-old Michael was the sole eyewitness, failing to determine whether he was competent was important:

“Michael's age necessitated an inquiry into his competency as a witness. That inquiry, focused as it was on his consciousness of the duty to speak the truth, failed to resolve the matter. His reluctance to answer questions had frustrated the trial court and the Commonwealth's efforts. Despite that result, the trial court permitted him to testify. During his testimony, he consistently answered questions as he believed his examiner desired. His inclination to please his questioner created a highly contradictory record, where he both saw and did not see the stabbing. From the portions quoted in the trial transcript, Michael had acted in a similar fashion at the preliminary hearing. Nevertheless, appellant's trial counsel failed to object to his competency at trial. We cannot determine from the record whether a reasonable basis existed for this approach by appellant's trial counsel. **With Michael as the only eyewitness to the stabbing, and the prejudice from his testimony being self-evident, the issue is significant.**”

Id. at 21-22 (emphasis provided). The Superior Court vacated Jose Medina's sentence and remanded the case to the trial court, directing that there be an evidentiary hearing

to address defense counsel's rationale for not requesting a competency hearing prior to Michael's testimony. Id. at 22-24. The Superior Court explicitly stated that if counsel was found to be ineffective, a new trial was required:

"We are mindful that an evidentiary hearing is unnecessary where 'the allegation lacks arguable merit; an objectively reasonable basis designed to effectuate appellant's interests existed for counsel's actions or inactions; or appellant was not prejudiced by the alleged error by counsel.'

The judgment of sentence is vacated, at least for the time being, and the case is remanded for an evidentiary hearing on appellant's claim that he received ineffective assistance by counsel. If trial counsel's assistance is found to be effective, the judgment of sentence may be reimposed. **If counsel's assistance is ineffective, however, a new trial must be granted.**"

Id. at 23-24 (emphasis provided) (citing Commonwealth v. Petras, 534 A.2d 483, 485 (Pa. Super. Ct. 1987)). Thus, the Superior Court found that there was "arguable merit" to the ineffectiveness claim and that the "prejudice from [Michael's] testimony [was] self-evident" but remanded the case solely to determine whether there was a reasonable basis for counsel's inaction. Id. at 20, 23-24.

At the November 22, 1995 evidentiary hearing, defense counsel explained that he believed that a challenge to Michael's competency would be unsuccessful and that his strategy instead was to use Michael's contradictory testimony to impeach him. Medina v. Diguglielmo, 373 F. Supp. 2d 526, 537 (E.D. Pa. 2005) (citing Tr. 11/22/95 at 18-19). The trial judge announced orally at a subsequent hearing that counsel was effective and that she had written an opinion supporting that decision. Id. (citing Tr. 3/16/96 at 2). No opinion or order was found in the state court record. 373 F. Supp. 2d 526, 537. Subsequent to the trial judge's death, another judge issued a written order denying the ineffective assistance of counsel claim consistent with the trial judge's verbal order, and Jose's life sentence was reimposed. See id. at 537.

On October 30, 1997, Jose Medina appealed¹⁵ again to the Superior Court contending that his trial counsel was ineffective for failing to contest the competency of both Michael and Hector. 373 F. Supp. 2d at 537 n.5. On February 16, 2001, the Superior Court denied his appeal finding that trial “counsel's strategy, while arguably the wrong one in hindsight, was not lacking in a reasonable basis designed to further appellant's interest.” Commonwealth v. Medina (Medina II), 776 A.2d 1007, No. 3132 EDA 1999, slip op. at 3 (Pa. Super. Ct., Feb. 16, 2001) (unpublished but attached). The Superior Court then affirmed the trial court and reimposed Jose Medina’s sentence of life without parole.

On December 11, 2001, Jose Medina acting pro se filed his first petition under Pennsylvania’s Post Conviction Relief Act (PCRA). 42 Pa.C.S.A. §§ 9541-9551. PCRA counsel was appointed and alleged that trial counsel was ineffective for failing to present medical records from five months prior to the murder showing Jose was physically incapable of doing what he was alleged to have done and failing to object both to the prosecutor’s comments at trial and the judge’s admonishments of him in front of the jury. This PCRA petition was denied by the Court of Common Pleas and the Superior Court. See Commonwealth v. Medina (Medina III), 835 A.2d 833, No. 3224 EDA 2002, slip op. at 4, 5, 11 (Pa. Super. Ct., Sept. 17, 2003) (unpublished but attached). The ineffectiveness claims regarding the prosecutor’s comments and trial judge’s remarks were not reviewed on the merits but were denied for technical reasons:

¹⁵ Jose Medina’s PCRA counsel failed to file an appeal to the trial court’s Order denying ineffectiveness. Jose Medina timely filed his own appeal which was not docketed by the clerk. To correct these errors, he filed a petition for a writ of mandamus with the Pennsylvania Supreme Court which remanded it to the Court of Common Pleas as a post conviction relief matter. Commonwealth v. Medina, CP 91-12-1080. (First Judicial Dist. of Pa., Ct. of Common Pleas, Feb. 8, 2000) (Lazarus, J.). Judge Anne Lazarus remedied PCRA counsel’s and the clerk’s mistakes by reinstating Jose Medina’s appellate rights. Id.

the claims had been waived since Pennsylvania law at the time required that ineffectiveness claims be made at the first opportunity on appeal, be “layered” to include all previous counsel who were alleged to be ineffective, and specify in detail the allegations. Id. at 5-7. The Superior Court held that since PCRA counsel had not stated with specificity which of the previous appellate attorneys had been ineffective in failing to raise the claims, the issues were waived. Id. at 7. With respect to the medical records, the Superior Court denied that claim since Jose Medina had not shown that his medical condition on the night of the stabbing was the same as it was five months prior as documented in his medical records. Id. at 9-10. Jose Medina’s petition for allowance of appeal to the Pennsylvania Supreme Court was denied on December 16, 2003. Commonwealth v. Medina, 841 A.2d 530, No. 468 EAL 2003 (Pa., Dec. 16, 2003) (unpublished but attached).

On January 13, 2004, Jose Medina acting pro se filed a petition for habeas corpus relief in federal court raising essentially the same issues for which he had sought relief in the Pennsylvania state courts. Specifically, he claimed the trial court denied his due process rights for failing to conduct a competency hearing for Hector and Michael Toro and his counsel was ineffective for not challenging the boys’ competency. He also argued that counsel was ineffective for failing to introduce medical records showing his physical condition five months before trial, not objecting to the prosecutor’s comments in closing vouching for the child witnesses, and not objecting to the trial judge’s comments to defense counsel in front of the jury. 373 F. Supp. 2d at 538 n.6. The District Court appointed Shannon Quill as counsel to represent him.¹⁶ Id. at 539.

¹⁶ Sometime after having represented Jose Medina, Shannon Quill left private practice at Ballard Spahr and became a federal public defender in Maryland. PCRA Tr. 49:8-11, July 19, 2010.

On January 13, 2005, the Magistrate Judge recommended that Jose Medina receive a new trial. Report & Recommendation (“R&R”), C.A. No. 04-128, 6-22, Jan. 13, 2005. The Magistrate Judge found that Jose Medina’s trial counsel was ineffective for not objecting to Michael Toro’s competency and that there was a reasonable probability that the outcome of trial would have been different absent Michael’s testimony. 373 F. Supp. 2d at 539 (citing R&R at 6-22). The Magistrate Judge found that there was no basis in the record to question Hector’s competency although no competency hearing was requested or held for Hector.¹⁷ Id. (citing R&R at 6). The Magistrate Judge characterized the competency claims as ineffectiveness of counsel claims rather than claims that the trial court violated Jose Medina’s due process rights when it failed to establish Hector and Michael’s Toro’s competency. Id. at 538 n. 6. He never ruled on the issue of the trial court’s independent duty to establish that child witnesses Hector and Michael were competent. Id. The Magistrate Judge found, consistent with the Pennsylvania courts, that the medical records issue had no merit and that procedural errors precluded review on both the issue of the prosecutor’s remarks and the judge’s comments to counsel during the trial. R&R at 5-6, 22.

The Commonwealth filed objections to the Magistrate Judge’s finding that trial counsel was ineffective for failing to challenge Michael’s competency whereas Jose Medina’s counsel filed objections to the Magistrate Judge’s finding that he was procedurally barred from the claim that trial counsel was ineffective for failing to object to prosecutorial remarks because his post trial counsel had not preserved it. 373 F. Supp. 2d at 539. Jose Medina’s counsel did not file objections to the Magistrate

¹⁷ In the supplemental briefing, Jose Medina’s counsel had focused on the issue of Michael’s competency rather than that of his younger brother, Hector, who was the only other significant incriminating witness. 373 F. Supp. 2d at 540 n.8.

Judge's other findings including whether counsel was ineffective for not challenging Hector's competency nor to the Magistrate Judge's failure to decide the issue of whether the trial judge denied his due process rights for failing to establish that Hector and Michael were competent. Id.

On June 2, 2005, the District Court affirmed¹⁸ the Magistrate Judge's finding that Jose Medina should be given a new trial because his trial counsel's ineffectiveness for failing to challenge Michael's competency had a reasonable probability of having affected the outcome of his trial. Id. at 550, 555. Specifically, the District Court held that the Pennsylvania Superior Court's conclusion that Jose Medina's trial lawyer was effective even though he failed to request a competency hearing for the only eyewitness, young Michael, was "an objectively unreasonable application of clearly established federal law" on ineffective assistance of counsel as set forth in Strickland v. Washington, 466 U.S. 668 (1984). Id. at 540, 549. The District Court did an extensive review of Pennsylvania law on competency of child witnesses and Michael's trial and preliminary hearing testimony and ultimately found that under an "objective standard of reasonableness" Jose Medina's trial counsel was ineffective for failing to challenge his competency. Id. at 542-49.

The District Court first addressed Pennsylvania competency law as it related to Michael Toro's testimony. Id. At the time of Jose Medina's trial, Pennsylvania law required that there "must be a searching judicial inquiry as to mental capacity" for any child witness under 14 years of age. Id. at 542 (citing Commonwealth v. Fultz, 462 A.2d

¹⁸ The District Court also affirmed the Magistrate Judge's findings with respect to claims that counsel's failure to introduce medical records from five months prior to the stabbing, failure to object to the prosecutor's alleged vouching for Michael's testimony in closing and to the trial judge's criticism of him in front of the jury did not warrant habeas corpus relief. Id. at 552-555.

1340, 1343 (Pa. Super. Ct. 1983)). Michael was an 11-year-old at the time of the stabbing and a 12-year-old at the time of trial. Id. at 531. To prove he was competent, the law required that he:

“(1) has the capacity to observe or perceive the occurrence with a substantial degree of accuracy; (2) has the ability to remember the event which was observed or perceived; (3) has the ability to understand questions and to communicate intelligent answers about the occurrence; and (4) has a consciousness of the duty to speak the truth.”

Commonwealth v. Mazzoccoli, 475 Pa. 408, 380 A.2d 786, 787 (Pa. 1977).

The District Court wrote:

“In light of the applicable law on the competency of juvenile witnesses and the specific facts in Medina's case, all of which are relevant to assessing the reasonableness of Daly's actions “under the prevailing professional norms” and “in light of all the circumstances” as required by Strickland, Daly's performance fell below an objective standard of reasonableness. Several individual circumstances in Medina's case would have caused a reasonably competent attorney to object to the competency of Marcos Toro, a juvenile who was the prosecution's sole eyewitness. The sum of these circumstances makes it overwhelmingly apparent that Daly fell below an objective standard of reasonableness in failing to do so.

First of all, Marcos's age alone should have prompted Daly to request a competency hearing. Marcos was 12 years old at the time of trial. (Tr. 11/5/92 at 83.)

Second, Daly should have requested a competency hearing on the basis of Marcos's preliminary hearing testimony, which contained sufficient contradictions and inconsistencies that it called into question Marcos's competency. The most significant contradiction in Marcos's testimony was whether he actually witnessed Medina stab Bogan. At certain points in the preliminary hearing, Marcos indicated that he was merely relating what his brother told him had happened or what he guessed had happened. On direct examination during the preliminary hearing, Marcos testified:

Q: What did you see Harry [Medina] do with the white dude [Bogan]?

A: Stabbed him.

(Tr. 11/26/91 at 9.) But on cross-examination, Marcos testified:

Q: In fact, you didn't see Harry stab the guy, did you?

A: My brother did.

Q: Your brother did. And you are only telling us what your brother told you; is that right?

A: A-huh.

(Id. at 23.) Marcos's preliminary hearing testimony was also inconsistent as to whether he saw Bogan before or after Bogan was stabbed; when Marcos first saw Medina in the presence of Bogan; and whether Marcos's brother, Hector, was with Marcos when he saw Bogan. The Pennsylvania Superior Court in Medina's first direct appeal, Medina I, noted that Marcos's preliminary hearing testimony was contradictory. Medina I at 21 (“[Marcos's] inclination to please his questioner created a highly contradictory record, where he both saw and did not see the stabbing. From the portions quoted in the trial transcript, [Marcos] had acted in a similar fashion at the preliminary hearing.”). Daly himself characterized Marcos's preliminary hearing testimony as “flip-flopping.” (Tr. 11/22/95 at 18-19.) It is apparent from the face of the preliminary hearing transcript that Marcos's testimony was full of contradictions and inconsistencies. These contradictions went directly to Marcos's ability to perceive the events in question, his ability to remember the events, and his ability to understand questions and communicate answers intelligently, three of the four factors that Pennsylvania courts must consider in assessing the competency of a juvenile witness. Mazzocoli, 380 A.2d at 787.

.....

Daly had yet a third indication that Marcos's competency was highly questionable. Like the 15-year-old witness in Mazzocoli, 12-year-old Marcos Toro failed to demonstrate a consciousness of the duty to speak the truth, one of the requirements of competency. At trial, Marcos testified as follows:

Q. [By the prosecution] Do you know what it means to tell the truth?

A. [By Marcos Toro] Yes.

Q. What does it mean?

A. (No response.)

Q. Let me ask it the other way. Do you know what it means to tell a lie?

A. No.

Q. Do you know the difference between telling the truth and telling a lie?

A. No.

Q. You just told the jury and the judge when you put your hand on the Bible you were going to tell the truth?

A. Truth.

Q. What does the truth mean?

THE COURT: First of all, let's sit up straight and take our hand down. What happens to you if you tell a lie?

(No response.)

THE COURT: What happens to you? Take your hand down and look at me. Tell me what will happen to you if you tell a lie?

(No response.)

(Tr. 11/5/92 at 83-84) (emphasis provided). This exchange blatantly called into question Marcos's consciousness of the duty to speak the truth. Having failed to make an objection to Marcos's competency before Marcos began to testify, Daly should have made such an objection upon hearing this exchange at trial.

Furthermore, like his testimony at the preliminary hearing, Marcos's trial testimony as to what he saw was so contradictory that it called into question his ability to perceive the events, remember the events, and to understand questions and communicate intelligent answers about those events. Like the witness in Mazzacoli, most of Marcos's answers were "yes" or "no" responses to leading questions, his answers could be manipulated by the question and usually matched the answer desired by his questioner and his answers were inconsistent and contradictory. See generally supra section I (containing excerpts of Marcos's direct, cross, redirect, re-cross and final redirect examinations). The most significant contradiction in Marcos's testimony involved whether or not he actually saw Medina stab Bogan. Marcos first indicated, indirectly, that he saw Medina stab Bogan:

BY MS. SWEENEY [prosecution]:

Q. Marcos, after you went home to your house, what did you see happen which is why you came to court today?

A. (Pause.) Because he stabbed somebody.

Q. Who stabbed somebody?

A. Harry [Medina].

(Tr. 11/5/92 at 97.) However, on cross, Marcos indicated that he did not see Medina stab Bogan:

Q. When the defense attorney [at the preliminary hearing] asked you that question, remember we went over here, when he asked you, "You only assumed that because you saw the knife in the restaurant is that right?"

A. Yes.

Q. And when he asked you the question, "Everything you said about Harry stabbing the white dude is either something that your brother told you or you made up because you figured he did it because he had a knife. Right?"

A. Yes.

Q. When he asked you that question, you were telling the truth. Weren't you?

A. Yes. (Id. at 125.)"

Id. 543-47 (footnotes omitted). The District Court emphasized that the sections of Michael's testimony where he was asked about his understanding of the difference between truth and a lie could not be considered a competency hearing under Pennsylvania law because the trial court "did not inquire as to all four requirements of witness competency," namely the trial court "did not test [Michael's] ability to perceive or remember events accurately or his ability to understand questions and communicate answers intelligently." Id. at 546 n.19.

The District Court found that "[a]t the time of Medina's trial, applicable state law also held that an objectively reasonable attorney would not merely rely on cross-examining a key witness when the attorney could also make an arguably meritorious competency challenge." Id. at 543. The District Court found Daly's articulated strategy

for not challenging competency because he planned to “discredit” Michael through cross examination instead “was objectively unreasonable”:

“[I]t represented a false choice. This was not a case where two potential strategies were mutually exclusive. Daly could have first attempted to eliminate Marcos's testimony altogether by objecting to Marcos's competency. As set forth above, such an objection had, at the very least, arguable merit. If the competency objection failed, Daly could have then pursued his chosen strategy of discrediting Marcos's testimony through cross-examination. Any cross-examination would not have been prejudiced by a prior competency objection. There is no reasonable basis under these circumstances for deliberately eschewing one weapon, out of two available, when both can be used.”

Id. at 547-48.

The District Court concluded that trial counsel was ineffective:

“In summary, the first prong of Strickland requires that Daly's performance be measured under an “objective standard of reasonableness.” 466 U.S. at 688. That reasonableness is determined under “prevailing professional norms” and “in light of all the circumstances.” Id. at 688-690. Determining whether counsel's performance was objectively reasonable necessitates viewing counsel's actions in light of applicable state law since reasonably competent counsel is patently required to know the state of the applicable law. Everett, 290 F.3d at 509. In light of the applicable state law on the competency of juvenile witnesses, Marcos's age, his equivocal answers as to whether he knew the difference between a truth and a lie, and his contradictory testimony during both the preliminary hearing and at trial all would have prompted reasonably competent counsel to object to Marcos's competency as a witness. Daly's decision to discredit Marcos through cross examination rather than to try to disqualify his testimony altogether through a competency challenge, when he could have pursued both options, was objectively unreasonable in light of prevailing professional norms as set by state Supreme Court law. In light of all these circumstances, Daly's failure to object to Marcos's competency fell below Strickland's objective standard of reasonableness.

....

Given how egregious Daly's failure to object was in light of all the circumstances of Medina's case, Medina II's conclusion that Daly's performance was not deficient was not merely an incorrect application of Strickland, it was an objectively unreasonable application of clearly established federal law.”

Id. at 548-549. The District Court found that it was “overwhelmingly apparent that Daly fell below an objective standard of reasonableness” for not challenging Michael’s competency. Id. at 544.

The District Court next examined whether trial counsel’s performance prejudiced Jose Medina by determining whether there was “a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 549-550 (citations omitted). The District Court addressed the prejudice prong of the Strickland standard de novo apparently believing that the prejudice issue had not been decided by the Pennsylvania state courts:

“Medina II concluded that the performance of Medina's trial counsel, Daly, was not deficient and, therefore, never reached the prejudice prong of Strickland. Because Medina II never reached the prejudice prong of the Strickland analysis, nor did any other state court, my review of the prejudice prong of Strickland is a de novo review rather than a deferential review under the “unreasonable application” clause of AEDPA. Wiggins, 539 U.S. at 534.”

Id. at 540 n.9, 550.

However, the Superior Court had already decided the second prong in Medina I, holding that the “prejudice” from Michael’s testimony was “self-evident” and merely remanded the case to the trial court to determine whether there was a reasonable basis for counsel’s failure to challenge competency. Medina I at 22. Having already done the Strickland prejudice analysis, the Superior Court in Medina I held that if the performance was deficient, then “a new trial must be granted.” Id. at 24. Thus, the District Court should not have analyzed the prejudice prong de novo but rather evaluated whether the Superior Court’s finding of prejudice violated clearly established federal law or was objectively unreasonable. Lam v. Kelchner, 304 F.3d 256, 263 (3d Cir. 2002).

Nevertheless, the District Court found prejudice warranting a new trial just as the Superior Court had found earlier. 373 F. Supp. 2d at 550-52; See Medina I at 24. Like the Medina I Superior Court, the District Court found that since Michael was the sole eyewitness testimony and the rest of the evidence was not very strong, if counsel had successfully challenged his competency there was a reasonable probability that Jose would not have been convicted:

“Without Marcos's testimony, there is a reasonable probability that the jury would not have convicted Medina. Marcos was the only witness at trial who testified to seeing the actual stabbing. Medina I at 22. A review of the other evidence offered at trial shows that Marcos's testimony was the key to the prosecution's case. Hector Toro testified that he saw Medina with the knife in a neighborhood store, threatening to kill someone. (Tr. 11/5/92 at 43-46.) Hector did not see the stabbing. (Id. at 47-48.) Maria Caraballo testified that she saw Bogan run past her while holding his chest, but when she followed him she could not find him. (Tr. 11/6/92 at 150-51.) When she returned to her house, she saw Medina in front of her house, looking under a car. (Id. at 152-53.) Caraballo also did not see the stabbing. (Id. at 156.) The knife used to stab Bogan was never found. Medina I at 19. While the forensic pathologist testified that the stab wound could have been caused by the type of “Rambo” knife that Hector said Medina possessed, the stab wound also could have been caused by a butcher knife or any knife with a single edge and a blade six inches in length. (Tr. 11/6/92 at 214.) Finally, Medina's white sweatshirt had no blood on it when he was stopped on the street shortly after the stabbing or when he was later arrested at a nearby bar. (Id. at 180-81.)

It is clear from this review of the evidence presented at trial that Marcos's testimony was significant. Indeed, when remanding Medina's case for an evidentiary hearing, the state Superior Court found that Marcos's testimony was key to the prosecution's case: “With Michael [Marcos] as the only eyewitness to the stabbing, and the prejudice from his testimony being self-evident, the issue is significant.” Medina I at 22. Absent Marcos's testimony, there is a reasonable probability that the jury would have a reasonable doubt regarding Medina's guilt. Thus, Medina has satisfied the prejudice prong of Strickland.

Medina has shown both (1) that his trial counsel, Ed Daly, was objectively unreasonable in failing to object to the competency of Marcos Toro and (2) that there was a reasonable probability that, had Daly objected, Marcos would have been disqualified from testifying and the jury would not have been able to find Medina guilty beyond a reasonable doubt. Medina has satisfied both the deficient performance and the prejudice prong of Strickland. The state court's

conclusion that trial counsel was effective was an objectively unreasonable application of federal law. Therefore, habeas relief is merited on the basis of this claim.”

373 F. Supp. 2d at 551-52.

The District Court noted that the Magistrate Judge did not address Jose Medina’s “pro se claim that the trial court violated his due process rights when it failed to conduct a sua sponte inquiry into the competency of the Toro brothers.” Id. at 538. The District Court wrote “in light of my granting habeas relief on the basis of Medina’s claim of ineffective assistance of trial counsel for failing to object to Marcos Toro’s competency, it is not necessary to discuss whether the trial court should have conducted a competency hearing sua sponte.” Id. at 538 n.6. The District Court commented that Jose Medina’s pro se claim challenging his trial counsel’s effectiveness for failing to raise competency included Hector along with Michael in this claim and that the Magistrate Judge found that there was sufficient evidence of Hector’s competency in the record. Id. at 540 n.8 (citing R&R at 6). However, since Jose Medina’s counsel never challenged the Magistrate Judge’s finding, the District Court accepted this finding. Id. at 538, 540 n.8.

The Commonwealth appealed the District Court’s grant of a new trial to the Third Circuit. Before addressing the issue of counsel’s ineffectiveness for failing to challenge Michael’s competency, the Third Circuit visited the issue of the Magistrate Judge’s not ruling on whether the trial court violated Jose Medina’s due process rights by not conducting a “hearing regarding the competency of the Toro brothers.” Medina v. Diguglielmo, 461 F.3d 417, 426-27 (3d Cir. 2006). The Third Circuit concluded that “this claim has been abandoned or forfeited” because Jose Medina’s counsel did not file a

protective cross-appeal to the Magistrate Judge's failure to address that issue raised by Jose Medina in his pro se petition. Id. Thus, even though Jose had consistently raised the issue of the failure of the trial court to conduct a competency hearing for both Michael and Hector, no court has ever ruled on this issue due to the failure of his lawyers to focus on or preserve the issue, and courts' holdings that the issue was procedurally waived.

On August 31, 2006, the Third Circuit affirmed the District Court's finding that Jose's trial counsel's performance in failing to challenge competency fell below objectively reasonable standards of professionalism. Specifically, the Third Circuit agreed with the District Court's finding of trial counsel's ineffectiveness but solely focused on Michael's testimony without comment about the nearly parallel facts that were also present in that of the younger boy, Hector. The Third Circuit stated:

"Trial counsel was ineffective in not requesting a judicial inquiry in to competency.

Mr. Daly attempted to justify his failure to object to Marcos Toro's competency on the basis that he concluded the child was competent after reading the transcript of his testimony from the preliminary hearing. Mr. Daly did not move for a competency hearing after Marcos Toro testified that he did not know the difference between telling the truth and telling a lie. This response should have alerted Mr. Daly that because of his **immaturity**, Marcos Toro lacked 'a consciousness of the duty to speak the truth.' Id.

Mr. Daly's excuse for failing to seek a competency hearing during the trial because he 'decided that the individual appeared to me to be competent' is baffling. We agree with the District Court that Mr. Daly's performance was objectively unreasonable under the professional standards applicable to lawyers who practice in Pennsylvania courts.

Mr. Daly's alternative decision not to challenge Marcos Toro's competency because he wanted to discredit the child's testimony on cross-examination was also objectively unreasonable under prevailing professional performance standards in Pennsylvania. In Commonwealth v. Mangini, 425 A.2d 734 (Pa. 1981), which was decided eleven years before the trial in this matter, the

Supreme Court of Pennsylvania held that a defense counsel's performance under virtually identical circumstances was ineffective. Id. at 737.

The Pennsylvania Superior Court failed to cite Rosche or Mangini in holding that Mr. Daly's strategy "while arguably the wrong one in hindsight, was not lacking in a reasonable basis." Commonwealth v. Medina, No. 3132 EDA 1999, slip op. at 3 (Pa. Super. Ct., Feb. 16, 2001). This ruling was an objectively unreasonable application of the Supreme Court's decision in Strickland because it failed to consider prevailing professional standards."

461 F.3d at 428-29 (emphasis in original).

The Third Circuit decided differently than the Pennsylvania Superior Court, the District Court and the Magistrate Judge's findings on the issue of prejudice. The Third Circuit held that there was no prejudice because even without Michael's testimony, other circumstantial evidence,¹⁹ especially Hector's testimony, would "support a reasonable inference that Mr. Medina carried out his threat to kill someone that day with his 'Rambo' knife." Id. at 432. The Third Circuit focused on the importance of Hector's testimony:

"Because of the strength of the circumstantial evidence, including Mr. Medina's statement to Hector Toro that he was going to kill someone with the knife in his possession a few minutes before Mr. Bogan was found stabbed to death nearby, we are persuaded that Mr. Daly's deficient performance was not prejudicial."

Id. at 432. Thus, the Third Circuit, having found ineffective performance but no prejudice, reversed the District Court's grant of relief in the form of a new trial. Id. at 433.

¹⁹ The Third Circuit's analysis of prejudice focused on whether there was sufficient evidence outside of Michael's testimony that would have sustained Jose Medina's conviction. The Court stated, "Even without the testimony of Marcos Toro, there was more than sufficient evidence to convict Mr. Medina." Id. at 430. The analysis required under Strickland v. Washington instead provides that prejudice is shown if counsel's deficient performance resulted in a "probability sufficient to **undermine confidence** in the outcome." 466 U.S. 668, 694 (1984) (emphasis provided). Strickland prejudice analysis focuses on whether, without counsel's errors, there was a "reasonable probability" that the outcome would have been different.

The Third Circuit's decision erred for not taking into account, nor even addressing, the Pennsylvania Superior Court's earlier decision in Medina I, finding that the prejudice from Michael's testimony was self-evident, and that if counsel's performance was found deficient, Jose Medina must be given a new trial. Medina I, at 22-24. The Superior Court's finding of prejudice would constitute the law of the case on that issue. See Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995) ("A court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter").

Federal habeas law precludes the federal court from disturbing a state law holding unless the state's decision was "objectively unreasonable" and violates clearly established federal law:

"[W]hen a federal court reviews a state court's ruling on federal law, or its application of federal law to a particular set of facts, the state court's decision must stand unless it is "contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."

Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), effective April 24, 1996 ("AEDPA"); Lam v. Kelchner, 304 F.3d 256, 263 (3d Cir. 2002) (quoting 28 U.S.C. § 2254(d)(1)). Thus, the Third Circuit could not disturb the Pennsylvania Superior Court's Medina I finding that Michael's testimony was prejudicial even if it believed it was "incorrect or erroneous"; it would have had to have been an "objectively unreasonable application of clearly established federal law." See Wiggins v. Smith, 539 U.S. 510, 520-21 (2003). The Third Circuit did not make such a finding. The Third Circuit easily may have overlooked Medina I because their analysis

stemmed from Medina II's finding that counsel's performance was effective. Once the Third Circuit found deficient performance, it should have accepted the Superior Court's finding of prejudice and granted a new trial unless it determined that the Superior Court's prejudice finding violated federal law.

Even if the Third Circuit were somehow permitted to deny habeas relief under federal law by ignoring the Superior Court's prejudice finding, there remains a glaring gap in the procedural history of this case. The Pennsylvania Superior Court explicitly directed in its ruling of August 31, 1995 when it vacated Jose Medina's sentence and remanded it to the trial court: "If counsel's assistance is ineffective, however, a new trial **MUST** be granted." Medina I, at 22-24 (emphasis provided). The Superior Court already found prejudice; it simply remanded for an evidentiary hearing on the issue of whether counsel had a reasonable basis for not challenging Michael's competency. Id. at 21-22 (emphasis provided). The Third Circuit held on August 21, 2006 that defense counsel was ineffective under clearly established federal law and that holding binds the state courts. 461 F.3d at 428 (affirming District Court's finding on ineffectiveness). Thus, even though the Third Circuit found counsel was ineffective, the Superior Court's earlier directive that "if counsel's assistance is ineffective...a new trial must be granted" has not been implemented. Medina I, at 22-24. This significant procedural omission in carrying out the Superior Court's earlier instructions surprisingly remains unresolved.

The focus of most of the post trial proceedings in this case was whether the two primary witnesses, Michael and Hector Toro, as children were subjected to Pennsylvania's legally required competency inquiry for children before they testified. Although every court to address the topic has articulated concern about the failure to

address Michael's competency, the Third Circuit decided that this error did not warrant a new trial for Jose Medina because of other incriminating evidence, principally that from Michael's younger brother, Hector. Nevertheless, the Third Circuit's ruling that under federal law trial counsel was objectively unreasonable for failing to challenge Michael's competency, still binds this and other state courts in analyzing other post trial claims and the remaining evidence in this case. For purposes of the PCRA petition before this Court, the Third Circuit's ruling requires that the lens we are bound to use in examining the claims must exclude Michael's eyewitness testimony.²⁰ This leaves his younger brother Hector Toro's testimony as the main incriminating evidence against Jose Medina.

B. Current Procedural Posture

On December 5, 2006, the current petition was filed pursuant to the Post Conviction Relief Act alleging after-discovered evidence from Hector Toro recanting his trial testimony and stating that police detectives coerced and threatened him and his brother to testify falsely.²¹ (Pro Se Pet. 2-3.) Petitioner Medina continues to assert his innocence claiming this newly discovered evidence of recantation and prosecutorial misconduct is exculpatory and reveals that the prosecution knowingly presented false

²⁰ Nevertheless, this Court's rulings would not be any different with or without Michael's testimony included in the analysis.

²¹ This is Jose Medina's second petition for PCRA relief. As discussed, Medina's first direct appeal alleged, among other issues, that counsel was ineffective. See Medina I, Commonwealth v. Medina (Medina I), 668 A.2d 1194, No. 3885 Phila. 1993, slip op. (Pa. Super. Ct., Aug. 31, 1995). Although the sufficiency of the evidence claim was denied, the Superior Court remanded the case for an evidentiary hearing on the ineffectiveness claim. Medina's filed a direct appeal from the trial court's decision after the remand. This appeal of the decision on remand was later docketed as a PCRA petition. In any event, the Superior Court decided it on the merits by affirming the trial court's finding that counsel's performance was not ineffective. Commonwealth v. Medina (Medina II), 776 A.2d 1007, No. 3132 EDA 1999, slip op. (Pa. Super. Ct., Feb. 16, 2001) (affirming judgment of sentence after remand and evidentiary hearing). The appeal from the remand decision being renamed as a PCRA petition explains the lack of clarity in the record as to how many PCRA petitions have been filed. Medina's first PCRA filed December 11, 2001 is sometimes referred to as his second PCRA petition.

testimony. He claims that the prosecution's actions so undermined the truth-determining process at trial that no reliable adjudication occurred and caused a miscarriage of justice warranting a new trial. (Pro Se Pet. 2-4, 6; Mem. Law Supp. Jose Medina's Supplemental Am. Pet. 8.) Petitioner Medina also asserts that the prosecutor knew at the time of trial that 11-year-old Michael Toro was receiving psychiatric treatment and SSI and did not reveal this exculpatory and impeachment information to the defense. (Pro Se Pet. 4-6.) Finally, Petitioner Medina asserts that the prosecutor knowingly solicited perjured testimony from Maria Caraballo, who was not at the scene, but did not disclose this information to the defense. (Pro Se Pet. 6-8.)

The petition was not assigned to, or received by, this judge until August 2008. After a preliminary review, this Court ordered on August 12, 2008 that the petition raised issues justifying the appointment of counsel. Court Administration²² appointed counsel Larry Feinstein. On June 29, 2009, this Court removed Larry Feinstein²³ as counsel. Court Administration appointed current counsel, Norman Scott, to represent Jose Medina on July 2, 2009.

On March 25, 2010, Norman Scott filed an amended petition narrowing the issues raised by Jose Medina to the newly discovered evidence of recantation of the two juvenile witnesses and law enforcement coercing and threatening the boys to testify falsely without disclosing such evidence to the defense. (See Second Am. Pet.) The

²² In Philadelphia County, Court Administration appoints counsel. The assigned judge has no control or involvement in the selection of court-appointed counsel.

²³ This Court informed Larry Feinstein and assistant district attorney, Cari Mahler, at sidebar that Larry Feinstein was being removed as counsel due to his failure to effectively represent Jose Medina, including but not limited to his failing to attend a scheduled hearing, his semi-retired status leading to difficulty and delay in scheduling hearings, and his filing an amended petition that failed to meet legal requirements. The Commonwealth made no objection to this Court's removal of counsel and order that Court Administration appoint new counsel.

second amended petition was supported by affidavits by both Hector and Michael Toro and asserts newly discovered evidence as follows:

“The two witnesses presented at trial by the Commonwealth to identify the defendant as the perpetrator of the homicide now recant that testimony contending that at the time of the incident and the trial they both were coerced by the police to identify the defendant[:] specifically the police took advantage of their youth and inexperience compelling them to identify the defendant. Had the true facts been presented to the jury at trial it would have been exculpatory in nature thereby affecting the outcome of trial.”

(Second Am. Pet. 5.) The petition asserts that the evidence is exculpatory, caused prejudice to Jose Medina and constitutes a miscarriage of justice warranting a new trial.

IV. PCRA Evidentiary Hearing

The testimony of two young boys constituted the primary incriminating evidence against Jose Medina. Both federal and state courts that have examined the major competency issues presented by Michael Toro’s testimony relied primarily on Hector’s incriminating testimony as justification to hold Jose Medina’s conviction in place. The Third Circuit’s decision that vacated the District Court’s grant of a new trial cited Hector Toro’s testimony as providing sufficient evidence that Jose Medina was not prejudiced by his counsel’s deficient performance in failing to challenge Michael’s competency. Medina v. Diguglielmo, 461 F.3d 417, 432 (3d Cir. 2006). The Superior Court in Medina I examined Jose Medina’s sufficiency of the evidence challenge and regardless of the major inconsistencies in Michael’s testimony,²⁴ found that Hector’s testimony remained and provided sufficient evidence upon which to convict. Medina I at 15, 19. Finally, the Superior Court’s Medina I holding that if counsel were found ineffective a new trial must be granted because of the obvious prejudice from Michael’s

²⁴ The Superior Court’s finding that a new trial must be granted if counsel was ineffective because of the prejudice from Michael’s testimony is a different determination than whether a conviction based on only Hector’s testimony would be sufficient as a matter of law.

testimony implicitly highlights the meager amount of evidence against Jose Medina. Michael Toro's testimony was consistently recognized as problematic leaving Hector Toro's testimony as the only serious incriminating evidence left.

Jose Medina's present PCRA petition squarely challenges the only remaining evidence that that would be sufficient to convict Jose Medina: Hector's testimony that he saw Jose Medina in the Chinese restaurant prior to the murder brandishing a knife and threatening to kill someone. The PCRA petition includes an affidavit by Hector Toro²⁵ recanting his trial testimony and recounting that a detective threatened him and his brother Michael to testify as instructed or they would be taken from their grandmother's care and placed in a foster home or juvenile placement. Hector stated that he and Michael were in the Chinese restaurant and never saw Jose Medina that night and by the time both boys left the restaurant, the murder had already occurred. Specifically, the Amended PCRA petition presents the following issues:

“Did law enforcement officers take advantage of the youth and inexperience of the two witnesses presented at trial by the Commonwealth, in order that the juveniles would falsely identify the defendant as the perpetrator of the homicide at his trial, resulting in the defendant's conviction deprive the defendant of a fair trial and entitle him to a new trial?”

(Mem. Law Supp. Jose medina's Supplemental Am. Pet. 4.)

The Court held a nine day evidentiary hearing during July and September 2010. The parties submitted post hearing briefs in February 2011.²⁶ This Court found that Hector Toro gave credible testimony in four areas of new or after discovered evidence:

²⁵ The PCRA Petition was also supported by an affidavit from Michael Toro. This Court will not delineate the substance of Michael Toro's supporting affidavit since once he was found incompetent to testify about events in 1991 surrounding or relating to the death of William Bogan, his statements from that time were not available as evidence.

²⁶ This Court notes that the Commonwealth's post hearing brief indiscriminately includes evidence that this Court held was inadmissible. The Court found Michael Toro incompetent to testify about events in 1991 and 1992. (See Ct. Incompetency Order, July 21, 2010.) But the Commonwealth selectively

1. Hector Toro's trial testimony was false;
2. Law enforcement officers and prosecutors failed to follow procedural requirements designed to protect child witnesses, such as informing legal guardians and having them present during questioning and trial;
3. A law enforcement officer threatened Hector and Michael Toro in order to procure testimony;
4. A law enforcement officer knew that false testimony was being presented.

The Commonwealth failed to show credible evidence that procedural protections designed to protect child witnesses were followed. The Commonwealth conceded that law enforcement officers transported the children but that it had no information as to the identity of the detectives. The Commonwealth also presented no witnesses to directly rebut Hector's statements, relying instead on challenges to his veracity and implications that he recanted out of fear. Hector's recantation was corroborated by his mother's testimony and evidence from the original trial.

Hector Toro's PCRA testimony is not only exculpatory but significantly undermines Michael Toro's trial testimony of having witnessed the murder and having seen Jose Medina in the Chinese restaurant before it occurred. Hector's testimony provides major impeachment of Maria Caraballo who facilitated the detective's pressure on the two young boys. Hector's credible story of being forced by a detective to testify falsely highlights the major prejudice caused by the failure to establish Hector and Michael's competency at the original trial. Based on the credibility of Hector's exculpatory testimony that a detective coerced him to testify falsely and that he did not

discusses statements from Michael Toro notwithstanding this incompetency determination. (See, e.g., Commonwealth's Post-Hr'g Br. at 31-33, 41-43, 87-90.) While the Commonwealth is free to challenge evidentiary rulings on appeal, it is improper to discuss the evidence as though it was admitted. Thus, readers should be cautioned that the Commonwealth's post hearing brief in this case improperly collapses evidence that was admitted with evidence that was excluded in its discussion of the record. (See, e.g., Commonwealth's Post-Hr'g Br. at 53, 64-65, 92-93, 106-08 (citing exhibits not admitted including: Ex. P-5 Michael Toro Investigation Interview Records, Jan. 1, 2009; Ex. C-21 Michael Toro Video Taped Interview; Ex. C-5 undated letter to Michael written in Spanish.)

see Jose Medina on the night of the murder, a new trial is required. The corroborating evidence from witnesses and the record of the original trial amplifies the necessity of a new trial to ensure justice.

The Third Circuit's ruling that counsel erred by not challenging Michael's competency as required by clearly established federal law means that the evidence in this PCRA proceeding must be examined without Michael's testimony. Hector was left as the remaining trial witness incriminating Jose Medina. Hector's credible PCRA testimony that he lied at trial would certainly have led to a different verdict. However, this Court's finding that Hector's PCRA testimony warrants a new trial is not dependent on Michael's testimony being excluded; the same conclusion would have been made with or without Michael's testimony being considered.

A. Preliminary Rulings

1. The Court sequestered witnesses and issued mutual stay away orders.

The Court ordered sequestration of all witnesses at the beginning of the PCRA hearing.²⁷ Given the allegations by both sides of the case of threats and coercion, the Court took additional steps to ensure the integrity of the proceeding and ordered that Michael, Hector, and Maria Toro be sequestered in the jury room once the PCRA evidentiary hearing began. The Court explained the reasons for the sequestration and additional protections in open court to counsel and prospective witnesses: the order was intended to ensure that testimony before the Court was truthful and uncompromised.²⁸ Witnesses, including, Hector and Michael Toro, were informed that it

²⁷ PCRA Tr. 12:10-13:19; 14:11-15, July 19, 2010.

²⁸ PCRA Tr. 12:23-13:19; 24:7-21, July 19, 2010.

was up to them as to whether they wanted to speak with counsel for the Petitioner or the Commonwealth.²⁹

The history of the case led to this Court's additional protective measures. The PCRA petition was supported by affidavits signed by Hector and Michael that claimed a detective coerced and threatened them at the original trial to secure statements and testimony. After the PCRA petition was filed, detectives, many of whom testified that they knew the decedent's brother who is a police officer,³⁰ visited Hector and Michael and procured signed statements retracting their recantations.³¹

At the original trial, the assistant district attorney informed the trial judge that both boys seemed terrified and Hector was crying before the trial after the Medina family showed up in court.³² The assistant district attorney reported that officers said that the boys were intimidated by Jose Medina's family and feared retaliation, even though no direct evidence had been shown of threats, and requested that the Medina family not sit in court for the trial.³³

A week before the scheduled PCRA hearing, the Commonwealth requested a hearing and stay away order for Jose Medina, Sr. The Commonwealth informed this Court that the detectives had reported that Maria, Michael and Hector Toro were afraid of Jose Medina, Sr. The Court did not need to make any finding as to whether there

²⁹ PCRA Tr. 5:19-6:13; 24:2-9; 24:22-25:15, July 19, 2010.

³⁰ Detective John McDermott testified that he has known the victim's brother, Officer Timothy Bogan, for 15 years because they have worked together on assignments. He also knows the detectives involved in Jose Medina's trial. PCRA Tr. 127:21-128:8; 128:14-16, Sept. 2, 2010. Detective Cruz testified that he is familiar with Officer Bogan based on seeing him around the Criminal Justice Center but has never had a conversation with him. PCRA Tr. 74:2-12, Sept. 3, 2010. Officer Bogan regularly attended the PCRA hearing.

³¹ PCRA Tr. 37:6-38:9; 77:13-78:5; 83:7-10, Sept. 3, 2010; PCRA Tr. 81:5-19; 82:1-16; 87:12-17; 90:6-12; 90:25-91:41; 92:22-97:24; 127:21-128:9, Sept. 2, 2010.

³² PCRA Tr. 188:7-189:9; 190:2-8, July 26, 2010; Trial Tr. 14:5-6; 6:10-7:22.

³³ PCRA Tr. 60:15-24; 61:1-12, Sept. 2, 2010; Trial Tr. 7:2-8:1.

was truth to these assertions because Jose Medina, Sr. voluntarily agreed to a stay away order, stating he did not want to do anything to jeopardize his son's claims. In any event, the Court issued a written stay away order prohibiting Jose Medina, Sr. from contacting members of the Toro family except through Jose Medina's counsel.³⁴ (See Ct. Order, July 15, 2010.)

The Court sequestered witnesses at the start of the PCRA proceeding on July 19, 2010, explaining,

"What I care about most is finding out what the truth is, and one of the ways of finding out the truth is to make sure that people are not sharing stories, but telling what they know from their own memory and sticking to their oath of telling just the truth,

. . .

I have no idea what the truth is. Part of what today's hearing will be is to explore those issues. So all the Court has done is try to avoid any kind of accusations that anybody looked at anybody askance."³⁵

On July 20, 2010, the Court issued a bilateral order precluding anyone from law enforcement or Jose Medina's family from talking to Michael Toro during the pendency of the matter:

"THE COURT: Until the testimony is done in this case, I want everyone to instruct their respective parties, Ms. Mahler, no detectives, no law enforcement, no one is to talk to Michael Toro about this case absent permission from the Court.

MS. MAHLER: Absolutely, Your Honor. I don't know -- is Your Honor --

THE COURT: And likewise, you are to instruct everyone in the Medina family or related that they don't talk to Michael about this until his testimony is done.

MR. SCOTT: Absolutely, Judge."³⁶

Law enforcement officers who were witnesses at the hearing did communicate with Hector and Michael Toro after the Court issued its sequestration order at the start of the

³⁴ PCRA Tr. 12:23-13:19; 24:7-21, July 19, 2010.

³⁵ PCRA Tr. 12:23-13:5; 24:16-21, July 19, 2010.

³⁶ PCRA Tr. 295:22-296:12, July 20, 2010.

proceedings although the Court's initial order had not precluded contact among witnesses but only prohibited discussion of the content of their testimony.³⁷ During the course of the hearing, the Court reduced its initial, verbal sequestration order to writing. In doing so, the Court amended the initial stay away order that Jose Medina, Sr. agreed to, making it bilateral to encompass the Commonwealth's witnesses: the order prohibited any members of the Medina family or law enforcement from communicating with Hector, Michael, or Maria Toro, or members of the Toro family except through Petitioner's or the Commonwealth's counsel. (See Ct. Order, July 21, 2010.) This measure was intended to ensure the integrity of the proceeding.³⁸

2. The Commonwealth's prosecution file was lost.

Despite efforts by the Clerk's Office, counsel for both sides and this Court, the official Court file from the original trial could not be located. Consequently, neither side had the trial exhibits and other information that would be in the Court's file.³⁹ The Court asked the PCRA assistant district attorney whether she had the trial prosecutor's file which would enable the Court and counsel to duplicate the original trial exhibits.⁴⁰ In addition, since the Commonwealth revealed to the Court that they had no information as to the identity of the law enforcement officers who transported the young boys and that was a significant issue in the PCRA proceeding, the prosecutor's file could potentially provide the detective's identity.⁴¹ The assistant district attorney who represented the Commonwealth at trial confirmed that her file would include the exhibits, witness

³⁷ See Commonwealth's Resp. to this Court's Order Dated July 26, 2010 Regarding Law Enforcement Contacts with Witnesses, ¶¶ 7, 14. PCRA Tr. 5:25-8:15, Sept. 2, 2010

³⁸ PCRA Tr. 5:25-8:15, Sept. 2, 2010.

³⁹ PCRA Tr. 6:5-7:19, July 27, 2010.

⁴⁰ PCRA Tr. 40:3-41:25, July 21, 2010.

⁴¹ PCRA Tr. 50:19-22; 55:24-56:20; 66:15-20; 68:3-11, July 27, 2010; PCRA Tr. 25:17-26:8, July 26, 2010.

subpoenas and some information to help identify who may have transported the witnesses.⁴²

The Commonwealth's PCRA counsel reported that the prosecutor's file had been lost.⁴³ The Court held a hearing to try to locate the prosecutor's file given its obvious importance to the PCRA proceeding. The evidence revealed that it is the Commonwealth's policy to always retain the prosecutor's files in homicide cases.⁴⁴ The person in charge of maintaining the prosecutor's files knew of no other instance where the prosecutor's file was completely missing.⁴⁵ The index card system used to track who last had the prosecutor's file, which was in place at the time of trial, is no longer available and the computerized record system in place since 1994 does not include any information as to who has possessed the prosecutor's file since Jose Medina's sentencing.⁴⁶ The assistant district attorney for the trial said she last saw her file at sentencing and had never had a file lost in any other homicide case.⁴⁷ This Court found that the Commonwealth provided no satisfactory explanation as to why the prosecutor's file in this case was irretrievably lost.

Any argument the Commonwealth posits claiming that favorable information was purportedly in the prosecutor's file is precluded because the file was within the Commonwealth's control when it was lost. It has long been established that a party may not benefit from its own withholding or spoliation of evidence. McHugh v. McHugh, 40 A. 410 (Pa. 1898). The rule concerning spoliation is "[w]here evidence which would

⁴² PCRA Tr. 74:11-76:19, Sept. 2, 2010; PCRA Tr. 180:13-19, July 26, 2010.

⁴³ PCRA Tr. 40:3-25; 46:20-47:24, 101:2-15, July 26, 2010.

⁴⁴ PCRA Tr. 36:23-45:12; 47:25-48:9; 92:19-100:6; 101:16-104:15, July 26, 2010.

⁴⁵ PCRA Tr. 95:5-20, July 26, 2010.

⁴⁶ PCRA Tr. 94:2-17; 96:17-99:19; 101:20-102:5, July 26, 2010.

⁴⁷ PCRA Tr. 78:1-14, Sept. 2, 2010.

properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him.” Haas v. Kasnot, 92 A.2d 171, 173 (Pa. 1952) (citing Wills v. Hardcastle, 19 Pa. Super. 525, 529 (1902)). The Medina file was in the exclusive control of the District Attorney’s Office. It is naturally in the Commonwealth’s interest to produce the prosecutor’s file since it would have included exhibits, subpoenas if any were issued, and possible information as to who the unknown detective was who transported Hector and Michael to and from investigative questioning and court.

In addition, the law precludes having a witness testify to the specific contents of documents lost while under the party’s control. Magette v. Goodman, 771 A.2d 775, 780-81 (Pa. Super. Ct. 2000). In Magette, the Superior Court reversed the trial court’s erroneous admission of a nurse’s testimony in place of an EKG strip which may have explained a plaintiff’s death since it was well-established hospital policy to keep such strips, especially after a death from cardiac arrest. The Superior Court also found that the trial court erred in denying the plaintiff’s request for an adverse inference jury instruction. Id.

Like in Magette, where the hospital had a clearly established record retention policy, the District Attorney’s Office has an established practice of keeping all prosecution files for the duration of a defendant’s incarceration. The prosecutor’s file for Jose Medina was lost while under the control of the District Attorney’s Office and the Commonwealth failed to offer any satisfactory explanation as to why this file was lost. The prosecution may not argue what may have been in the file and certainly may not

benefit from its disappearance. Indeed, the law supports this Court's drawing a negative inference about what the file may have shown. However, such a negative inference was unnecessary to any of the Court's findings in this case.

B. PCRA Evidentiary Hearing Findings of Fact

1. Hector credibly recanted his trial testimony and credibly described that a detective coerced and threatened the young boys to obtain false testimony.

Hector Toro⁴⁸ gave compelling and disturbing testimony⁴⁹ recanting his trial testimony and describing events that took place the night of the murder when he was only 10 years old and in the subsequent period until the trial when he was 11 years old. Shortly after he took the oath, Hector spilled out the following explanation:

“THE COURT: Okay. Do you have any questions about testifying?

THE WITNESS: Not no questions. It's just that I wanted to get this off my shoulders, something that's been on me for years. You know?

THE COURT: Okay.

THE WITNESS: I'm glad it came to this point, to say what I got to say. Your Honor. I feel as though the right thing is the right thing; wrong is wrong. You know what I mean? It keeps bothering me. Like It's something like a dark cloud over my shoulder. You know?

THE COURT: Okay.

THE WITNESS: And I was waiting for this time to come so --

THE COURT: Okay.

THE WITNESS: -- I could say it.

THE COURT: Well, great. It's here. And so we want to hear whatever it is you have to say about the matter involving Jose Medina, Jr. Okay?

THE WITNESS: Yes.

...

THE COURT: So what else happened? Why don't you explain -- you said you had a cloud over your head and you wanted to get something off your chest. Why don't you tell us what that is?

THE WITNESS: It's -- you know what it is, is that, when the incident

⁴⁸ Hector Toro only completed the fifth grade and attended special education classes as a child. He successfully obtained his high school diploma while in prison. PCRA Tr. 232:11-235:4, July 20, 2010.

⁴⁹ A full reading of the transcript of Hector Toro's testimony at the PCRA hearing is recommended, particularly pages 10-11; 29-43; 51-56 of the July 20, 2010 PCRA Transcript.

happened, we wasn't there. We never seen the -- you know -- did anything to the guy. We don't know the guy. We never seen the guy. You know?

...

BY THE COURT:

Q. So go ahead and proceed where you were talking right now, what it was you wanted to tell us that's been a cloud over your head.

A. The thing was that -- you know, I couldn't -- it been haunting me for awhile because I ain't seen -- I didn't seen nothing, and I wasn't there when the incident happened.

Q. Meaning the stabbing?

A. The stabbing, 'cause we was in the Chinese store when all that went -- like when all that happened, so I couldn't say -- sit there and look and say, Well, yeah, he did it, because I never seen the person. You know, it was -- after everything happened, we walked outside. That's when everything was already done.

Q. Okay.

A. You know? And it's -- it's been bothering me because, just like this whole time, I'm lying and it's hurting me, like, you know. I kept telling my mother that I can't keep going on with this because it keeps bothering me. Sometime I sit -- I sit in my house and I -- all I think is that. You know, I just wanted to come here and get it out and get that weight lift (sic) off my shoulders so I can move on with my life.⁵⁰

Hector Toro then gave a harrowing and credible description of what took place when he was 10 years old after William Bogan was stabbed. Hector testified that he and his brother were alone in the Chinese restaurant playing arcade games and that Jose Medina never came into the restaurant while they were there.⁵¹ Hector testified that he had never seen Jose Medina on the night of the murder with or without a knife and never heard him make any threats.⁵² Hector explained that the first time they learned that someone had been murdered was after he and his brother left the restaurant.⁵³ Hector's testimony not only recanted his trial testimony but directly impeached Michael's testimony including his claim of having seen the murder: Hector's

⁵⁰ PCRA Tr. 10:8-11:9; 30:3-13; 31:10-32:11, July 20, 2010.

⁵¹ PCRA Tr. 40:8-9; 61:22-62:2; 130:5-132:1, July 20, 2010.

⁵² PCRA Tr. 40:5-11; 83:23-84:12, July 20, 2010.

⁵³ PCRA Tr. 31:18-24, July 20, 2010.

testimony placed both boys in the Chinese restaurant before and during the murder thereby undermining Michael's testimony that he observed it. Hector explained that the first time he ever saw Jose Medina was when he was taken to court to testify against him in his murder trial.⁵⁴

Hector's lengthy testimony was credible and consistent with his handwritten description and the several affidavits that he gave in this case in October and November of 2006. (See Ex. P-3, Hector Toro Statement, written Oct. 2006, titled Oct. 18, 1991; Ex. C-1/P-7, Hector Toro Aff., Oct. 25, 2006; Ex. C-2/P-8, Hector Toro Aff., Nov. 2, 2006.)⁵⁵ He also read and confirmed the truth in each one of the affidavits and his handwritten account.⁵⁶ Hector described that before he physically wrote the handwritten statement, it was "in my mind, I already had this written inside of me."⁵⁷ Hector Toro's sworn affidavit stated that the boys were stopped by police at about 9:30 at night, the police questioned the boys for half an hour about "something that occurred" and that the boys repeatedly told police they didn't see what occurred. (See Ex. C-1/P-7 ¶¶ 2-3.) Maria Caraballo – the neighborhood block captain – came and spoke with the boys. (See Ex. C-1/P-7 ¶ 4.) Police then transported 10-year-old Hector and 11-year-old

⁵⁴ PCRA Tr. 78:12-24, July 20, 2010.

⁵⁵ On September 29, 2008, Hector signed another handwritten statement, prepared by someone else, and sent it to Larry Feinstein, Jose Medina's then PCRA counsel. See Ex. C-8/P-9, Hector Toro Notarized Statement, Sept. 29, 2008; PCRA Tr. 189:13-14; 190:16-22; 209:8-210:24, July 20, 2010. This statement was essentially the same as all of the other written statements or affidavits Hector had signed since he first disclosed the evidence to Jose in October 2006. The primary difference is that the September 29, 2008 statement names the coercing officer as "Officer Geico [sic]" whereas Hector has consistently and credibly stated that he did not know the name of the coercing officer, and just remembered that he was a Caucasian male. PCRA Tr. 32:16-24; 34:2-12; 121:24-122:14, July 20, 2010. There was no evidence presented at the PCRA hearing that Officer Greico was in fact the officer who transported the boys or that he was responsible for coercing and threatening them into testifying falsely. PCRA Tr. 50:19-22; 55:24-56:13, July 27, 2010. Consequently, this Court concludes that the designation of Officer Greico was done by whoever prepared the document, possibly Larry Feinstein or someone working with him, and Hector may have just assumed this was the name of the offending officer.

⁵⁶ PCRA Tr. 16:14-18:25; 19:10-20:2; 23:15-25:15, July 20, 2010.

⁵⁷ PCRA Tr. 227:19-25, July 20, 2010.

Michael to the Homicide Unit to be questioned. (See Ex. C-11, Hector Toro Investigation Interview Record, Oct. 19, 1991, 1; Ex. C-15, Michael Toro Investigation Interview Record, Oct. 19, 1991, 1.)

According to Hector Toro's sworn affidavit:

"[I]t felt like I was being interrogated for hours. I was offered something to eat and drink, then the detective passed me the paper he was writing on and told me to sign it so I can go home."

(Ex. C-1/P-7 ¶ 4.) Hector's testimony credibly described how he was questioned by police the night of the murder, forced to make false statements about what happened that night, and threatened that he would be put in foster care or get "locked up" if he did not testify at trial. He testified to the following at the PCRA hearing:

“Q. Did you see Mr. Medina, Jr. before the stabbing?

A. No.

Q. Did you see him in the Chinese store?

A. No, Your Honor.

Q. Did you ever see him with a knife?

A. No. At the time I don't even know his family. I don't know his family.

...

Q. Okay. And can you break it down? You were brought down the night of the stabbing. You went down to talk to the police that night; is that right?

A. Uh-huh. Yes.

Q. Was that the first time you were questioned?

A. Yes.

Q. Okay. And what happened that night?

A. They -- they -- we was -- I -- well, me -- I ain't want to go because I didn't know what happened, but the lady, the block captain lady, she kept pushing us to go with the police officers. She was like, Yeah, it's gonna be all right, go, without consulting -- like, telling my grandmother. Like, this whole time, my grandmother ain't know what was going on.

Q. Was there any member of your family with you --

A. No.

Q. -- the night of the stabbing?

A. No.

...

Q. Okay. Tell us about that.

- A. The statement we gave -- I -- I gave --
- Q. The night of the stabbing
- A. Yes. The statement that -- I don't want to keep bringing her up, but she was there when the statement was said, like she was the one that -- how do you say it -- spoke to us and told us.
- Q. She, meaning the block captain?
- A. Yes.
- Q. Okay. Well, how did the statement come about?
- A. Like, Tell us about the incident that happened. She knew more about the incident than we did. We was in the Chinese store when the incident happened. She was, I guess, around there when it happened.
- Q. Okay. Had you ever seen Jose Medina, Jr. before the stabbing?
- A. No.
- Q. When you were in the Chinese store?
- A. No. I ain't see him when we was in the Chinese store. It was just -- I don't want to keep bringing it up, but me and my brother was the only ones in the Chinese store and the people working in the Chinese store.
- Q. So did you sign a statement that night of the stabbing?
- A. Yes.
- Q. Was the statement true?
- A. (Pause.)
- Q. Were you able to read it?
- ...

THE WITNESS: I couldn't read at the time, Your Honor."⁵⁸

Hector described his encounter with the detectives:

- "Q. Did you tell the detectives that you had not seen anything?
- A. Yes.
- Q. And what did they do?
- A. They kept forcing us.
- ...
- Q. Okay. So what did the detectives do, if anything, when you said you didn't see it?
- A. Nothing. They was like we can get in trouble and this and this and the third. And I -- I told them I didn't see nothing. And -- and he was going by what the lady had said, that supposedly that we was there and we seen everything, and we never seen nothing. You know, I can't sit here, Your Honor, and -- and lie to you and say, Yeah, I was right here and he was there when the incident happened. No, we wasn't there. I wasn't there.
- ...

⁵⁸ PCRA Tr. 40:5-12; 56:4-25; 61:2-62:8; 62:13-14, July 20, 2010.

BY MR. SCOTT:

Q. Did you ever tell anyone that you were present?

A. About?

Q. That you were present when the white dude was stabbed?

A. No.

Q. You never told that?

THE WITNESS: Can I say something?

THE COURT: Yes.

THE WITNESS: No. Because, see, the thing was, we was forced to say the things we said. So how do you say? We wasn't –

...

Yeah. Like, we was forced to say the things, so I can't hardly remember.

...

Q. Okay. So who forced you?

A. It was the detectives and the lady. I forget her name.

Q. The block captain?

A. Yeah, the block captain.

Q. Okay. And what did they say would happen if you did not testify?

A. The first thing, they would tell us we could get locked up --

Q. Okay.

A. -- if we didn't testify.

Q. And who said that?

A. The -- the detective guy.

Q. Okay.

A. He said that the first time when we went to -- took the statement. Then, after that, after everything was said, like when they take us to -- come and get us to take us to court, they tell us if we don't go, that we could go to a foster -- foster home. And he said, Y'all don't want that because you ain't gonna see that family no more.

Q. And who said that again?

A. The detective.

Q. Did you believe him?

A. I was a kid. I didn't have no choice but to believe him. That was the way we was brought up.

Q. What else, if anything, did he do to force you to testify?

...

THE WITNESS: Like -- basically, like threatened us. We kids. It's like you tell the kid, I'm gonna take you away from your parents. You're gonna do whatever that person is asking to say or do because you don't want to leave your family. I already lost like my mother and my father. They was incarcerated. I was living with my grandmother.

BY THE COURT:

Q. Okay. So the thing is, none of us were there, so you have to tell us what happened. So when you say someone threatened you, you have to tell us who it was and what the threats were.

A. Okay. Yeah.

Q. Can you do that for us?

A. Yes. There was a detective. He kept threatening us, you know, if you don't say what we said in the -- the statement we gave -- they want us to say, that we was either gonna go to a foster home, we wasn't gonna see our parents no more. Like this whole incident, when this incident happened, Your Honor -- like they kept -- how you say -- like when you bribe a person, like -- you know, we kids. They -- I'm gonna give you this and I'm gonna give you that, and, you know . . .

Q. What exactly?

A. Like he tells us, Don't worry about it, y'all gonna be all right. We'll make sure. You want some candy, pieces of candy? We'll get you whatever you want, like pretzels and stuff like that."⁵⁹

Hector Toro credibly explained what happened later in the investigation. A detective dressed in plain clothes would park his Ford near the school he and Michael attended.⁶⁰ When the boys neared the school, the detective would stop and instruct them to go with him.⁶¹ The detective would offer the boys candy and pretzels.⁶² He would also threaten the boys that if they did not testify as he described, they would be taken from their home and placed in foster care or in juvenile custody.⁶³ The detective would take the boys downtown to be questioned and ultimately to testify at trial.⁶⁴ Hector described how the detective or sometimes two detectives would intercept the boys on their way to school:

“BY MR. SCOTT:

Q. Did you talk with your grandmother about the case before you testified at trial?

⁵⁹ PCRA Tr. 41:11-15; 43:3-14; 51:7-20; 52:8-10; 52:22-54:3; 54:18-55:2; 55:5-56:3, July 20, 2010.

⁶⁰ PCRA Tr. 29:14-16; 32:12-25; 176:15-177:9, July 20, 2010.

⁶¹ PCRA Tr. 29:6-13; 33:7-34:22, July, 20, 2010.

⁶² PCRA Tr. 35:3-5; 149:11-13, July 20, 2010.

⁶³ PCRA Tr. 29:18-22; 34:21-35:3; 53:13-55:15; 149:15-23, July 20, 2010.

⁶⁴ PCRA Tr. 176:15-179:24, July 20, 2010.

A. Yes, my mom -- my grandmother. See, the thing about it was, we didn't want to go, like it was forced -- we was forced to -- to go. We was kids. You know? Like every time we go to school and -- they would be waiting for us already. And then by the time we try to go in the school, they'd come and grab us and say, We need y'all to go down here. There were a couple incidents. It was the detective at the time, and he took us down in a Ford car, an old car, I guess they used back then. And they kept like taking us without a legal guardian or anybody's permission. You know? And they used to like -- how you say it? They used to like scare us, to say, If y'all don't go, we gonna take y'all from your grandmom. You're gone to a foster home. So we ain't had no choice but to go.

THE COURT: And when you say "we," you are referring to you and your brother Michael?

THE WITNESS: Yes.

...

A. Like we -- we would be walking -- like say this is Cambria and school's right here. And we just walking, me and my brother are walking to school, and all of a sudden -- there's a little block named Water.

Q. Okay.

A. And usually they'd be parked there. And soon we 'bout to go -- like, this is the gate. Soon we 'bout to go in the gate to go to school, he calls us -- the detective.

Q. As soon as you're --

A. Like we -- to go like, go in the gate, 'cause it's like a gate you go through, and then it's like cement.

Q. Right.

A. And we keep walking, and then there's the door to the building right there. But every time we come through there, like, they there, like --

Q. When you say "they" --

A. The detective.

Q. One person or more than one?

A. One. Sometimes there'd be one; sometimes two.

Q. Okay. Do you know that person's name?

A. It's been so long, Your Honor, I don't remember.

Q. Okay.

A. All I remember, he was Caucasian, a little bit taller than me.

Q. About how many times did this happen?

A. Like about four, five.

Q. And what happened when they called you over?

A. They kept like -- basically like harassing us, basically.

Q. Well, just tell us what it is you remember.

A. Like they telling us we got to go with them, to get in the car; we got to go with them; if we don't go, they gonna take us from our grandmother. Now, we kids. We -- taking us from our grandmother is like -- you know, that's the only thing we had at the time 'cause my mother and father were incarcerated. You

know, and they used to bribe us, talking 'bout they gonna buy us candies, gonna buy pretzels and stuff like that.

Q. Okay. And where would they take you?

A. Down here, City Hall.

. . .

Q. Were you taken down to testify in a courtroom or questioned or was it both things?

A. Both things, Your Honor.”⁶⁵

Hector described that the detective had a paper that he would angrily point to and tell him that he had to testify to what was written on the paper.⁶⁶ Hector described that the detective and other officers harshly coached the boys' testimony:

“Like they take us, you know, to – it was basically like a room like that (indicating), and basically, they used to like - how do you say – like how do you say? If they – they give you something. They'd be like, read this and say this (indicating) – like how you say - like try to, um... make you remember what they said – they want you to say when you get out there. Like there was times when they used to tell us, don't be scared, go out there and say this, like, in a mean way. You know? Like it was times when -- the one incident that happened, that they called my brother to testify and he started crying –”

This testimony about being coached was consistent with statements in his 2006 Affidavit where Hector Toro described that a detective and police wanted the Toro boys “to say what they were saying and to repeat it in front of them as if they wanted us to believe what they wanted us to say” and when Hector didn't comply, the detective “got mad.”

“You could see it in his eyes and his tone of voice changed. He became more serious but not like professional serious I noticed at first. He then told me he could keep me looked [sic] up for this but I was sure what he meant. He said that I have to say what he was telling me to say to a judge about Jari [sic].”

⁶⁵ PCRA Tr. 29:4-30:2; 33:7-35:7; 35:17-19, July 20, 2010.

⁶⁶ Id.

(Ex. C-1/P-7 ¶¶ 10-12.) His testimony at the PCRA hearing that he lied at Jose Medina's trial is consistent with his prior statement in October 2006 describing his experience at trial,

"A man in uniform guided me into a booth next to the judg[e] and handed [me] a bible. I can now say I was sworn in but I didn't know any of this at the time it was happening nor why I was brought the[re.] Once sworn in all these questions were being asked and I did not know what I was being asked but I understood the questions because I did not see any crime

(Ex. P-3.) Hector testified further about the impact of the pressure on the boys:

"BY THE COURT:

Q. Okay. Then tell us that. If you were there and saw it also, tell us what happened with your brother.

A. It was -- it was -- it was the one time when they brung (sic) him -- brung (sic) him to testify. He was so scared. He didn't want to testify and he started crying. And we was in -- both in the back room. And, anyway, when -- when -- we was in the back room, they took me to the bathroom, and I don't know what they do to him. But they left me in the room by myself."⁶⁷

His PCRA testimony about being upset in a room in the courthouse is consistent with statements in his affidavit where Hector Toro described that he became scared "for myself and my brother when he was brought to the room where I was because he appeared terrified and he was crying. Sort of like when a kid cries when my mother or father hits us for doing something wrong." (Ex. C-1/P-7 ¶ 12.) Hector described the impact and how he observed Michael cry on several occasions in response to the detective's pressure.⁶⁸ Hector Toro's PCRA testimony was also consistent with his prior descriptions of the detective who transported him to trial and then dropped him off at Mutter Street after the trial:

"The very same ditective [sic] which abruptly com[e] and got us before making it inside the school come inside the room and told us if w[e] were ready to go to school and then we walk[ed] away with him. On the ride to

⁶⁷ PCRA Tr. 36:22-37:8, July 20, 2010.

⁶⁸ PCRA Tr. 35:22-37:8; 38:11-39:25, July 20, 2010.

school the man said good job in there. You guys did a good job. We were then dropped off on Mutter Street. The man told us that “we are here.” We simply opened the car door and walked away. This is all I can remember about what happened to me and about what they made me do.”

(Ex. P-3) (capitalization errors in original corrected).

Hector testified that neither his grandmother nor any other family member was notified prior to law enforcement taking him and his brother the night of the murder, or taking them out of school, for questioning.⁶⁹ There was no evidence that the school was notified about their absence. In addition, there was never a relative or legal guardian with them during law enforcement or prosecutor questioning before or during court proceedings.⁷⁰ Even when Michael broke down and cried, no one notified their grandmother or any family members.⁷¹

During the entire PCRA hearing, Hector Toro credibly and consistently stated that he had never seen Jose Medina the night of the murder, that he and Michael were in the Chinese restaurant and that it was only after both boys left together that they learned that someone had been murdered.⁷²

Hector’s demeanor and tone as he described these events reflected remorse, sadness, guilt and enormous relief at his ability to confess this long withheld secret. He appeared to be unloading a lifelong burden as the words flowed. He showed no concern about the consequences he could suffer from disclosing his role in succumbing to pressure to give false testimony in Jose Medina’s murder trial. He never asked about what would happen to him but was focused solely on revealing the truth, as though in describing it he would somehow be able to make needed amends to remedy his

⁶⁹ PCRA Tr. 29:9-30:2; 35:6-10; 56:17-58:8, July 20, 2010.

⁷⁰ PCRA Tr. 197:17-199:24; 198:6-199:24, July 26, 2010.

⁷¹ PCRA Tr. 190:2-20; 201:2-10, July 26, 2010; PCRA Tr. 70:14-25, Sept. 2, 2010.

⁷² PCRA Tr. 31:18-24; 40:5-41:5; 77:23-79:7; 160:2-25, July 20, 2010.

actions. The emotion that filled Hector's words as he talked was palpable and heartfelt.

The Court found it credible that a 10-year-old boy would believe a detective had the power to remove him from his grandmother's home and have him placed in a juvenile home or in foster care if he did not cooperate and testify as directed. The detective had been able to bring both boys into the Homicide Unit in the middle of the night after the murder without getting or attempting to get their grandmother's permission or having her present. One year later, that same detective successfully and repeatedly intercepted the boys on their way to school bringing them downtown for questioning and to testify without a legal guardian or family member being informed or present. During these episodes the detective threatened the boys without any apparent consequence. No one had intervened to stop this police conduct. Hector's fear of the detective's power seemed to him to be confirmed by the facts. Hector's belief that the detective had the ability to carry out threats to take the boys away from their home was understandable.

Hector Toro's description during the PCRA hearing of events on the night of the murder, during the ensuing interviews and throughout trial was completely convincing and credible to this Court, by itself. His testimony of disclosing this information to Jose Medina in mid to late October 2006 was also completely credible. The essence of his testimony and his demeanor while testifying eighteen years later, had the powerful ring of truth. This Court found Hector's testimony credible and genuine including his recantation, his description of a detective's coercion and threats toward him and his brother and the detective's pressuring him to testify falsely to events he did not witness.

Hector's testimony was also corroborated by his mother's testimony and supported by other evidence. This testimony was unrebutted by Commonwealth witnesses; it was simply challenged as not being truthful. There were no witnesses presented who claimed they were the transporting officers and that Hector was describing something that they knew did not happen. The Commonwealth's witnesses agreed that law enforcement officers transported the boys but denied knowing the identity of the officer or officers. The Commonwealth's evidence challenging the recantation based on bias or motive was wholly unconvincing.

This Court also found that although Hector was in his late 20s during the PCRA hearing in 2010 testifying about events that occurred when he was a child of 10 and 11, he was completely competent to testify about those past events. Hector's testimony demonstrated that he had the capacity to observe the past events with a substantial degree of accuracy, he had the ability to remember what he observed or perceived (and felt comfortable admitting what he did not remember), he demonstrated a clear understanding of the questions and gave intelligent answers about what he saw and experienced. Furthermore, Hector credibly expressed his consciousness of the need to speak the truth. Commonwealth v. Mazzocolli, 380 A.2d 786 (Pa. 1977).

2. The Commonwealth's PCRA evidence leaves Hector's testimony uncontradicted, demonstrates that procedures to protect child witness were not followed and corroborates that Hector and Michael Toro were transported by law enforcement officers.

The Commonwealth's witnesses bolstered Hector's account. Maria Toro corroborated that a detective threatened and coerced the boys. Officers and prosecutors confirmed that law enforcement officers transported the young boys but that procedures to protect child witnesses were not followed. Notwithstanding its extensive

investigation into the claims presented in this petition, the Commonwealth was unable to present a single transporting officer to testify that what Hector described did not occur. Five officers and two assistant district attorneys from the original trial testified. Yet not a single one said they knew the identity of the transporting detective. The essence of the Commonwealth's evidence was that although it could not identify who transported the boys to and from questioning and trial, and even though the officer bypassed procedures for child witnesses, that transporting officer must not have coerced or threatened the boys. The Commonwealth's evidence, thus, left Hector's testimony unrebutted.

a) Maria Toro corroborated Hector's testimony that a detective coerced and threatened the boys and the Commonwealth failed to notify the family that the boys were being questioned.

Although the Commonwealth called Hector's mother, Maria Toro, as a Commonwealth witness at the PCRA hearing, she provided powerful and convincing testimony corroborating Hector's testimony that the boys were picked up by detectives, questioned about the murder at the Homicide Unit and at trial without authority from any family member, and were threatened and coerced. Maria Toro confirmed that her daughter Jacqueline told her of these upsetting events shortly after they occurred:

“Q. Okay. In October 1991 when this incident happened and you were in prison, what location were you in prison?

A. PIC.

Q. Okay. Did anybody, a prosecutor or a police officer or detective, come to you and ask permission to have your children, Michael and Hector, talk to them?

A. No.

...

Q. Did a prosecutor or a police officer or a detective ever ask you permission to bring your children, Michael and Hector, to trial to testify?

A. Never.

Q. And I'm talking about November of 1992 or earlier.

A. That's what my daughter was telling me. They would go and take them out of school. That's what my daughter was telling me. And they told me that they were told that if they didn't want or if they refused to court (sic), they were going to put them in a home.

Q. Okay. Now, we need to put names to the they.

A. It was the woman block captain who put the kids in all this.

Q. Lola?

A. Yes, Lola Caraballo. She died.

Q. Okay. And when you said your daughter told you this, you're talking about Jacqueline.

A. Yes.

Q. Jacqueline told you that they came and got Michael and Hector out of school?

A. Yes. Every time that there was to be an interview, they would go to school and take the children out with her.

...

Q. Okay. But no one came to you to ask permission?

A. No, no one.

Q. Did anyone go to your daughter that you know of to ask her permission?

A. No. It was the block captain, the woman block captain that put them in this.

Q. So no grownups in your family went with Michael and Hector when the police took them out of school to take them to court or to question them?

A. I don't know. Because according to what my daughter tells me, it was the woman block captain who would go get them.

Q. Okay. But you have never heard that there was any family with Michael or Hector when they were questioned by the prosecutors or the police?

A. No. Because every time I call my daughter, that's what she would tell me.

...

Q. Okay. And how many times do you remember her telling you about that?

A. Every time that they took them away, every time.

Q. Do you remember how many times – or that was an unclear question. How many times did your daughter say this happened?

A. I think this happened more than ten times that they would go to school to pick them up.

Q. And as you heard about it from your daughter, what you heard is that the police or prosecutors, you don't know which -- do you know if it was police or prosecutors?

A. It seems they were detectives.

Q. Okay. As you understood it, the detectives picked them up at school?

A. Yes, with Caraballo.

Q. And, then, where would they take them when they were done?

A. That was when they would come to court to testify.

Q. And when they were done with that, where did the detectives take your sons, if you know?

A. To my daughter's house."⁷³

Thus, Maria Toro's testimony⁷⁴ credibly corroborated Hector Toro's testimony at the PCRA hearing that Hector and Michael had told family members of the detective's picking the boys up on the way to school without getting family permission, school permission or participation by any adult with legal authority or family connection. Maria Toro's testimony also reinforces Hector's testimony that he was upset when police repeatedly and covertly picked the boys up on their way to school, thereby sidestepping any adult family involvement. Maria Toro's testimony confirms that even though she was easy to locate since she was in prison at PIC, no one ever contacted her or her mother or her sister who were caring for the boys in her absence. Her testimony also suggests that Maria Caraballo was somehow involved with getting the boys connected to detectives.

⁷³ PCRA Tr. 217:16-24; 219:11-220:12; 220:18-221:12; 221:13-14; 225:14-226:14, July 19, 2010.

⁷⁴ After Maria Toro testified to all of the above, the Commonwealth belatedly objected to the testimony as hearsay. The objection was overruled. Among other reasons, the testimony is admissible under Pa.R.E. 613(c) and 803(3). Maria Toro's testimony that she was notified that the boys were picked up en route to school in 1992 is evidence that Hector's testimony was not recently fabricated. Commonwealth v. McCracken, 659 A.2d 541, 543-44 (Pa. 1995) (prior consistent statement admitted under Rule 613(c) in murder case to show witness said he had not seen defendant at crime scene in order to rebut claim that recent recantation was due to physical threats by defendant's associates); Commonwealth v. Beale, 655 A.2d 473, 475 (Pa. Super. Ct. 1995) (613(c) prior consistent statement "must have been made before its effect on the case could have been foreseen or before the corrupt motive or influence existed"); Commonwealth v. Hutchinson, 556 A.2d 370, 372 (Pa. 1989) (declining to admit, under the prior consistent statement exception, testimony given after a defendant's arrest that he had been at his grandmother's residence at the time of the murder, as the statement was made after a corrupt motive had arisen). Maria's testimony also reflects her "then existing state of mind, emotion. . . such as. . . mental feeling. . .", as well as that of Hector, Michael and Jacqueline. Pa.R.E. 803(3). See also Commonwealth v. Peterkin, 513 A.2d 373, 379-80 (Pa. 1986) (phone call from victim saying that he thought defendant who entered the office with a gun to test it was admitted to show victim's state of mind).

b) Not one Commonwealth witness testified that standard procedural safeguards for child witnesses Hector and Michael were followed nor disputed that the young boys were questioned without the permission or presence of their legal guardian.

Virtually every Commonwealth witness who testified on the topic confirmed that at the time of William Bogan's murder and Jose Medina's trial, prosecutors and police were required, prior to interviewing a child witness or presenting their testimony in court, to notify the child's legal guardian, get permission and invite them to be present to support and protect the child's interest.⁷⁵ The assigned homicide detective testified that before a child could be transported to Homicide for questioning, detectives were required to comply with certain procedures designed to protect the child:

"Before we could remove a juvenile from or do an interview with them in a police facility, we had to contact family or a concerned adult and let them know where the person is. If they want to come, they could have the opportunity to come with the person, with the juvenile; and I would give them my phone number and make sure that I knew where they were at so we can return them back to wherever they wanted to go."⁷⁶

The procedure for identifying who the family or legal guardian was to ask the children:

"Q. Back in October 1991 can you tell me what, if any, procedure was in place with regard to the identification of interested adults?
A. After talking to the children you would find out who their parents were. And if their parents weren't available, you would find somebody else that was a relative. And after that it would be a concerned adult, neighbor or somebody that's close to the family.

...

THE COURT: You're just addressing what the department's policy was back then, correct?

THE WITNESS: Yes."⁷⁷

⁷⁵ PCRA Tr. 171:3-172:10, July 26, 2010; PCRA Tr. 24:9-11; 25:21-25; 32:17-24, Sept. 2, 2010; PCRA Tr. 24:7-17; 44:6-25, Sept. 1, 2010.

⁷⁶ PCRA Tr. 24:7-17, Sept. 1, 2010.

⁷⁷ PCRA Tr. 44:6-13; 44:23-25, Sept 1, 2010.

The first piece of paper to be generated when a juvenile comes into custody is a Form 75-229 where a child's age, family members and residence are listed.⁷⁸ (See Ex. C-19, Hector Toro Form 75-229.) The police Investigation Interview Record also requires the interviewer to record the name of a "close relative" along with their address and phone number. (See Ex. C-11, Hector Toro Investigation Interview Record, Oct. 19, 1991, 1; Ex. C-15, Michael Toro Investigation Interview Record, Oct. 19, 1991, 1.)

Prior to a child testifying in court, the policy required detectives to serve subpoenas and have them signed by the legal guardian and the child.⁷⁹ A juvenile cannot sign the subpoena without having a corresponding family member or guardian also sign.⁸⁰ Legal guardians were to be invited to attend the proceeding.⁸¹ Families were supposed to be notified in advance so that children would not attend school the day of court.⁸² The policy was that detectives were to arrange to have the child witness picked up from home, brought into the courtroom and then returned directly to their home.⁸³

The credible evidence showed that the procedures that were designed to protect child witnesses were not followed in this case. While the Commonwealth presented many witnesses who testified to a clear recollection of many aspects of the investigation and trial, not a single witness – prosecutor or detective -- testified to having notified or received permission from Hector and Michael's grandmother and legal guardian nor any

⁷⁸ PCRA Tr. 85:23-86:4, Sept. 1, 2010.

⁷⁹ PCRA Tr. 171:3-172:11;174:21-175:6; 178:23-179:16; 180:13-182:2; 210:5-11; July 26, 2010; PCRA Tr. 32:17-24; 54:13-55:1; 89:23-905, Sept. 1, 2010; PCRA Tr. 24:9-11; 25:21-25, Sept. 2, 2010.

⁸⁰ PCRA Tr. 54:21-55:1, Sept. 1, 2010.

⁸¹ PCRA Tr. 171:21-172:3, July 26, 2010; PCRA Tr. 171:13-20, July 26, 2010.

⁸² PCRA Tr. 172:15-23; July 26, 2010.

⁸³ PCRA Tr. 171:21-172:23; July 26, 2010; PCRA Tr. 24:7-17; Sept. 1, 2010; PCRA Tr. 24:9-11; 25:21-25, Sept. 2, 2010.

other member of their family to transport, question or present the boys as witnesses.⁸⁴ Nor did anyone testify that they spoke with the family and invited their grandmother and legal guardian, Julia Rodriguez, or another family member to be there in support.⁸⁵ No steps were taken to notify the boys' parents who were both in custody in the Philadelphia area and, thus, easy to locate.⁸⁶

On the night of William Bogan's murder, police questioned both Hector and Michael, along with many others in the neighborhood, including a "block captain" named Maria Caraballo.⁸⁷ The Investigation Interview Record for both 10-year-old Hector and 11-year-old Michael shows both of them were "brought in by police" to the Homicide Unit of the Philadelphia Police Department with Michael's form showing this occurred at 12:05 a.m.⁸⁸ The Form 75-229 for Hector shows that he identified his address and that he lived with his grandmother ("Julia Rodriguez"), listed his parents' names and that they were in prison at "Ping"⁸⁹ and Graterford, and identified his older brothers providing an address for one. (See Ex. C-19.) No Form 75-229 was introduced for Michael. Before the formal interview both boys informed police that their grandmother, Julia Rodriguez, was their "close relative" and provided her address and the phone number. This information was recorded on their Investigation Interview Record. (See Ex. C-11,

⁸⁴ PCRA Tr. 86:21-87:13; 155:23-25; 199:4-19, July 27, 2010; PCRA Tr. 191:5-8, July 26, 2010; PCRA Tr. 78:8-80:6, Sept. 1, 2010; PCRA Tr. 46:23-48:4, Sept. 2, 2010.

⁸⁵ PCRA Tr. 86:21-87:13; 153:21-154:12; 155:23-25; 199:4-19, July 27, 2010.

⁸⁶ It was uncontested that Hector and Michael's parents were in prison the night of the murder and at other stages when the boys were questioned. PCRA Tr. 192:20-25; 198:17-25, July 26, 2010; PCRA Tr. 50:12-18, Sept. 1, 2010; PCRA Tr. 18:14-17, Sept. 2, 2010. There was no evidence of a procedural rule or exception to the procedures for child witnesses suggesting that if a child's parents are in jail, procedures designed to protect child witnesses did not need be followed.

⁸⁷ PCRA Tr. 48:12-51:5; 60:19-66:20; 107:25-109:6; 114:10-19; 156:2-5; 179:7-10; 179:23-180:15, July 27, 2010; PCRA Tr. 25:6-15; 40:20-23, Sept. 1, 2010.

⁸⁸ See Ex. C-11, 1; Ex. C-15, 1; Ex. C-19; PCRA Tr. 66:15-20, July 27, 2010; PCRA Tr. 67:22-68:1, Sept. 1, 2010.

⁸⁹ Maria Toro was likely housed at PIC but Hector stated that it was a jail named "PING". PCRA Tr. 34:3-15, Sept. 3, 2010.

1; Ex. C-15, 1.) The Investigation Interview Record shows that police started formal questioning of Michael at 12:15 a.m. and Hector at 1:15 a.m. (*Id.*) Not a single Commonwealth witness testified that they followed the appropriate procedure by notifying Julia Rodriguez that detectives took her two grandsons to the Homicide Unit after midnight or that they were being questioned about a murder.⁹⁰

It was stipulated by the parties that Maria Caraballo was neither a blood relative nor legal guardian to Michael and Hector Toro.⁹¹ At Jose Medina's criminal trial, Maria Caraballo testified that she was just a friend and neighbor.⁹² For unknown reasons, Maria Caraballo represented to detectives that she was Hector and Michael Toro's aunt.⁹³ Notwithstanding that both boys named their grandmother as their closest relative and provided information on how to reach her, instead of contacting the boys' grandmother, the Commonwealth mysteriously permitted Maria Caraballo to substitute as the family and legal guardian for the boys during questioning.

Compounding that procedural error, Maria Caraballo was another prosecution witness who was allowed to sit in at least part of Hector and Michael's interviews and became privy to both boys' full statements by reading and signing them as though she

⁹⁰ PCRA Tr. 29:17-18; 100:9-12, July 20, 2010; PCRA Tr. 81:10-82:7; 85:10-86:10; 155:23-25; 199:4-19, July 27, 2010; PCRA Tr. 78:2-19; 79:11-80:6; 80:25-81:9; 89:13-19, Sept. 1, 2010; PCRA Tr.155:23-25, July 27, 2010.

⁹¹ PCRA Tr. 156:24-160:8, July 27, 2010; Hector confirmed that Maria Caraballo was not a relative at all but was a person who lived in his neighborhood who was described as the block captain. PCRA Tr. 76:9-77:11, July 20, 2010.

⁹² Trial Tr. 146:21-147:5.

⁹³ According to detectives who testified, Maria Caraballo did not describe her role of "aunt" in the sense of being a neighbor or close family friend such that the boys may refer to her as aunt; she instead affirmatively told law enforcement that she was the boys' aunt. PCRA Tr. 36:9-14, Sept. 1, 2010; PCRA Tr. 130:4-11; 155:11-15; 162:10-12, July 27, 2010. There was no evidence that the boys lived with her or that she was intimately a part of their family. Maria Caraballo's motivations for affirmatively misrepresenting that she was biologically related to Hector and Michael Toro are unknown and will remain unknown since Maria Caraballo is deceased.

was their legal guardian or family.⁹⁴ As the assigned homicide detective stated, the practice in the Homicide Unit was to separate all prospective witnesses for interviewing because otherwise:

“You’re influencing what they might do in their own interview. You want their separate accounts. You don’t want any kind of collusion or any knowledge, so you don’t want to pollute the interview.”⁹⁵

This practice was not followed in William Bogan’s murder investigation.

There was no evidence that anyone from the Toro family was ever present during the investigative questioning of the boys.⁹⁶ No one testified to there being any family members at the preliminary hearing or the trial.⁹⁷ Remarkably, no one even called a family member when the boys were visibly “terrified,” when the assistant district attorney informed the court that a detective said they were intimidated and when Michael had an emotional breakdown on the stand and emergency medical assistance was almost called.⁹⁸

The Commonwealth’s claim that Maria Caraballo could give permission as an interested adult on the night of the murder violated their established procedures given that the boys explained who their legal guardian was. This excuse becomes even less persuasive as the investigation proceeded and prosecutors got involved. The assistant district attorney for the preliminary hearing testified that she knew the boys lived with Julia Rodriguez, not Maria Caraballo, and said Maria provided her with Julia’s phone

⁹⁴ See Ex. C-11; Ex. C-15; PCRA Tr. 132:20-25; 179:23-180:8, July 27, 2010.

⁹⁵ PCRA Tr. 99:4-14, Sept. 1, 2010.

⁹⁶ PCRA Tr. 179:23-180:8, July 27, 2010; PCRA Tr. 68:12-16; 128:24-129:5; 156:2-5; 179:23-180:4, July 27, 2010; PCRA Tr. 137:18-138:17, Sept. 1, 2010.

⁹⁷ PCRA Tr. 183:18-22; 200:7-13; 209:18-210:4, July 26, 2010; PCRA Tr. 21:4-11; 14:23-25; 70:10-19, Sept. 2, 2010.

⁹⁸ PCRA Tr. 190:2-20; 200:21-201:10, July 26, 2010; PCRA Tr. 21:21-22:7; 33:10-35:13; 59:16-25, Sept. 2, 2010; PCRA Tr. 70:14-25, Sept. 2, 2010. Trial Tr. 6:20-8:1.

number.⁹⁹ Even though the assistant district attorney had this number from Maria, and the boys who had provided it to police the night of the murder, there was no evidence that Julia was ever contacted.

There was not a single witness – detective or prosecutor – who testified to picking the boys up from their home for either the preliminary hearing or trial.¹⁰⁰ Nor did any witness testify to having their grandmother or other relative sign the subpoena or to seeing a subpoena after it was signed.¹⁰¹ The assistant district attorney for the preliminary hearing did not recall that she ever had subpoenas for either Michael or Hector, only that detectives brought Michael in for the hearing.¹⁰² A detective announced the boys' arrival to a meeting with the assistant district attorney for the trial and told the assistant district attorney the boys were unaccompanied by anyone.¹⁰³ She deviated from her usual practice of prepping the boys for trial at their home because an unnamed detective told her that the Toros “didn't want any police or people who were affiliated with police coming to their home.”¹⁰⁴ Yet there was never any proof that the boys or any member of their family articulated this concern.¹⁰⁵ The assigned homicide detective, Gerard Robison,¹⁰⁶ testified that he does not recall ever serving subpoenas, or directing anyone else to serve subpoenas, for the boys to attend the preliminary hearing or trial.¹⁰⁷ There was no credible evidence that subpoenas were even issued for Hector or Michael for the preliminary hearing or trial nor signed by their legal

⁹⁹ PCRA Tr. 157:19-162:6; 191:20-192:4; 199:2-24, July 26, 2010.

¹⁰⁰ PCRA Tr. 66:15-20; 151:20-22, July 27, 2010; PCRA Tr. 66:7-67:1, Sept. 1, 2010.

¹⁰¹ PCRA Tr. 82:21-84:1, Sept. 1, 2010.

¹⁰² PCRA Tr. 181:19-182:3; 210:25-211:10, July 26, 2010.

¹⁰³ PCRA Tr. 14:18-15:25, Sept. 2, 2010.

¹⁰⁴ PCRA Tr. 12:16-14:2; 42:20-43:7, Sept. 2, 2010.

¹⁰⁵ PCRA Tr. 97:15-21, Sept. 1, 2010; PCRA Tr. 60:15-24, Sept. 2, 2010.

¹⁰⁶ The transcript incorrectly refers to Detective Robison as “Robinson”.

¹⁰⁷ PCRA Tr. 82:21-83:3; 83:22-84:1; 89:21-22, Sept. 1, 2010.

guardian, Julia Rodriguez or by any family member. Not a single Commonwealth witness testified that they informed Hector and Michael's legal guardian or any other family member about police taking these boys into either the Homicide Unit for questioning or into a courtroom to testify regarding a murder.¹⁰⁸

During the court proceedings, the Commonwealth's failure to inform the young boys' family of their role as the primary witnesses in a murder trial or to have any family present for support and protection is even more disturbing. The assistant district attorney at trial informed the judge several times that the boys were emotional, scared and that Michael had cried at the preliminary hearing.¹⁰⁹ When Michael testified, he actually broke down to the point that the trial judge dismissed the jury and took a recess.¹¹⁰ Michael went into the bathroom and did not want to return to the stand, sobbing, "I can't go back. I can't go back."¹¹¹ The trial judge was so concerned that she directed that 911 be called.¹¹² Notwithstanding that Michael's condition rose to the level of potentially needing emergency medical intervention, not one Commonwealth witness – prosecutor or detective – testified that they called or contacted the boys' grandmother

¹⁰⁸ The assistant district attorney for the trial gave testimony that on one occasion she called the Toro home and a Spanish-speaking but unknown person answered the telephone. The assistant district attorney testified that she asked an unnamed Spanish-speaking detective to speak with the person. The assistant district attorney said she did not know what was said, who the unidentified detective was speaking with or when this occurred. To the extent that this vaguely described scenario occurred, and the Court was not persuaded that it did, it would not satisfy the requirements for obtaining permission for child witnesses. It remains unknown what was said to whom. Moreover, this testimony was not persuasive nor corroborated by any other evidence. PCRA Tr. 27:16-25; 28:13-29:18; 47:10-24; 49:2-20, Sept. 2, 2010. PCRA Tr. 55:24-56:20; 86:21-87:13; 153:23-155:25; 199:4-19, July 27, 2010; PCRA Tr. 198:6-199:24, July 26, 2010; PCRA Tr. 78:2-81:9, Sept. 1, 2010; PCRA Tr. 62:16-64:25, Sept. 2, 2010.

¹⁰⁹ Trial Tr. 6:20-7:22; PCRA Tr. 21:21-22:11, 59:16-25, Sept. 2, 2010.

¹¹⁰ Trial Tr. 102:8-12.

¹¹¹ Trial Tr. 102:21-22; PCRA Tr. 35:3-7, Sept. 2, 2010.

¹¹² Trial Tr. 103:15-19.

or family members.¹¹³ There was no suggestion even made that someone tried and was unable to contact them.

There was no credible evidence that the procedures designed to protect child witnesses were followed.¹¹⁴ No satisfactory explanation was provided by the Commonwealth as to why they did not follow required procedures for child witnesses particularly in a case of this magnitude when the prosecutors and detectives acknowledged that both boys were terrified and emotional and were the main witnesses against the defendant in a murder trial. Thus, Hector's testimony that he and his brother were taken in repeatedly alone without family knowledge, permission or support was not contradicted by the Commonwealth's witnesses.

c) The Commonwealth agreed that law enforcement officers always transported the boys for questioning and court but provided no evidence as to the identity of those officers.

The Commonwealth's witnesses all agreed that law enforcement officers transported the boys for questioning and court but not a single witness admitted to transporting them nor to knowing specifically who did.¹¹⁵ The assistant district attorney for the PCRA informed the Court, "I have absolutely no idea"¹¹⁶ who transported the young boys.

It was undisputed and police paperwork confirms that the boys were "brought in by police" after midnight on the night of the murder to the Homicide Division at the

¹¹³ PCRA Tr. 190:2-20, July 26, 2010; PCRA Tr. 70:14-25, Sept. 2, 2010.

¹¹⁴ PCRA Tr. 191:5-8; 199:16-25, July 26, 2010; PCRA Tr. 44:6-25, Sept. 1, 2010; PCRA Tr. 24:9-18; 32:6-24; 70:10-25, Sept. 2, 2010; PCRA Tr. 54:13-25; 72:17-75:23; 81:10-82:7; 86:21-87:13, July 27, 2010.

¹¹⁵ PCRA Tr. 203:6-14, July 26, 2010; PCRA Tr. 50:19-22; 55:24-56:20; 66:15-20; 68:3-11, July 27, 2010; PCRA Tr. 57:1-12; 66:25-68:1; 106:21-107:6, Sept. 1, 2010; PCRA Tr. 15:8-25; 19:9-13, Sept. 2, 2010.

¹¹⁶ PCRA Tr. 34:20-24, July 21, 2010.

Police Administration Building.¹¹⁷ (See Ex. C-11, Hector Toro Investigation Interview Record, Oct. 19, 1991, 1; Ex. C-15, Michael Toro Investigation Interview Record, Oct. 19, 1991, 1.) The assigned homicide detective, Gerard Robison, recalled that the boys were already at Homicide when he arrived and he did not know who transported them.¹¹⁸ He had no recollection of ever transporting Hector and Michael Toro during the investigation or court proceedings.¹¹⁹ The assigned homicide detective testified that although he attended the trial, he never met at any point with Michael in the bathroom after he broke down on the stand, nor did he know the detective, referred to in the trial transcript, who did.¹²⁰

Both assistant district attorneys remembered that detectives brought the boys to and from court and prep sessions but neither had any memory of the identity of the transporting detectives on any of these occasions.¹²¹ The assistant district attorney for the trial also confirmed that the Toro boys were brought into her office on November 5, 1992, the morning of trial which was a school day---but again, never mentions the identity of the transporting detective nor arrangements that were made to have them miss school.¹²²

Even though detectives were supposed to pick up children from their homes and bring child witnesses in after a family member or guardian signed the subpoena, no one testified to having done that in this case.¹²³ Thus, if the boys' grandmother and family and school were not consulted and the boys were not picked up from their home as the

¹¹⁷ PCRA Tr. 50:19-22; 55:24-56:20; 66:15-20; 68:3-68:11, July 27, 2010.

¹¹⁸ PCRA Tr. 66:4-67:4, Sept. 1, 2010.

¹¹⁹ PCRA Tr. 66:7-67:1, Sept. 1, 2010.

¹²⁰ PCRA Tr. 100:20-101:25, 102:13, Sept. 1, 2010.

¹²¹ PCRA Tr. 203:6-14, July 26, 2010; PCRA Tr. 15:8-25, Sept. 2, 2010.

¹²² PCRA Tr. 21:4-11, Sept. 2, 2010.

¹²³ PCRA Tr. 155:23-25; 178:13-179:6; 199:4-19, July 27, 2010; PCRA Tr. 24:9-17; 82:21-84:1, Sept. 1, 2010.

policy requires, this provides corroborating evidence to Hector's and Maria's description that the boys were picked up by a detective as they neared their school in the morning.

The Commonwealth's loss of its prosecution file of course compromises anyone's ability to reconstruct who the transporting detectives were. In addition, the police file in this case does not have a police activity sheet that would have provided the identity of who transported the boys.¹²⁴

Since there was no dispute that law enforcement officers always transported both Hector and Michael Toro at all relevant times in this case¹²⁵ but no witness admitted to transporting the boys at anytime, there was no evidence contradicting Hector's description that the boys were threatened during these trips by detectives.

d) There was no evidence directly contradicting Hector's recantation and testimony of detective coercion.

The Commonwealth presented no direct evidence challenging Hector's recantation and description of detective coercion. At the PCRA evidentiary hearing, the Commonwealth did not present any witnesses---employees, customers or bystanders---with direct evidence contradicting Hector's recantation testimony that Jose Medina did not come into the Chinese restaurant with a knife making threats. No one was presented to testify that they had seen Jose Medina at or near the Chinese restaurant, in a drunken state, showing off a knife or promising to kill someone that night. The Commonwealth also did not present evidence placing Hector and Michael someplace other than inside the Chinese restaurant playing arcade games when the murder took place. Again, the Commonwealth presented no witness who admitted to transporting

¹²⁴ PCRA Tr. 106:7-15, Sept. 1, 2010

¹²⁵ PCRA Tr. 203:6-19, July 26, 2010; PCRA Tr. 50:19-22; 55:24-56:20; 66:15-20; 68:3-11; 151:20-152:15; 179:7-13; 202:6-7, July 27, 2010.

the boys to and from court or questioning to rebut Hector's rendition of what occurred during those trips. Thus, Hector's PCRA testimony about what occurred remains uncontradicted in addition to being corroborated by his mother's testimony.

3. Evidence from the original trial corroborated or was consistent with Hector's PCRA testimony.

a) There was evidence in the trial record that the boys were scared and behaving as though they had been threatened.

At the very beginning of the trial, the assistant district attorney described to the trial judge that she was concerned that the boys had been threatened or intimidated. She recounted that they were acting nervous and scared, that Michael was crying and that the officers suggested that the Toros feared some kind of retaliation. She requested that Jose Medina's family be excluded from the courtroom. Specifically, the assistant district attorney stated:

"Next, Your Honor, at the preliminary hearing, when Michael Toro who was then 11 testified it was put on the record that the mother and sister of the defendant who were at the hearing that day spoke to him before he testified, made him very nervous, and affected his ability to testify.

Today, he and his brother Hector, Michael now being 12, Hector now being 11, were sitting in the anteroom looking, in my opinion, somewhat nervous about testifying as you might expect from children, but composed and under control until the defendant's family arrived and when his mother, meaning the defendant's mother, walked by and sat in the courtroom and the defendant's sister and when the defendant's brother, I believe it is his brother, a young man about the same age began milling around in the area outside the anteroom.

Michael Toro began to cry, and really lost his composure and said he was very nervous about testifying. The impression I got from the police that is, what I was supposedly told by the police and the officers are right here to relate to it, that is he is afraid to testify, his family fears some kind of retaliation. I am not saying that they were justified in fearing that. I am not asking for any instruction. There has been no problem, but I ask you, during Michael's testimony and possibly during Hector, although Hector was not an emotional person, Michael was, to ask the defendant's family to remain outside."¹²⁶

¹²⁶ Trial Tr. 6:20-8:1.

The assistant district attorney at Jose Medina’s preliminary hearing also testified that both boys were distressed and Michael cried at that proceeding,¹²⁷ and she confirmed that Michael seemed “scared to death” during the trial.¹²⁸ That same district attorney¹²⁹ and law enforcement officers¹³⁰ from the original trial testified that they had not witnessed or received any reports that Jose Medina’s family threatened or attempted to influence the boys’ testimony at the trial. Likewise, Maria¹³¹ and Hector Toro¹³² testified they had never been threatened by Jose Medina, his family or anyone else to testify favorably for Jose Medina. Nevertheless, the assistant district attorney at trial described the boys’ behavior as being consistent with being threatened or intimidated.

Hector’s answers to basic questions at trial about whether he spoke with the detective were oddly conflicting. His responses were consistent with someone being afraid to tell the truth about what happened during the interview with the detective due to threats. Young Hector first denied talking to the detective completely and then finally admitted it:

“Q. Did you have a chance to talk either to the District Attorney or to any of the detectives outside?

A. No.

Q. Before you came in today?

A. No.

Q. You weren’t sitting in the room outside talking to the detective before you came in?

A. When I was in the little room.

Q. The little room there?

A. No.

Q. You didn’t talk to the detective with the mustache as he was sitting there?

¹²⁷ PCRA Tr. 151:11-16; 152:6-9; 208:14-16; 211:15-213:14, July 26, 2010.

¹²⁸ PCRA Tr. 188:14-189:9; 190:2-8, July 26, 2010.

¹²⁹ PCRA Tr. 60:15-62:2; 67:20-68:9, Sept. 2, 2010.

¹³⁰ PCRA Tr. 194:8-196:25, July 27, 2010; PCRA Tr. 97:15-21, Sept. 1, 2010.

¹³¹ PCRA Tr. 214:6-215:13, July 19, 2010.

¹³² PCRA Tr. 28:8-13; 215:19-25; 216:12-17; 217:16-25; 218:7-9; 235:14-23, July 20, 2010.

A. No.
Q. Was he talking to your brother?
A. No.
Q. Do you recall what I am talking about, this little room right in here?
A. Yes.
Q. Do you remember the detective in the suit with the mustache?
A. He got the black suit.
Q. Right. He was sitting there. He had a book open in front of him?
A. Yes.
Q. And he had down there statements that you had given before?
A. Yes.
Q. And did he ask you some questions about the statements?
A. Really he asked my brother Marcos.
Q. So he was talking to Marcos rather than you?
A. Yes.
Q. When you described the knife, did he show you your statement at all?
A. Yes.
Q. Did he show it to you out here?
A. No, he showed it at me in the next building from here.”¹³³

Hector Toro’s description of his experience at Jose Medina’s trial is corroborated by Michael Toro’s apparently distraught state as documented in the trial record. Michael still resisted answering questions leading the assistant district attorney to request that the prior assistant district attorney be brought in to make him feel more comfortable to which the trial judge agreed.¹³⁴ The Court also suggested that Michael testify later but the assistant district attorney insisted that he would not get any better acknowledging that she was aware of his resistance to testifying.¹³⁵ After the assistant district attorney struggled to get Michael to answer questions and resorted to numerous leading questions that Michael answered by implicating Jose Medina in the murder, Michael finally completely broke down necessitating a long break.¹³⁶ The assistant district attorney had just shown him a copy of his statement from the night of the

¹³³ Trial Tr. 58:1-59:14.

¹³⁴ Trial Tr. 91:19-93:18.

¹³⁵ The ADA stated “He won’t be any better tomorrow. . . . He won’t be any better.” Trial Tr. 93:7-11.

¹³⁶ Trial Tr. 93:23-102:12.

murder.¹³⁷ Michael went into the bathroom and apparently a detective went in with him.¹³⁸ Defense counsel got upset and requested that a court reporter go in to the bathroom.¹³⁹ The trial judge was concerned enough that she directed someone to call 911.¹⁴⁰ The assistant district attorney reported that a detective had been with Michael and reported he had stopped crying.¹⁴¹ Specifically, the record shows the following after Michael was shown his statement:

“MS. SWEENEY: He can’t read it. Are you okay? (Witness shakes his head in the negative.) (Whereupon, Marcos Toro went into the men’s room.)

MR. DALY: I request that Victor (court reporter) go in there.

THE COURT: What does he have to go in there for?

MR. DALY: Well, being he is a witness on trial and I would like a court officer to go in there.

THE COURT: Well, we have no male court officer.

MS. SWEENEY: I asked one of the police officers to go in and ask the status of Marcos and come out and report to us.

MR. DALY: The police officers are in there. I would like to be in there or I would like the court officer.

THE COURT: I don’t have a court officer and I don’t think you should be in there. We no longer have a doctor. I was trying to get a doctor. Grace called. They don’t even have one down there. They could call 911 and they will take him to the hospital. There are no doctors. Call 911.

MS. SWEENEY: One of the detectives came to get me to say he had stopped crying, seemed a lot calmer but wanted to talk to me. Mr. Daly walked into the men’s room behind me and refused to leave. Now, this witness is not under cross-examination. I am not talking about the substance of the case with him, and I have an absolute right to talk to the witness. I would like you to order him to wait here until I come out.

MR. DALY: Your Honor –

THE COURT: Where are you going?

MS. SWEENEY: Yes, the men’s room.

MR. DALY: The only problem is when she made the request, she said, “I will talk to him.” She had just told me in the corridor about five minutes before. “You shouldn’t go in there without me.” So she went in, I followed in behind her. When she turned around and she hollered at me.

MS. SWEENEY: That’s not true.

¹³⁷ Trial Tr. 101:3-102:7.

¹³⁸ Trial Tr. 102:21-103:21.

¹³⁹ Trial Tr. 102:23-103:6.

¹⁴⁰ Trial Tr. 103:17-19.

¹⁴¹ Trial Tr. 103:15-22.

THE COURT: You are acting like children.
MR. DALY: Childish, right.
MS. SWEENEY: I talked to him.
MR. DALY: I don't know whether you talked to him in the men's room.
THE COURT: I will give both of you a spanking. Go back out there and sit down and calm your nerves.
MR. DALY: I won't go in the bathroom, Your Honor."¹⁴²

Thirty five minutes elapsed before Michael returned to the stand, questioning resumed and the record shows less of a struggle in getting him to answer.¹⁴³

Thus, the assistant district attorney's belief that the boys' behavior was consistent with being threatened, the unidentified officer's explanation that it must be Jose Medina's family that made the boys afraid, Hector's inexplicable denial of being questioned by the detective and Michael's resistance and fear leading to a breakdown on the stand followed by a detective talking with him in the bathroom before he resumed testifying, all constitute evidence from the original trial that corroborate, or at a minimum are events that are consistent with, Hector's PCRA testimony that a detective threatened him and his brother to testify.

b) The Commonwealth inexplicably failed to follow normal procedures for child witnesses even when Michael Toro completely broke down.

Although prosecutors and law enforcement officers involved in the original trial testified they were familiar with the special procedures for child witnesses,¹⁴⁴ there was no adequate or credible explanation offered as to why the Commonwealth failed to follow its own procedures. Even after the assistant district attorney was informed by a detective that the boys were intimidated and afraid of Jose Medina's family, no one

¹⁴² Trial Tr. 102:17-105:3.

¹⁴³ Trial Tr. 102:8-12, 105:5-12.

¹⁴⁴ PCRA Tr. 169:17-172:23; 174:21-175:19; 178:23-179:16; 181:13-182:3; 210:5-211:10, July 26, 2010; PCRA Tr. 54:13-25; 72:17-75:23; 81:10-82:7; 86:21-87:13; 178:13-179:6; 180:12-15, July 27, 2010; PCRA Tr. 44:6-25, Sept. 1, 2010; PCRA Tr. 24:9-18; 32:6-24; 70:10-25, Sept. 2, 2010.

reached out to tell the young boys' family of these alleged threats.¹⁴⁵ Again, when Michael was so emotionally distraught that the trial judge directed that someone call for emergency medical assistance, no one notified the boys' family to let them know what was happening.¹⁴⁶ Certainly, if the boys were testifying truthfully and voluntarily one would expect that if they were frightened, their family would provide them emotional support to enable them to testify.

The Commonwealth never explained why the boys' testimony was kept secret from their grandmother or parents.¹⁴⁷ This covert conduct is certainly consistent with sinister motives by a detective who coerced and threatened the boys to testify falsely and who did not want their family to discover from the boys what was occurring.

c) Maria Caraballo falsely represented to law enforcement that she was Hector and Michael Toro's aunt and detectives permitted her to participate in signing their statements despite her role as a witness.

It was undisputed that Maria Caraballo was not the boys' aunt, not listed by the boys as their closest family member, and yet she falsely represented to detectives that she was.¹⁴⁸ Detectives also testified that proper procedure is to separate witnesses in homicide cases and question them individually without allowing them to hear testimony of other potential witnesses.¹⁴⁹ Yet Maria was permitted to be present, at least to some extent, during interviews with the boys, read their statements, and sign their statements as the family member.¹⁵⁰ Certainly, if a detective was attempting to coerce testimony

¹⁴⁵ PCRA Tr. 155:23-25; 199:4-10, July 27, 2010.

¹⁴⁶ PCRA Tr. 190:2-20; 201:2-10, July 26, 2010.

¹⁴⁷ PCRA Tr. 155:23-25; 199:4-10, July 27, 2010.

¹⁴⁸ PCRA Tr. 130:4-11; 155:11-15; 156:24-160:8; 162:10-12, July 27, 2010; PCRA Tr. 36:9-14, Sept. 1, 2010.

¹⁴⁹ See Ex. C-11; Ex. C-15; PCRA Tr. 163:13-164:24; 204:5-205:10; July 27, 2010.

¹⁵⁰ PCRA Tr. 127:11-23; 128:24-129:5; 132:20-25; 156:2-5; 179:23-180:11, 192:13-18, July 27, 2010.

and did not want a family member contacted, having Maria Caraballo sign as though she was a family member might achieve the goal of secrecy from the boys' family.

d) Hector Toro's trial testimony was inconsistent, unusual and contradicted by other circumstantial evidence from the trial and further supports Hector Toro's present day testimony that it was fabricated.

The truthfulness of Hector Toro's recantation is corroborated by other circumstantial evidence presented at the original trial. First, Police Officer Fetters, who initially interviewed Jose Medina close in time to the murder, testified at trial that Jose Medina did not behave or appear to be intoxicated.¹⁵¹ Hector's trial testimony that he allegedly saw Jose Medina visibly drunk and falling down in the Chinese restaurant¹⁵² is a demeanor completely at odds with what Officer Fetters described of Jose Medina within minutes of when Hector allegedly saw him.

Second, the responding officer stated that no one at the murder scene came forth as a witness, and an officer who later interviewed Hector and Michael on the night of the murder stated that one of the Toro boys claimed that he had not seen anything or did not mention seeing anything.¹⁵³ Officer testimony at the PCRA evidentiary hearing reiterated that only one of the boys claimed to have seen anything prior to being questioned at the Homicide Unit.¹⁵⁴

Third, Hector's trial testimony of what he saw has the fantastic and implausible quality of a child's fabrication. Hector, an 11-year old, testified at trial to seeing a very intoxicated Jose Medina prior to the murder enter a Chinese restaurant brandishing a knife, ordering a cheeseburger, announcing that he planned to kill someone that night,

¹⁵¹ Trial Tr. 171:4-9.

¹⁵² Trial Tr. 46:10; 63:6-64:6.

¹⁵³ Trial Tr. 35:13-36:1; 190:1-3; PCRA Tr. 54:13-25; 72:17-75:23; 81:10-82:7; 86:21-87:13, July 27, 2010.

¹⁵⁴ PCRA Tr. 49:17-50:18; 54:13-55:6; 62:18-25; 65:10-22, July 27, 2010.

and leaving the restaurant. (See Ex. C-11, Hector Toro Investigation Interview Record, Oct. 19, 1991, 2.) Inexplicably, there is no testimony that Jose Medina waited for his food and then departed or that store employees looked for Jose Medina when his cheeseburger was ready. Hector testified that all of this occurred while he was in the Chinese restaurant with his brother Michael playing arcade games. The exact testimony at trial was as follows:

“Q: What happened when you were in the Chinese store with Marcos and you saw the defendant?

A. (Pause.) Harry went in. He walked in the store.

Q. And then what happened?

A. He had a knife.

Q. What kind of knife did he have?

A. It looked like a Rambo knife.

...

Q. What if anything did the defendant do? When I say the defendant, I mean Harry. What if anything did the defendant say when he showed that knife to you?

A. He said, he was drunk and he said, “Today I am going to kill somebody with this knife.”

Q: What did he do with the knife then?

A. Then he walked, he ordered a cheeseburger and he walked back out.

Q. Hector, down about what time this was?

A. It was like around 8:30 or 9:00.

THE COURT: Day or night?

THE WITNESS: It was like night.

BY MS. SWEENEY:

Q. How long did you stay with Marcos playing the video games?

A. Like around 15 minutes.

Q. Did you and Marcos leave at the same time?

A. Yes.

Q. And where did you go?

A. My grandmom’s house.”¹⁵⁵

No one asked Hector at trial about what Jose Medina was wearing or any other facts that might be corroborated by other circumstantial evidence presented at trial. It was surprising that no restaurant employees or other customers were called at trial to

¹⁵⁵ Trial Tr. 44:8-15; 46:6-47:1.

corroborate this rather bizarre demonstration. Likewise, the Commonwealth did not present the testimony of “Bojo” who Hector named in his statement (but not at trial) as having been with Jose Medina in the restaurant. (See Ex. C-11, Hector Toro Investigation Interview Record, Oct. 19, 1991, 5.) Significantly, Michael Toro’s statement from the night of the murder never mentions seeing Jose Medina in the Chinese restaurant carrying a knife and threatening to commit a murder – a major omission if in fact it had occurred. (See Ex. C-15.) At trial, though, Michael testified to this unusual story.¹⁵⁶

Fourth, both Hector and Michael’s trial testimony was wildly inconsistent on both major and minor details which is totally consistent with witnesses testifying to something they never saw. Hector offered an ever-changing description of where he went after the Chinese restaurant, where Michael and he were before the stabbing and what each was doing, whether he was riding a bicycle or not, and when and how they initially saw the dead body.¹⁵⁷ Michael’s inconsistent testimony that he saw the murder, that he didn’t see the murder and that he said he saw the murder because his brother, Hector, said he saw it, has been the topic of years of post conviction proceedings on the issue of his competency. Hector Toro’s PCRA testimony that neither boy saw Jose Medina in the Chinese restaurant or the murder finally makes these inconsistencies make sense.

Finally, both Hector and Michael Toro testified at trial that they saw Jose Medina daily in the neighborhood, but police paperwork from the time of trial showed that Jose Medina lived in Reading, Pennsylvania.¹⁵⁸ (See Ex. C-13/P-6.) Ephraim Torres’ trial testimony corroborated that Jose Medina had been living in Reading for over half a year

¹⁵⁶ Trial Tr. 93:23-96:14

¹⁵⁷ See generally Trial Tr. 39:14-81:1.

¹⁵⁸ Trial Tr. 42:4-6; 87:22-25.

and had just come to town to attend the birthday party.¹⁵⁹ Likewise, Jose Medina testified credibly at the PCRA hearing that he had been living in Reading with his mother for “about a year or so” before his arrest in this case. Jose Medina’s PCRA testimony, listing the same Reading address Jose Medina had given over 20 years ago on the night of the murder, was uncontradicted at the PCRA hearing. In fact, Hector’s and Michael’s trial testimony to seeing Jose Medina in the neighborhood everyday at the time of the murder was unsupported by any other evidence. If the detective coerced the boys into incriminating Jose Medina, their testifying that they saw him regularly in the neighborhood would help establish a link to how they would have been able to know who he was and to identify him at trial. Logically, if Jose Medina had been living in Reading for over half a year, the 10 and 11-year-old boys could not have seen him on a daily basis, their trial testimony to that effect was false, and it corroborates Hector’s PCRA testimony recanting his trial testimony.

4. The Commonwealth’s challenge to Hector’s veracity was not supported by any relevant testimony or credible evidence.

With no direct or circumstantial evidence to contradict Hector’s recantation of his trial testimony incriminating Jose Medina, the Commonwealth’s main challenges¹⁶⁰ to

¹⁵⁹ Trial Tr. 222:2-22; 225:22-25.

¹⁶⁰ The Commonwealth listed Jose Medina’s trial counsel, Edward Daly, as a witness. PCRA Tr. 28:4-10, July 19, 2010. After the hearing began, the Commonwealth reported that Ed Daly requested that he not have to testify in open court because of some type of medical condition that made him not able to be in crowds. *Id.* The Court agreed to consider reasonable accommodations to any disability but stated that the medical condition simply had to be confirmed on the record and, with the parties’ consent, agreed to conduct a closed session on the record with counsel present to address the issue. PCRA Tr. 129:3-18, Sept. 1, 2010; PCRA Tr. 92:5-94:15, Sept. 3, 2010. Since the Court and prosecution file was lost, the Court also asked that counsel find out whether defense counsel’s file existed so that trial exhibits could be reconstructed. PCRA Tr. 129:19-1; 30:8, Sept. 1, 2010. PCRA counsel for Jose Medina spoke with Ed Daly and said he had retired from the practice of law in 2005 following hospitalization relating to a medical condition stemming from his military service in Vietnam. PCRA Tr. 54:19-55:2, July 26, 2010. The Disciplinary Board website listed Ed Daly as inactive with the bar due to a disability in August 2005. PCRA Tr. 110:19-111:11; 117:15-18; 122:25-123:11, Sept. 1, 2010. Counsel for both sides ultimately

Hector's testimony consisted of people vouching that they believed him as a child and unsubstantiated suggestions that Jose Medina or his family must have threatened Hector into recanting and claiming detective misconduct. The retraction that Hector made when he was unexpectedly visited by homicide detectives at his mother's home when he was on state parole did not undermine his persuasive PCRA testimony and consistent signed statements since 2006.

a) The Commonwealth's presentation of prosecutors and officers who said they believed Hector's trial testimony is irrelevant to this Court's credibility findings.

The challenge that the Commonwealth presented to Hector's recantation was prosecutors' and detectives' testimony to the effect that they believed Hector's version of events when they heard them in 1991 and 1992. The question to be determined at the evidentiary hearing was not whether advocates for the Commonwealth believed Hector back then, but rather whether the Court believed Hector's present day testimony that he lied when he incriminated Jose Medina and that he did so after having been improperly pressured by a law enforcement officer with removal from his home if he did not testify.

Any testimony from Commonwealth witnesses as to whether they believed Hector constitutes inappropriate vouching and is irrelevant. Consequently, this Court will not detail all the prosecutors and detectives who testified at the 2010 evidentiary hearing that they believed Hector back in 1992.¹⁶¹ The very existence of Jose Medina's conviction based primarily on the testimony of these two young boys demonstrates that

chose not to call Ed Daly as a witness and reported that he no longer had his file from the case. PCRA Tr. 56:16-20, July 26, 2010; PCRA Tr. 113:1-9, Sept. 1, 2010.

¹⁶¹ Presumably these Commonwealth witnesses did believe Hector in 1992; otherwise they would have been knowingly suborning perjured testimony.

the jury also likely believed Hector's testimony since he was one of two primary witnesses with the other, Michael, alternating between testifying that he did and did not see the stabbing.

Nor is it relevant whether these same Commonwealth advocates believed both boys were competent since competency is a judicial determination to be made after appropriate questioning in court, not something decided by advocates for one side or the other. There was no such determination made in 1992 for either boy.

The issue of Hector's credibility is solely one for the Court. This Court found Hector's PCRA testimony credible and his reasons for his earlier false testimony credible. The Commonwealth failed to present any credible evidence that Hector's recantation and testimony of detective coercion was not truthful.

b) The Commonwealth implied that Hector recanted due to threats from Jose Medina's family but this was not supported by any credible evidence.

The Commonwealth spent considerable time suggesting that Hector must have been coerced or threatened by Jose Medina or his family to recant and testify. There was no credible evidence that Jose Medina or anyone in his family¹⁶² ever coerced or threatened anyone in the Toro family to obtain their testimony.

Maria¹⁶³ and Hector Toro testified credibly at the PCRA hearing that they had never been threatened by Jose Medina or his family.¹⁶⁴ The assistant district attorney for the trial testified at the PCRA hearing that she had never received any actual reports that anyone associated with Jose Medina had threatened the boys or attempted in any

¹⁶² The families of both William Bogan and Jose Medina were respectful and peaceful throughout the entire PCRA proceeding. PCRA Tr. 115:15-116:12, Sept. 03, 2010.

¹⁶³ PCRA Tr. 214:6-215:13, July 19, 2010.

¹⁶⁴ PCRA Tr. 28:8-13; 215:19-25; 216:12-17; 217:16-25; 218:7-9; 235:14-23, July 20, 2010.

way to influence their testimony.¹⁶⁵ Jose Medina credibly testified that he never threatened or promised anyone anything for Hector's recantation or disclosure of coercion or threats, and that he was not aware of anyone who did.¹⁶⁶ Jose Medina also testified that he informed his family after Hector recanted¹⁶⁷ and asked if Jose Medina, Sr. would give Maria Toro a ride up to Graterford for a visit when he came.¹⁶⁸

The Commonwealth suggested that Hector fabricated his recantation testimony because of fear or threats from Jose Medina in prison. Again, Hector credibly testified that he was never threatened by Jose or any member of his family and that neither Jose Medina nor any member of his family have offered him anything for testifying.¹⁶⁹

At many stages since this case's inception, the Commonwealth has explained weaknesses in its case by implying that Jose Medina's family must have made threats against the Toro family. Yet there has never been any credible evidence to support these suggestions. First, at trial, the Commonwealth suggested that the Medina family's appearance in court must explain why Hector and Michael were so upset and Michael was crying.¹⁷⁰ Later, at the post trial stage in federal court which focused on the issue of Michael's competency, the Commonwealth argued in its briefs that Michael's testimony was inconsistent at trial because Jose Medina's family may have threatened him. 373 F. Supp. 2d 526, 547 n.23. The District Court dismissed this explanation and noted that the Commonwealth's speculation was completely unsubstantiated:

"Respondents argue that the contradictions in Marcos's preliminary hearing testimony were not caused by Marcos's incompetency but by

¹⁶⁵ PCRA Tr. 60:15-62:2; 67:20-68:9, Sept. 2, 2010.

¹⁶⁶ PCRA Tr. 153:20-154:4, July 19, 2010.

¹⁶⁷ PCRA Tr. 71:22-72:2, July 19, 2010.

¹⁶⁸ PCRA Tr. 73:5-8; 74:4-8; 75:6-10; 75:19-24; 93:7-94:18; 95:8-13, July 19, 2010.

¹⁶⁹ PCRA Tr. 218:10-219:10; 235:14-23, July 20, 2010.

¹⁷⁰ Trial Tr. 7:14-8:1.

Marcos's fear of Medina's family members, who were sitting in the audience at the preliminary hearing. (Resp. to Pet'r's Post-Argument Letter at 2.) Respondents then speculate that "it is not beyond the realm of possibility" that Medina's family engaged in witness intimidation in the time between Marcos's preliminary hearing testimony and his trial testimony. (Resp. to Pet'r's Post-Argument Letter at 10.) There are no evidentiary findings or affidavits on the record, either inside or outside of the courtroom, to support this speculation. **Contrary to respondents' intimations** in their briefs (Resp'ts' Obj. to R&R at 5-6; Resp. to Pet'r's Post-Argument Letter at 10 n.3), which cite to an entirely unrelated article in the New York Times on witness intimidation by Boston street gangs, **there is no evidence that Medina's family members intimidated or even approached Marcos in the time between the preliminary hearing and the trial.** Regardless of the cause for the contradictory nature of Marcos's testimony, the combined circumstances of his age, the fact that his testimony at both the preliminary hearing and trial contradicted itself, and his ambiguous understanding of the difference between the truth and a lie all would have caused a reasonably competent attorney to object to Marcos's competency."

Id. (emphasis provided).

Evidence presented by Commonwealth witnesses at the PCRA evidentiary hearing confirm the District Court's earlier finding that there was no credible evidence of threats by Jose Medina's family at the original trial. Law enforcement officers and prosecutors testified that they had never observed nor were informed of any threats by Jose Medina or anyone in his family at the original trial.¹⁷¹

The Commonwealth's suggestions over the years about alleged threats from Jose Medina's family toward Hector and Michael Toro are ironic in light of Hector's credible PCRA testimony that it was a detective who threatened him to testify against Jose Medina rather than anyone from Jose Medina's family threatening him not to testify. Not only did his behavior as a young boy appear to the assistant district attorney to be like someone who had been threatened, he now credibly testified that he

¹⁷¹ PCRA Tr. 194:8-196:25, July 27, 2010; PCRA Tr. 97:15-21, Sept. 1, 2010; PCRA Tr. 60:15-62:2; 67:20-68:9, Sept. 2, 2010.

succumbed to the Commonwealth's detective's threats to incriminate Jose Medina. Indeed, Hector's testimony at the trial bolstered the Commonwealth's case and in no way benefitted Jose Medina.

The Commonwealth adopted the same approach during the PCRA evidentiary hearing: implying that Hector must be recanting due to threats made by Jose Medina or his family. Once again, this suggestion was not supported by any credible evidence. There was not a single person who testified to observing Jose Medina, or anyone associated with him, threaten Hector Toro. Hector confirmed that he had never been threatened by Jose Medina, his friends, or his family, either at the original trial or relating to the PCRA proceeding.¹⁷² Hector also testified that he did not disclose this evidence of his earlier false testimony against Jose Medina in order to "survive in prison" and adamantly asserted he would survive anywhere he was.¹⁷³ Hector was only temporarily housed at Graterford. There was no evidence of any threats or coercion that occurred when Hector and Jose were housed together for three weeks at Graterford. Moreover, Hector signed another affidavit and testified in court long after he was transferred from Graterford and released from prison, undermining the Commonwealth's theory. (See Ex. C-8/P-9, Hector Toro Notarized Statement, Sept. 29, 2008.) Law enforcement officers also testified that if they had observed Jose Medina or anyone associated with him making a threat against Hector or Michael to secure their testimony, they would have taken appropriate steps to have the person arrested.¹⁷⁴ They did not.¹⁷⁵

¹⁷² PCRA Tr. 28:8-13; 215:19-25; 216:12-17; 217:16-25; 218:7-9; 235:14-23, July 20, 2010.

¹⁷³ PCRA Tr. 70:10-19; 71:10-19; 196:11-15; 208:5-20, July 20, 2010.

¹⁷⁴ PCRA Tr. 61:2-62:17; 89:15-90:1, Sept. 3, 2010.

¹⁷⁵ Id.

Significantly, all of the Commonwealth's evidence implying that Jose Medina or his family exercised some type of coercion or pressure upon the Toro brothers to recant their trial testimony focuses on events after October 18, 2006 when Hector already had disclosed the information recanting his trial testimony to Jose Medina.¹⁷⁶ The essence of the Commonwealth's evidence focuses on Jose Medina, Sr.'s innocuous but persistent efforts in 2009 and 2010 to ensure that Hector and Michael Toro were informed that there would be a PCRA hearing relating to Jose Medina's petition.¹⁷⁷ The credible evidence showed that after Hector's disclosure to Jose Medina, there was a cordial relationship between Hector and Michael Toro's family and Jose Medina's family.¹⁷⁸ Additionally, no one from the Toro family raised any concerns about Jose Medina, Sr.'s efforts to ensure he could contact Hector and Michael to inform them of PCRA court dates when they would testify, until homicide detectives started to question the Toro family about the Jose Medina case.

Indeed shortly following Hector's disclosure to Jose Medina in October 2006, Maria Toro asked to go with Jose Medina, Sr. to Graterford when he next visited Jose so that she could visit Hector.¹⁷⁹ Maria testified that she rode to Graterford but never described being afraid to take the ride with Jose Medina, Sr. even though she knew he had a conviction from decades earlier for murder.¹⁸⁰ Maria said the ride was pleasant.¹⁸¹ Prison records confirm that Maria Toro and Jose Medina, Sr. visited their

¹⁷⁶ PCRA Tr. 167:14-169:3; 170:13-176:7; 195:15-22; 196:11-14; 205:11-206:5, July 19, 2010; PCRA Tr. 49:4-18; 59:21-61:11; 62:15-63:15; 64:15-65:5; 65:24-66:8; 70:7-18, July 28, 2010.

¹⁷⁷ Id.

¹⁷⁸ PCRA Tr. 215:8-16, July 19, 2010.

¹⁷⁹ PCRA Tr. 65:24-66:8; 66:12-13; 66:25-67:20, July 28, 2010.

¹⁸⁰ PCRA Tr. 177:12-14; 178:3-13; 203:15-204:10, July 19, 2010.

¹⁸¹ PCRA Tr. 215:14-19, July 19, 2010.

respective sons on October 22, 2006.¹⁸² On November 12, 2006, Maria Toro again travelled to Graterford this time with both of Jose's parents, Jose Medina, Sr. and Lydia Aponte, and other relatives and the group checked in as visiting Jose Medina, Jr.¹⁸³ Hector Toro had just recently transferred to SCI Houtzdale.¹⁸⁴ By this time Hector had completed his handwritten statement, his October 25, 2006 notarized affidavit and the November 2, 2006 affidavit taken by Jose Medina's habeas counsel, Shannon Quill. (See Ex. P-3, Ex. C-1/P-7, Ex. C-2/P-8.) Maria Toro testified that Jose Medina, Sr. asked her to talk to Michael about coming to court.¹⁸⁵ On December 5, 2006, Jose Medina filed his PCRA petition with only Hector's affidavit. Michael Toro signed an affidavit on December 7, 2006 that ultimately was attached to the second amended petition.

The Commonwealth's allegation that Hector's affidavits were done in response to threats by Jose Medina's family is not supported by any credible evidence and rests solely on speculation. Hector's transfer to Graterford was temporary and his family did not behave as though they were afraid of Jose Medina or his family. Michael completed his affidavit a full month after Hector left Graterford. Moreover, Hector confirmed his earlier affidavits with a September 29, 2008 affidavit after he was out of prison and when Jose Medina, Sr. had no idea where Hector lived. (See Ex. C-8/P-9, Hector Toro Notarized Statement, Sept. 29, 2008.)

Jose Medina, Sr. credibly testified that he contacted Maria Toro at the instruction of Jose Medina's PCRA counsel, Larry Feinstein, to learn the whereabouts of Hector

¹⁸² PCRA Tr. 13:2-18; 18:10-18, Sept. 3, 2010.

¹⁸³ PCRA Tr. 20:7-22:11, Sept. 3, 2010.

¹⁸⁴ PCRA Tr. 12:3-7, Sept. 3, 2010.

¹⁸⁵ PCRA Tr. 195:15-22; 196:11-14, July 19, 2010.

and Michael Toro so that they could be informed of any PCRA evidentiary hearing that might be scheduled where their respective recantations would be evaluated by the Court.¹⁸⁶ Larry Feinstein was not appointed as counsel until August 12, 2008, long after Hector and Michael's affidavits had been written and submitted to the Court as part of the PCRA petition. (See Ct. Order, Aug. 12, 2008 directing the appointment of PCRA counsel.) Maria Toro confirmed that Jose Medina, Sr. contacted her in approximately July 2009 to get Hector and Michael's addresses.¹⁸⁷ There was no credible evidence that Jose Medina, Sr. did anything more than try to find out where Hector and Michael were so that they could testify at the PCRA proceeding and in no way supports a conclusion that the testimony would be inaccurate. Maria Toro credibly testified that Jose Medina, Sr. never asked that her sons lie.¹⁸⁸ Jose Medina, Sr.'s legitimate concern was whether Hector and Michael Toro could be located so that he could inform them about the scheduled hearing to secure their presence in court.¹⁸⁹ Both Michael and Hector had been released from prison by 2010.¹⁹⁰

Maria Toro testified credibly that no one from Jose Medina's family ever threatened her.¹⁹¹ During Maria's testimony she claimed that during one of Jose Medina, Sr.'s visits in 2009 or 2010, he said he would buy Hector a car if he testified at the PCRA hearing.¹⁹² Jose Medina, Sr. denied saying this.¹⁹³ Whether or not this

¹⁸⁶ PCRA Tr. 49:4-18; 59:21-61:11; 62:15-63:15; 64:15-65:05; 70:7-18, July 28, 2010.

¹⁸⁷ PCRA Tr. 167:4-169:19; 205:11-16, July 19, 2010.

¹⁸⁸ PCRA Tr. 201:4-19, July 19, 2010.

¹⁸⁹ PCRA Tr. 61:4-11; 62:18-23, July 28, 2010; PCRA Tr. 170:14-176:7, July 19, 2010.

¹⁹⁰ PCRA Tr. 215:19-22; 223:8-224:5; 294:4-5, July 20, 2010; PCRA Tr. 61:18-20, July 21, 2010.

¹⁹¹ PCRA Tr. 214:6-215:13, July 19, 2010.

¹⁹² PCRA Tr. 202:13-17, July 19, 2010.

¹⁹³ PCRA Tr. 92:16-18, July 28, 2010. The Commonwealth focused much attention on Jose Medina, Sr., his criminal record and his efforts to notify Hector and Michael Toro of trial dates. This case is not about Jose Medina, Sr.'s credibility or his criminal record. It is about whether this Court found Hector's PCRA testimony credible in light of all the evidence in this case.

actually occurred, did not affect this Court's determination of Hector's credibility since this allegedly happened after Hector had signed four written documents recanting his testimony and there was no evidence that either Jose Medina, Jr. or Hector Toro were aware or even remotely involved in this alleged offer.¹⁹⁴

All parties are expected to have their witnesses ready and able to attend scheduled court hearings. Undoubtedly, the Commonwealth was contacting its witnesses and confirming their attendance just as Jose Medina's father attempted to locate the two prime witnesses necessary for the PCRA evidentiary hearing. Nothing credible was shown about these efforts that led the Court to believe that Hector's recantation was coerced or threatened. To the contrary, it was the Commonwealth's homicide detectives' repeated unannounced visits and questioning of Michael and Hector about their recantations while they were either in jail or on parole that seemed to generate concern for the Toro family.

c) This Court's finding that Hector Toro's PCRA testimony is credible is not changed by homicide detectives' questioning of Hector, Michael and Maria Toro after Jose Medina's PCRA petition was filed.

(1) Maria Toro

There was no evidence that Maria Toro expressed concerns or complaints about Jose Medina, Sr. until January 2009 when homicide detectives paid an unexpected visit to her home looking for Hector who was on parole.¹⁹⁵ In May 2010, the homicide detectives returned to Maria Toro's home again without notice and wanted to talk to

¹⁹⁴ PCRA Tr. 218:10-219:14, July 20, 2010.

¹⁹⁵ PCRA Tr. 203:20-205:8; 208:17-212:6, July 19, 2010; PCRA Tr. 109:9-11; 114:4-12; 115:8-15; 117:3-4, Sept. 2, 2010; PCRA Tr. 43:1-4, Sept. 3, 2010.

Michael and Hector about Jose Medina's case.¹⁹⁶ On that day, homicide detectives also took a statement from Maria about the Medina matter in Hector and Michael's presence.¹⁹⁷ Maria Toro has a first grade education, is not fluent in English, and is not able to read or write in English or Spanish.¹⁹⁸ Maria testified that the visiting homicide detectives asked her whether she knew that Jose Medina, Sr. had been convicted for murder. Maria lied to the detectives and said she had not known this information.¹⁹⁹ During the visit, Maria Toro also lied to homicide detectives about taking a ride with Jose Medina, Sr. to Graterford Prison.²⁰⁰ When asked why she lied to the detectives, Maria responded, "I was afraid something would happen to my son – sons."²⁰¹ At the PCRA hearing, Maria was questioned about whether she was fearful during this second visit and the basis for her fear:

"BY MS. MAHLER:

Q. Ms. Toro, did you tell the detectives that you worry about your sons?

A. Yes.

Q. And that you were personally aware that Harry Medina, Sr., was in prison for murder?

A. Yes.

Q. And that your sons don't want anything to do with the Medina family?

A. Because they were really young and many years had passed.

THE COURT: Okay. Did you tell the detectives that, or did they ask you that?

THE WITNESS: They asked me and I told them that I am afraid for my sons because they are out in the street. They are calmed down. I'm just like any mother who worries for her children.²⁰²

...

Q. Ms. Toro, do you fear that if your sons don't help Jose Medina, Jr., that something bad will happen to them?

A. Yes.

Q. When the detectives came to your house, did they threaten you in any way?

¹⁹⁶ PCRA Tr. 212:15-213:19, July 19, 2010.

¹⁹⁷ PCRA Tr. 176:15-181:24; 190:9-12, July 19, 2010; PCRA Tr. 106:21-108:8; 108:14-21, Sept. 2, 2010.

¹⁹⁸ PCRA Tr. 156:16-157:18; 215:20-23; 216:2-13, July 19, 2010.

¹⁹⁹ PCRA Tr. 202:24-205:6, July 19, 2010.

²⁰⁰ PCRA Tr. 177:10-178:13, July 19, 2010.

²⁰¹ PCRA Tr. 179:2-6, July 19, 2010.

²⁰² PCRA Tr. 185:23-186:16, July 19, 2010.

A. Not me.

...

Q. Did you again invite them into your home?

A. I didn't invite them. They just came.

Q. But they didn't bust through the door, right?

A. No.

...

Q. Ms. Toro, you said that you were afraid if your sons didn't cooper – didn't help Mr. Medina, Jr., that something bad would happen to you or your family?

A. Yes.

Q. Why?

A. That is keeping my – my mind going like crazy.

Q. Do you know any specific thing that happened to make you feel that way, to think that way?

A. No.

...

Q. Has anyone ever threatened you?

A. No.

Q. Relating to this case?

A. No.²⁰³

Although Maria Toro never called police to complain about Jose Medina, Sr.'s efforts to find her son's addresses so that they could be notified of the PCRA evidentiary hearing, when detectives came to question her about the case, she got frightened for her sons. This Court found that Maria Toro's fear led her to lie to detectives and ruminate over what might happen to her sons if they testified at Jose Medina's hearing but that she never had been threatened or intimidated by any member of Jose Medina's family. Both Officer Cruz and Detective Booker confirmed that Jose Medina, Sr.'s interactions with the Toro family were not sufficient to warrant criminal charges.²⁰⁴

²⁰³ PCRA Tr. 210:5-11; 212:9-14; 214:6-17; 214:25-215:4, July 19, 2010.

²⁰⁴ PCRA Tr. 62:7-62:17; 88:25-89:1; 89:15-90:1, Sept. 3, 2010.

(2) Hector Toro

Hector was released from prison in June 2008 but remains on parole or probation until August 2011.²⁰⁵ Hector had memorialized the details of the detective's coercion and his recantation in 4 separate and consistent writings between October 23, 2006 and September 29, 2008. (See Ex. P-3, Hector Toro Statement, written Oct. 2006, dated Oct. 18, 1991; Ex. C-1/P-7, Hector Toro Aff., Oct. 25, 2006; Ex. C-2/P-8, Hector Toro Aff., Nov. 02, 2006; Ex. C-8/8-9, Hector Toro Notarized Statement, Sept. 29, 2008 attached to Second Am. Pet., Mar. 5, 2010.) In January 2009, Hector was at the hospital with his brother, Lewis, who had just had a baby when he received an urgent call from his mother reporting that two homicide detectives had showed up at her home and insisted on speaking with him.²⁰⁶ His mother urged him to come immediately.²⁰⁷ Hector credibly described:

"I thought I did something wrong. I went over there. That's the first thing that came to my mind, that they were there for me. I ain't know."²⁰⁸

Hector stated that he was very rushed during the meeting with the detectives because he was concerned that he would be late for his job; working was a condition of his probation.²⁰⁹ He acknowledged that his signature is on a statement that the detectives wrote but claimed that he did not read the statement before signing it out of concern he would be late for work.²¹⁰ He unequivocally and credibly disagreed with the substance of the statement which essentially is a purported retraction of his recantation.²¹¹

²⁰⁵ PCRA Tr. 215:19-22; 223:8-224:5, July 20, 2010.

²⁰⁶ PCRA Tr. 224:10-225:3, July 20, 2010.

²⁰⁷ PCRA Tr. 225:6-16, July 20, 2010.

²⁰⁸ PCRA Tr. 225:23-25, July 20, 2010.

²⁰⁹ PCRA Tr. 212:25-214:17, July 20, 2010.

²¹⁰ PCRA Tr. 212:25-215:18; 226:4-13, July 20, 2010.

²¹¹ PCRA Tr. 212:4-215:2, July 20, 2010.

Whatever occurred during the meeting with the detectives, this Court finds that Hector was nervous about the detectives' visit because of his parole status and their apparent power over him. Hector may have signed the statement in order to be able to leave the surprise visit by law enforcement without any negative consequences to himself. Whatever circumstances led to Hector's signature on the statement retracting his recantation, this Court does not find Hector's January 2009 statement credible on the issue of retracting his recantation. (See Ex. P-4.) Hector's credible account of his experience of having been forced as a child to testify falsely against a man who, due in part to that testimony, remains in prison serving a life sentence for murder, and the fact that there had been no consequence to the earlier detective for his conduct, undoubtedly played a role in Hector's thinking during the January 2009 visit by homicide detectives. As Hector credibly mentioned frequently during the PCRA hearing, he wanted to tell the truth about his false testimony when he was a boy:

"They keep—they made me lie and lie and lie and I can't. I can't keep lying."²¹²

(3) Michael Toro

Michael Toro submitted an affidavit notarized on December 7, 2006 and statement notarized on September 29, 2008 to Jose Medina's lawyers recanting his trial testimony. (See First Am. Pet., Nov. 10, 2008; Second Am. Pet., Mar. 5, 2010.) When Michael submitted the affidavits he was serving a state sentence at SCI Huntingdon. Sometime in January 2009, Michael was notified by a correctional officer that he was being transferred to SCI Graterford.²¹³ Michael assumed he was being transferred for a court hearing but instead on January 7, 2009 homicide detectives picked him up from

²¹² PCRA Tr. 215:6-7, July 20, 2010.

²¹³ PCRA Tr. 297:14-24, July 20, 2010.

Graterford and brought him in to the Homicide Unit to question him about the Jose Medina case.²¹⁴ Specifically, Michael described how this meeting came about:

“Q. Describe how you ended up talking to the detectives the first time.

A. I was at S.C.I. Huntington State Prison. I was in my cell. The C.O. brung me a letter, saying pack my stuff; I’m going down to Philly. I was coming down to Philly for court, but it wasn’t court. It was to talk to the detective about this statement instead of --- they brung me straight to Graterford State Prison, and from Graterford they picked me up and brung me to the Homicide Unit.”²¹⁵

One of the detectives confirmed the questioning and testified that they did not tell Michael Toro why he was being brought to the Homicide Unit.²¹⁶ Once at the Homicide Unit detectives questioned him about his recantation in the Jose Medina PCRA matter.²¹⁷ Michael Toro was up for parole that year.²¹⁸ Later when Michael was out on parole, detectives went to his home on at least one other occasion to question him again in connection with the Jose Medina case and obtained another statement from him.²¹⁹ Law enforcement confirmed that they questioned Michael about his affidavits recanting his trial testimony.²²⁰

This Court ultimately found Michael incompetent to testify about just the events in 1991 and 1992 surrounding William Bogan’s murder and Jose Medina’s trial. The Court’s ruling rendered all of Michael’s sworn statements in and out of court relating to that time period when he was a child unavailable to Petitioner Jose Medina’s PCRA hearing. Michael credibly testified that he believed that the testimony he gave at Jose

²¹⁴ PCRA Tr. 297:12-298:3, July 20, 2010.

²¹⁵ PCRA Tr. 297:14-24, July 20, 2010.

²¹⁶ PCRA Tr. 126:21-127:4, Sept. 2, 2010.

²¹⁷ PCRA Tr. 126:21-127:9, Sept. 2, 2010.

²¹⁸ PCRA Tr. 61:18-20, July 21, 2010.

²¹⁹ PCRA Tr. 295:2-21, July 20, 2010.

²²⁰ PCRA Tr. 78:2-5, Sept. 3, 2010.

Medina's PCRA hearing would have an impact on his state parole.²²¹ Michael was unable to explain how he came to this incorrect conclusion.²²² Michael's perception, even if not accurate, about how his testimony could affect his parole might normally be relevant as potential bias and motive affecting his credibility. However, since his testimony about the events that occurred in 1991 ultimately was not admitted, any issue of Michael's potential bias became moot.

This Court found no credible evidence that Jose Medina or anyone from his family ever threatened anyone from the Toro family in order to procure their testimony. However, when homicide detectives paid unexpected visits to question Hector and Michael about their recantations, Hector, Michael and Maria Toro got nervous about any involvement in the case, particularly given Hector and Michael's status as parolees. There was no testimony that the homicide detectives threatened anyone in 2009 and 2010 during their questioning; however, their mere presence instilled a level of fear in the Toros about their sworn statements that formed the basis for Jose Medina's PCRA petition and any involvement they might have in his PCRA hearing. Jose Medina, Jr. was in prison for life; Hector and Michael were free on the street but under the supervision of state parole officers. This Court found that it was likely that the Toro family viewed homicide detectives investigating Hector and Michael Toro's recent sworn statements supporting Jose Medina's request for a new trial as a threat, even if the detectives never made any overt threats. This Court found that even in the absence of any evidence of threats, the homicide detectives carried a level of apparent power that created fear.

²²¹ PCRA Tr. 61:18-63:9, July 21, 2010.

²²² Id.

5. The credible evidence demonstrates Jose Medina filed this PCRA within 60 days of when he first received the information.

Jose Medina presented credible evidence that his petition was timely filed: Hector transferred to Graterford on October 18, 2006 and disclosed the information to Jose Medina who filed his petition within 60 days on December 5, 2006. The Commonwealth presented no credible evidence refuting these facts.

Shortly after arriving at Graterford, Hector Toro testified credibly that another inmate told him that someone from his neighborhood, Jose Medina, was also housed on the same cell block as he was.²²³ Upon learning this information, Hector Toro sought out Jose Medina.²²⁴ Hector wanted to clear his conscience.²²⁵ Hector credibly testified that he then wrote down, in his jail cell, a statement describing that he had been coerced by a detective and that is why he testified falsely, and gave the statement to Jose Medina.²²⁶ (See Ex. P-3, Hector Toro Statement, written Oct. 2006, dated Oct. 18, 1991.) Jose Medina typed Hector Toro's handwritten statement into affidavit form.²²⁷ Jose Medina returned it to Hector Toro who had the affidavit notarized.²²⁸ (See Ex. C-1/P-7, Hector Toro Aff., Oct. 25, 2006.) Hector testified credibly that both statements are "basically the same" and are truthful.²²⁹

Hector Toro testified credibly that prior to his disclosure to Jose Medina sometime after October 18, 2006, he had never disclosed to anyone else from law enforcement, to defense counsel or to the press information about the detective's

²²³ PCRA Tr. 40:25-41:10; 153:7-154:3, July 20, 2010.

²²⁴ PCRA Tr. 206:9-207:4, July 20, 2010.

²²⁵ PCRA Tr. 153:4-6, July 20, 2010.

²²⁶ PCRA Tr. 16:14-18:3; 152:16-153:3; 175:17-24; 187:18-24; 228:14-229:24, 237:15-23, July 20, 2010.

²²⁷ PCRA Tr. 85:15-21; 86:20-89:16, July 19, 2010.

²²⁸ PCRA Tr. 149:19-151:22, July 19, 2010; PCRA Tr. 22:25-23:3; 175:5-24; 205:13-22, July 20, 2010.

²²⁹ PCRA Tr. 16:14-17:9; 18:14-20:5; 21:15-23:8; 175:4-176:8, July 20, 2010.

coercive conduct, threats and instructions to testify falsely.²³⁰ The Commonwealth presented no contradictory evidence. Hector credibly testified that since the trial he had not seen Jose Medina before October 2006.²³¹ There was no evidence that he told Jose Medina or any member of Jose Medina's family, or anyone who knew him, before that date.

The credible evidence showed that Jose Medina, who was represented by counsel at the time he found out about Hector Toro's recantation, diligently took steps to file this PCRA petition without delay. Jose Medina testified that Hector came to his cell with another person from Jose's neighborhood "near the week of October 23rd."²³² Jose Medina had never seen Hector Toro at Graterford prior to Hector's identifying himself. Jose Medina said that he actually did not recognize Hector when he met him.²³³ When Hector confessed to giving false testimony and explained that police had coerced and threatened him without any guardians or family members involved, Jose Medina credibly testified that he asked Hector to write down what happened and explicitly told him he must only have the truth. Jose described the exchange:

"BY THE COURT:

Q. Paint a picture for us.

A. Well, when he first came on the block, I don't believe he was already on the block, maybe a week or two, I don't even know it was him. The last time I seen him he was probably 11 years old at the time. So I didn't recognize him. And he just said that he wanted to make things right, that he felt bad about what happened, because they coerced him. He said they made him say what he did at trial when he testified, and he immediately started going into details about the occurrences of during the trial and before the trial, the police officers or the district attorney. So I then told him, I said, I don't -- I don't want you to tell me anything further. Just -- just put it in paper. I didn't want to influence him in any way. I wanted him to put it in his own words on a tablet

²³⁰ PCRA Tr. 163:14-166:21, July 20, 2010.

²³¹ PCRA Tr. 152:9-20, July 20, 2010.

²³² PCRA Tr. 53:12-54:10; 81:8-21; 145:22-24; 147:9-148:12, July 19, 2010.

²³³ PCRA Tr. 152:12-16, July 19, 2010.

with a pen and pencil. I told him, I said, just do it in your own words. I'll see you -- it was almost time for lockup, and I said, I'll see you in the morning, just do it in your own words. When I seen him in the morning, I read what he wrote down in the affidavit. He did it in his own words, and I asked him, specifically told him, are you sure that everything in here i[s] the truth? I don't need you to lie. I don't need you to make anything up. I don't want you to feel uncomfortable because you're here with me. I don't hate you or anything. You were a little kid. I don't -- I can't blame you for what happened. He was, like, yes, that was the truth and everything I wrote down is exactly how it happened, and I said okay. Then I immediately called my attorney at the time, Ms. Shannon Quill."²³⁴

When Jose Medina asked Hector Toro why he had not come forward earlier, Hector responded that he had not known where Jose was until his transfer to Graterford.²³⁵

Hector Toro testified that after he gave the written statement to Jose Medina and had the typed one notarized, two women came to interview him at Graterford about Jose's case. He assumed one of the women was a lawyer and the other was a student.²³⁶ When they were there he read and signed an affidavit.²³⁷ Hector Toro agreed to the accuracy of the October 25, 2006 and November 2, 2006 affidavits that he signed and had notarized. (See Ex. C-1/P-7; C-2/P-8.) Hector was transferred to SCI Houtzdale on November 7, 2006 not long after he told Jose Medina that he testified falsely against him.²³⁸ Hector Toro had no more contact with anyone from Jose Medina's family until he testified at the PCRA hearing.²³⁹

There was no suggestion by the Commonwealth that any of the evidence supporting Jose Medina's petition was available to him any earlier or at the time of trial or that it could have been reasonably discovered through due diligence. Specifically,

²³⁴ PCRA Tr. 57:15-59:2; 59:19-60:16, July 19, 2010; See also PCRA Tr. 148:13-149:22, July 19, 2010.

²³⁵ PCRA Tr. 84:6-13; 148:16-18, July 19, 2010.

²³⁶ These visitors were undoubtedly Jose's counsel, Shannon Quill, and an associate.

²³⁷ PCRA Tr. 205:13-24, July 20, 2010.

²³⁸ PCRA Tr. 158:22-24, July 20, 2010; PCRA Tr. 12:3-7, Sept. 3, 2010.

²³⁹ PCRA Tr. 215:19-25; 216:2-17; 218:8-21, July 20, 2010.

the Commonwealth claimed not to have known that Hector informed the unnamed detective he had not seen anything relating to Bogan's murder, that the detective threatened or coerced testimony from Michael or Hector, or that any prosecutor knew that a detective had knowingly secured false testimony. There was no testimony at trial or any discovery produced that would have alerted Jose Medina and his counsel that the children's testimony was procured through threats and coercion. Nor was there any evidence that Jose Medina would have known why Hector testified falsely.

There was no evidence that Hector or Michael Toro had any contact with Jose Medina after the trial and prior to October 2006. On October 18, 2006, Hector Toro, who was an adult and in prison, was transferred temporarily to SCI Graterford where Jose Medina had been consistently housed since 1999.²⁴⁰ Prison records confirm that Hector Toro was temporarily housed at Graterford from October 18, 2006 until November 7, 2006.²⁴¹ There was no evidence showing that either Hector or Michael Toro had been at Graterford prior to October 18, 2006. Nor was there any evidence that any member of the Toro family visited with Jose Medina at Graterford or elsewhere, or had contact with anyone in the Medina family prior to Hector's transfer to Graterford in October 2006. Jose Medina filed his pro se PCRA petition on December 5, 2006 which was within 60 days of when Hector and Jose were first housed in the same prison.

The Commonwealth presented no evidence that Hector and Jose Medina had spoken or seen each other since Jose Medina's trial prior to their meeting after October 18, 2006. There was no evidence of letters sent within the prison and no testimony by

²⁴⁰ PCRA Tr. 152:3-12, July 20, 2010; PCRA Tr. 9:2-4, Sept. 3, 2010.

²⁴¹ PCRA Tr. 8:17-9:4, Sept. 3, 2010.

guards, inmates or any other people to the effect that Hector was recanting his trial testimony prior to October 18, 2006. Indeed, the Commonwealth's evidence essentially confirmed that Hector, Michael and Jose had never been at the same prison during the same time period with the exception of the overlap that Hector Toro had with Jose Medina for three weeks from October 18, 2006 through November 7, 2006 in the same block of Graterford prison until Hector's transfer to SCI Houtzdale.²⁴²

In addition, the credible evidence showed that if Jose Medina had known the information earlier, he would have acted upon it immediately: the procedural history of this matter indicates that Jose Medina and his counsel have consistently satisfied filing deadlines. Hector Toro's testimony had been what held the conviction in place as early as the first appeal to the Superior Court in 1995. Had Jose Medina ever heard of any evidence that Hector Toro recanted his testimony and had been pressured by detectives to testify falsely prior to October 2006, Jose Medina would have notified whoever his counsel was and timely filed a PCRA petition. In October 2006, when Jose Medina first saw Hector Toro, he was seeking review from the United States Supreme Court of the Third Circuit's decision rescinding the District Court's grant of a new trial.²⁴³ See Medina v. DiGuglielmo, 551 U.S. 1115 (2007). Jose Medina testified credibly that upon learning Hector's disclosure he called Shannon Quill, his lawyer, who was representing him in his habeas matter. She came up promptly and obtained an affidavit

²⁴² PCRA Tr. 8:21-9:1, 12:3-7, Sept. 3, 2010. The Commonwealth presented a correctional officer who described that there was on average 360-400 inmates on the D Block. PCRA Tr. 24:10-13, Sept. 3, 2010. Inmates housed on the "D Block" are permitted to intermingle during "block out" time when they can play cards, watch TV, be in the yard or have meals. PCRA Tr. 11:14-12:2; 24:15-19, Sept. 3, 2010. This testimony did nothing to undermine the timing of the PCRA filing. Moreover, to the extent it was presented as an attack on Hector and Jose's credibility it was not accompanied by any testimony that either one did anything inappropriate that would compromise their credibility.

²⁴³ Jose testified credibly that he told Hector that he only wanted the truth because anything more would just hurt him. PCRA Tr. 60:8-12; 81:25-82:8; 148:22-149:2; 153:10-18, July 19, 2010. Jose's expressed concern for the truth is consistent with a petitioner's desire not to compromise a pending appeal.

from Hector at Graterford on November 2, 2006.²⁴⁴ Jose filed his PCRA petition with Hector's affidavit and his court appointed counsel later amended it to include an affidavit by Michael Toro.²⁴⁵ In June 2008 Hector was released from prison but remained on state parole until August 2011.²⁴⁶

This Court found that Jose Medina and Hector Toro both testified credibly that they had not seen one another since Jose's trial and there was no credible evidence that they had any indirect contact with one another. The fourteen year gap since Jose Medina and Hector Toro had seen one another and Hector having been an 11-year-old boy testifying at trial rather than the grown man he was in October 2006, made it unlikely that either one would easily recognize one another unless introduced by name. Thus, it was essentially undisputed that Jose Medina and Hector Toro met for the first time since the trial some time after October 18, 2006, Hector disclosed to Jose that he lied at trial because of the detective's threats, and the PCRA petition was filed on December 5, 2006. This Court finds the credible evidence was that Jose Medina filed his petition well within the 60 day filing deadline of having first learned of the new evidence.

C. Evidentiary Rulings During the PCRA Hearing

1. Petitioner's witness Michael Toro was found incompetent to testify about events relating to the murder in 1991 when he was 11 years old.

Shortly after Jose Medina's counsel called Michael Toro onto the stand to testify at the PCRA hearing, he challenged his competency²⁴⁷ to testify about events that took

²⁴⁴ PCRA Tr. 55:5-11; 60:13-16; 95:24-96:20; 100:3-8; 152:9-11, July 19, 2010.

²⁴⁵ PCRA Tr. 62:9-63:12, July 19, 2010.

²⁴⁶ PCRA Tr. 215:19-22; 223:8-224:5, July 20, 2010.

²⁴⁷ PCRA Tr. 305:22-306:3, July 20, 2010.

place on the night of the murder when he was 11 years old. After further questioning by the Court²⁴⁸ together with arguments by counsel, this Court found:

“based on all of the evidence in both proceedings including observing Michael Toro’s demeanor, behavior, alertness and general response during his July 20, 2010 testimony, that he does not meet competency requirements to testify about events surrounding or relating to the death of William Bogan that took place almost nineteen years ago when Michael was eleven years old.”²⁴⁹

In addition, this Court found that Michael’s testimony was so wholly unreliable as to not be admissible.²⁵⁰

Michael Toro had been listed as a witness for Jose Medina; the Commonwealth had never listed him as a witness for the PCRA hearing. Jose Medina’s pro se PCRA petition was supported only by Hector Toro’s affidavit. Michael Toro later signed two affidavits, which counsel attached to Jose Medina’s amended PCRA petitions, recanting his trial testimony and attesting to detective coercion and threats consistent with what Hector had described in his two affidavits. (See Ex. C-3 Michael Toro Aff., Dec. 7, 2006; Ex. C-7 Michael Toro Notarized Statement, Sept. 29, 2008.)

As discussed previously, to be competent to testify a child witness must be shown to:

- “(1) have the capacity to observe or perceive the occurrence with a substantial degree of accuracy;
- (2) have the ability to remember the event which was observed or perceived;
- (3) have the ability to understand questions and to communicate intelligent answers about the occurrence; and
- (4) have a consciousness of the duty to speak the truth.”

²⁴⁸After the Court completed questioning Michael regarding his competency at the PCRA hearing, the Commonwealth was invited to question him but declined the opportunity. PCRA Tr. 9:7-17, July 21, 2010.

²⁴⁹See Court’s Order, July 21, 2010; PCRA Tr. 24:13-18; July 21, 2010.

²⁵⁰PCRA Tr. 24:19-24, July 21, 2010. See also Pa.R.E. 104(a).

Commonwealth v. Mazzoccoli, 380 A.2d 786, 787 (Pa. 1977); See also Commonwealth v. Koehler, 737 A.2d 225, 239 (Pa. 1999); Pa.R.E. 601(b)(1)-(4) (stating the rules similarly). A competency evaluation is not concerned with the witness's credibility but focuses on the "mental capacity" of the witness with respect to the specified criteria. 855 A.2d at 40, 45.

"A determination of testimonial competency rests in the sound discretion of the lower court." Commonwealth v. Goldblum, 447 A.2d 234, 239 (Pa. 1982). See also Commonwealth v. Koehler, 737 A.2d 225, 239 (Pa. 1999). Rulings on competency²⁵¹ are reviewed for abuse of discretion. Commonwealth v. Delbridge, 855 A.2d 27, 34 n.7 (Pa. 2003). See also Syno v. Syno, 594 A.2d 307, 315 (Pa. Super. Ct. 1991) ("Hence while the cases often state that a finding of witness competence determined in the discretion of the trial court will not be disturbed absent an abuse of discretion, more rigorous analysis is advanced by observing that findings of fact will not be reversed if supported by evidence of record.") The Superior Court has noted that "[b]ecause a trial judge has a superior opportunity to assess the competency of a witness, an appellate court should virtually never reverse a competency ruling." Commonwealth v. Anderson, 552 A.2d 1064, 1067 (Pa. Super. Ct. 1989), app. denied 571 A.2d 379 (Pa. 1989).

When Jose Medina's counsel challenged Michael Toro's competency, it was incumbent upon the Court to consider the challenge,²⁵² particularly against the backdrop of the serious concerns about Michael's competency evidenced in his trial and

²⁵¹ "[T]he burden of proof of incompetency rests on the party opposing the witness" who must prove incompetency by clear and convincing evidence. Commonwealth v. Ware, 329 A.2d 258, 267 (Pa. 1974); See also Commonwealth v. Delbridge, 855 A.2d 27, 40 (Pa. 2003).

²⁵² Evidence rules instruct that the court "shall" determine preliminary questions as to the qualification of a person to be a witness and that in making that determination, the court is not "bound by the rules of evidence except those as to privileges." Pa.R.E. 104(a). Consequently, in determining competency some exhibits were used that were ultimately not admitted as substantive evidence.

preliminary hearing testimony and the fifteen years of post conviction proceedings that addressed whether Michael was competent to testify about the events on the night of William Bogan's murder. All courts to consider the issue agreed that the law required that a boy of Michael's age be evaluated for competency since he was only 11 years old at the time of the murder and only 12 years old at the time of trial. All these courts were concerned about defense counsel failing to challenge Michael's competency given that Michael's testimony signaled competency problems: he testified that he did not know the difference between truth and a lie, his testimony varied as to whether he saw or didn't see the stabbing and his answers changed depending upon whether the Commonwealth or defense questioned him. The District Court hearing Jose Medina's habeas petition found that:

“These contradictions went directly to Marcos's [Michael's] ability to perceive the events in question, his ability to remember the events, and his ability to understand questions and communicate answers intelligently, three of the four factors that Pennsylvania courts must consider in assessing the competency of a juvenile witness.”

Medina v. Diguglielmo, 373 F. Supp. 2d at 545, 547, 548-549; Medina v. Diguglielmo, 461 F.3d at 428. The competency analysis must address all four factors of child competency. Commonwealth v. Koehler, 737 A.2d at 239. As the Pennsylvania Superior Court stated in Medina I, the trial court's inquiry had focused solely on “his consciousness of the duty to speak the truth, [and] failed to resolve the matter.” Medina I at 21. See also 373 F. Supp. 2d at 546 n.19 (noting that the trial court's questioning cannot be considered a competency hearing because it addressed only one prong of the test). No post conviction federal or state court found that Michael Toro's testimony showed he was competent. The courts that addressed Jose Medina's ineffective

assistance of counsel claims simply differed as to whether the failure to challenge Michael's competency justified a new trial.

The challenge to Michael's competency at the evidentiary hearing was appropriate given that Michael had never been shown to be competent to testify about events relating to William Bogan's murder when he was 11 years old – a showing required by Pennsylvania law. Even though the law presumes that adults are competent to testify to events that occurred when they are adults, when an adult is testifying about events that took place when he was a child, there must still be a showing that he was competent as a child at the "relevant time" when the event allegedly occurred. Commonwealth v. D.J.A., 800 A.2d 965, 971 (Pa. Super. Ct. 2002). In affirming the trial court's competency determination, the Superior Court in Commonwealth v. D.J.A. reasoned,

"We agree with the trial court, however, that the language of Pa.R.E. 601(b)(1) **requires a court to determine a child's ability to perceive** accurately both at the time of the competency hearing and **at any other relevant time. 'Any other relevant time' necessarily includes the time during which the events the child is describing occurred.**"

800 A.2d at 971 (internal citations omitted, emphasis provided).

In this case, the PCRA Court was informed about Michael's mental capacity as documented by the trial record. The bulk of the evidence at Jose Medina's preliminary hearing and trial suggested that Michael did not demonstrate through his testimony that he had actually perceived the events relating to the murder, could therefore not remember or talk about them intelligibly and did not appreciate his duty to tell the truth. The District Court after having reviewed Michael's trial testimony, held that, "[t]here is a reasonable probability that. . .the trial court would have found Marcos incompetent. For

the trial court to do otherwise could well have been an abuse of discretion. . . .” 373 F. Supp. 2d at 544-45, 550 (describing how Michael’s testimony “called into question” his competency). The Third Circuit’s decision was in accord with the District Court’s decision on competency. 461 F.3d at 428-429.

At trial, Michael Toro initially was reluctant to testify at all and was described by the assistant district attorney as being “terrified”.²⁵³ Much of his testimony about seeing Jose Medina in the Chinese restaurant and seeing the stabbing was elicited through leading questions and only after Michael’s repeated statements that he did not see anyone talking in the Chinese restaurant or that he and Hector were alone in the Chinese restaurant. For example, the scene at the Chinese restaurant was developed as follows:

“Q. Would you tell the jury what happened when you and Hector and the defendant Harry were in the Chinese store that night?

A. I am going to take that string off those pants.

MR. DALY: Objection.

THE COURT: Hold your head up and talk.

BY MS. SWEENEY:

Q. What happened that night? Marcos, we were not there. So you have to tell us what you saw and what you heard?

THE COURT: Marcos, now, listen. Sit up straight. We are not going to hurt you. What are you playing with there?

COURT REPORTER: His string.

THE COURT: Let’s put the string down. Now, take your hand down from in front of your face. So we can all see your handsome face. Now, tell us.

(Pause.)

BY MS. SWEENEY:

Q. Did you see anyone talking in the Chinese store?

A. No.

Q. Did you hear anyone talking in the Chinese store[?]

A. No.

Q. – when Harry came into the Chinese store that night?

MR. DALY: Objection to the leading nature of the question.

THE COURT: I will sustain that.

²⁵³ PCRA Tr. 21:24-22:1, Sept. 2, 2010.

BY MS. SWEENEY:

Q. Did you see Santa Claus in there?

A. No.

Q. Did you see anyone in there?

A. No.

Q. Just you alone were in the Chinese store?

A. And my brother.

Q. Who came into the Chinese store while you and your brother were in there?

A. Harry.

Q. What happened after he came into the Chinese store?

MR. DALY: Objection to the form of the question.

THE COURT: Overruled.

BY MS. SWEENEY:

Q. What if anything happened when he came in the Chinese store?

MS. SWEENEY: We can take a break but I will ask you the same question when we come back.

THE COURT: Marcos, listen. Stop playing with the string. Put your hand down and put your head up. Now, talk.

MR. DALY: Note my objection for the record.

THE COURT: Your objection is well noted. Proceed. What happened?

MR. DALY: Objection to the form of the question.

THE COURT: What happened, if anything in the Chinese store?

MR. DALY: I object.

...

THE COURT: What happened if anything?

MR. DALY: I have the right to object.

THE COURT: What happened if anything?

...

MS. SWEENEY: Tell them what you saw and what you heard inside the Chinese store, if anything?

A. (Pause)²⁵⁴

After Michael's reluctance to answer these questions about what, if anything, happened in the Chinese restaurant, there was a sidebar during which the trial judge suggested that Michael be taken off the stand and questioned another day:

"THE COURT: . . . Don't you have somebody else you can put on.

MS. SWEENEY: He won't be any better tomorrow.

THE COURT: You don't know that.

MS. SWEENEY: He won't be any better.

²⁵⁴ Trial Tr. 88:1-91:13.

THE COURT: Take him off altogether.
MS. SWEENEY: I don't want to did (sic) that."²⁵⁵

The Court then permitted the assistant district attorney from the preliminary hearing to come into the courtroom and sit at counsel table. The leading questioning resumed:

“Q. Marcos, when you were in the Chinese store, and Hector was in the Chinese store, and the defendant was in the Chinese store, Harry was in the Chinese store, this defendant over here, was anyone holding anything?

A. Yes.

Q. Who was holding something?

A. Harry.

Q. What was he holding?

A. A knife.

Q. What was he doing with the knife? Was he showing it to somebody?

MR. DALY: Objection.

THE COURT: Sustained.

BY MS. SWEENEY:

Q. What was he doing with it?

A. He showed it to me and my brother."²⁵⁶

In the middle of the assistant district attorney's questioning about whether Michael saw the stabbing – questioning peppered with defense counsel's objections to leading questions – Michael had a complete emotional breakdown that led to a lengthy recess. When he resumed the stand, Michael testified inconsistently that he saw the stabbing, he did not see the stabbing, and that both he and his brother saw the stabbing; he testified with “an inclination to please the questioner.” Medina I at 21. It is quite telling that Michael testified at the preliminary hearing that he had not witnessed the stabbing but that his brother Hector had, and Michael was only repeating what his brother told him.²⁵⁷ This testimony illustrates the very real concern that testimony of a child like Michael can be malleable or the product of suggestion and imagination:

²⁵⁵ Trial Tr. 93:5-15.

²⁵⁶ Trial Tr. 93:2-94:14.

²⁵⁷ Trial Tr. 109:8-110:22. See also Ex. C-16, Prelim. Hr'g Tr. 23, Nov. 26, 1991.

“The capacity of young children to testify has always been a concern as their immaturity can impact their ability to meet the minimal legal requirements of competency. **Common experience informs us that children are, by their very essence, fanciful creatures who have difficulty distinguishing fantasy from reality; who when asked a question want to give the “right” answer, the answer that pleases the interrogator; who are subject to repeat ideas placed in their heads by others; and who have limited capacity for accurate memory.**”

Delbridge, 855 A.2d at 39-40 (Pa. 2003) (emphasis provided).

The question presented at the PCRA hearing was whether, after nineteen years, Michael Toro was able to demonstrate that when he was 11 years old he had been able to perceive the murder and events relating to it, had a memory about those events, was able to express himself and sufficiently understood his duty to tell the truth. See Pa.R.E. 601(b). Although an adult is generally presumed competent, since Michael was testifying about events that occurred when he was a child, the law requires that he was competent “at the relevant time” as well as at the time he is testifying.²⁵⁸ This Court found by clear and convincing evidence from the underlying trial combined with Michael’s continuing inconsistent sworn statements and by directly observing his demeanor, behavior and testimony in court during the evidentiary hearing that Michael Toro was not competent regarding events relating to William Bogan’s murder. Michael could not demonstrate he actually perceived the events that he testified about, could remember them and could intelligently communicate about them. He also demonstrated a lack of understanding of his duty to speak the truth under oath.

²⁵⁸ As a general rule, “every person is competent to be a witness.” Pa.R.E. 601(a). However, a witness is incompetent where:

- “[T]he Court finds that because of a mental condition or immaturity the person
- (1) is, or was, at any relevant time, incapable of perceiving accurately;
 - (2) is unable to express himself or herself so as to be understood either directly or through an interpreter;
 - (3) has an impaired memory; or
 - (4) does not sufficiently understand the duty to tell the truth.” Pa.R.E. 601(b).

Michael Toro's complete inability to say consistently whether he witnessed the murder continues to the present. His continuing equivocation convinced this Court that he either did not witness it or had no memory of it that would enable him to describe what he saw when he was 11 years old consistently or accurately; therefore, he failed to satisfy the first two elements of competency. Perhaps after so many inconsistent renditions of the story, starting when he was so young and impressionable and spanning across two decades, Michael honestly may not know whether he witnessed William Bogan's murder or not. Id.

Michael's equivocation about witnessing the murder is illustrated by his contradictory affidavit statements. Michael signed affidavits on December 7, 2006 and September 29, 2008 taken by Jose Medina's lawyers stating that he had not witnessed the stabbing and had not seen Jose Medina in the Chinese restaurant with a knife threatening to kill someone before the murder. (See Ex. C-3, ¶¶ 3-5; Ex. C-7, ¶¶ 5-6, 8.) Yet when the Commonwealth transferred Michael from SCI Huntingdon to SCI Graterford and homicide detectives interviewed him at the Homicide Unit while he was in custody and again while he was on state parole, Michael claimed he had witnessed the stabbing and Jose Medina in the Chinese restaurant. (See Ex. C-21; Ex. C-23, July 15, 2010.) After these meetings, the Commonwealth submitted affidavits and a videotape secured by homicide detectives in which Michael purported to retract his recantation. (See Ex. C-21.) Between December 2006 and the time of the PCRA hearing in July 2010, Michael had signed four written statements that contradicted each other. Just as in his trial testimony, his sworn statements varied depending upon whether the Commonwealth or defense was doing the questioning.

There were additional aspects of Michael's PCRA testimony that showed a compromised memory. Michael testified that after he left the stand in the middle of his trial testimony and went into the bathroom, he was in there alone the entire time.²⁵⁹ Yet the trial transcript shows that when Michael broke down on the stand he was not alone in the bathroom: detectives went into the bathroom when he was crying and the assistant district attorney ultimately followed.²⁶⁰ At the PCRA hearing, Michael also testified that he had never talked with the assistant district attorney prior to being questioned at trial.²⁶¹ Yet the assistant district attorney testified that she definitely met with Michael on more than one occasion prior to the trial.²⁶² Thus, Michael's PCRA testimony demonstrated that he lacked a basic memory of significant events that occurred during the trial. This Court found Michael's lack of memory about the trial was consistent with his apparent lack of memory of what he saw on the night of the murder.

Michael's demeanor, behavior and testimony during the PCRA hearing showed that his ability to understand questions and to communicate intelligent answers about the events taking place when he was 11 and 12 years old, the third component of competency, was also compromised. Michael testified that he attended special education classes until he dropped out of school in tenth grade, that he had collected SSI disability and had seen a mental health specialist.²⁶³ He did not know what specific disability had entitled him to receive SSI but explained that it had something to do with "learning".²⁶⁴ He also testified he had taken medications but couldn't remember what

²⁵⁹ PCRA Tr. 276:15-20; 277:15-278:8, July 20, 2010.

²⁶⁰ Trial Tr. 102:18-22; 103:7-104:16, Nov. 5, 1992.

²⁶¹ PCRA Tr. 277:9-14, July 20, 2010.

²⁶² PCRA Tr. 134:10-135:8, Sept. 1, 2010.

²⁶³ PCRA Tr. 279:3-282:12; 313:22-315:11, July 20, 2010.

²⁶⁴ PCRA Tr. 314:24-315:11, July 20, 2010.

medications.²⁶⁵ His mother, Maria Toro, testified similarly.²⁶⁶ While she could not explain what Michael's disability was, she stated he received SSI because "he couldn't read and some other stuff," that he was "being attended by a doctor" when he was in special education and that this occurred when he was about fourteen or fifteen years old.²⁶⁷ Even as an adult, Michael inconsistently spells his name both as "Michael" and "Micheal" and "Marcos" and "Marcus."²⁶⁸

Throughout the PCRA hearing, this Court observed that Michael had difficulty focusing on exhibits that were identified by number and placed in front of him.²⁶⁹ This Court observed that during his testimony Michael kept looking away from exhibits and counsel and seemed disconnected from the hearing. When Michael was being questioned he would get distracted easily and looked through the transcript rather than answering questions.²⁷⁰ This Court found that Michael seemed to have serious difficulty grasping questions posed to him and had difficulty interacting with Court staff and others in the courtroom. The Court struggled to get Michael to focus and understand the questions in a similar fashion as the trial court had nearly two decades earlier, raising the genuine concern of whether ongoing intellectual deficits compromised Michael's competency.

The trial record and Michael's PCRA testimony show an inadequate appreciation of his duty to tell the truth. State and federal courts spent considerable time discussing

²⁶⁵ PCRA Tr. 280:24-281:17, July 20, 2010.

²⁶⁶ PCRA Tr. 222:4-224:22, July 19, 2010.

²⁶⁷ Id.

²⁶⁸ Michael: Ex. C-3;

Micheal: Ex. C-7, C-10, C-17;

Marcos: PCRA Tr. 254:4-7, July 20, 2010; Ex. C-23, C-15 (as a child);

Marcus: Ex. C-3, C-7, C-10, C-17, C-20, P-5.

Some of these exhibits ultimately were not admitted after the Court found Michael was incompetent.

²⁶⁹ See, e.g., PCRA Tr. 284:18- 286:15, July 20, 2010.

²⁷⁰ PCRA Tr. 274:16-21; 284:18-286:15, July 20, 2010.

Michael's trial statements showing he did not know the difference between the truth and a lie.²⁷¹ At the PCRA hearing, Michael claimed that he hand wrote and signed the two affidavits recanting his trial testimony knowing these sworn statements were false.²⁷² This shows that he lacks an appreciation of, or has disregard for, the significance of swearing to the truth of a statement. Having spoken with homicide detectives,²⁷³ Michael then retracted his recantation altogether. (See Ex. C-21, Ex. C-23.) Finally, Michael testified that he was under the impression that his PCRA testimony would have an impact on his state parole status²⁷⁴ which may or may not explain his reasons for retracting his recantation. In any event, the Court concluded that the credible evidence showed that Michael did not "sufficiently understand the duty to tell the truth." Pa.R.E. 601(b)(4).

Some of the same concerns that prior courts had over Michael's competency to testify at the trial were compounded by additional, similar, and continuing problems including: contradictions about whether or not he actually witnessed the murder, his demeanor and understanding, his respect for the oath and his duty to tell the truth. These problems led this Court to conclude that the credible evidence showed Michael was not competent "at the relevant time" when he was 11 years old to testify about "events surrounding or relating to the death of William Bogan" and, now that he was nineteen years older, that he remained incompetent to testify to those events.²⁷⁵ (See

²⁷¹ See, e.g., Trial Tr. 83:8-84:5; Medina v. Diguglielmo, 373 F. Supp. 2d. 526, 545-46 (E.D. Pa. 2005); Medina v. Diguglielmo, 461 F.3d 417 (3d Cir. 2006).

²⁷² PCRA Tr. 287:2-8; 290:13-15; 290:24-291:5. See also Ex. C-3, C-7.

²⁷³ PCRA Tr. 292:18-294:2; 294:24-295:21; 297:10-299:25, July 20, 2010.

²⁷⁴ PCRA Tr. 61:18-63:8, July 21, 2010.

²⁷⁵ This Court's ruling was narrowly focused on Michael's ability to testify about events that took place on the night of the murder and did not curtail Michael from testifying about other events. As an adult, he would be presumed to be competent to testify to events that occurred when he was an adult absent a

Court's Incompetency Order, July 21, 2010.) The Court's Order was not so broad as to completely preclude Michael from testifying but was narrowly tailored to cover testimony concerning the time period when he was 11 years old, relating to the events surrounding William Bogan's murder.

Separate and apart from Michael's incompetency relating to the events nearly two decades earlier, this Court found that Michael's constantly changing testimony, poor memory and limited understanding made his testimony so wholly unreliable that he was not qualified to testify relating to the murder. See Pa.R.E. 104(a) ("questions concerning the qualification of a person to be a witness....shall be determined by the court"). Michael swore under oath so many times, both in and out of court that he both saw and did not see the murder, that his testimony on this subject was not even remotely useful to the Court.

Michael's testimony was similar to that held to be inadmissible in Cheng v. Septa, 981 A.2d 371 (Pa. Commw. 2009). In Cheng the trial court had excluded the video-taped testimony of a witness with cerebral palsy as unreliable:

"[I]n this matter the Trial Court found that Harris's testimony was inadmissible on the grounds that the witness's own testimony, where it was clear in the first person, was unreliable, self-conflicting, and contradictory. Further, and not insignificantly, the Trial Court found that the witness's mother and sister were unreliable in their roles as interpreters, adding more to short answers provided by the witness herself, and appearing to give their own opinions of the witness's answers when those answers were indiscernible."

Id. at 380-81. The Commonwealth Court found that the trial court "did not abuse its discretion in excluding the deposition testimony at issue." Id. at 381. The reviewing court reiterated that "[t]he admission and/or exclusion of evidence are matters within the

showing to the contrary. Pa.R.E. 601(a). See also Commonwealth v. Fultz, 462 A.2d 1340, 1343 (Pa. Super. Ct. 1983).

sound discretion of the trial court, and will not be disturbed on appeal absent a clear indication that its discretion has been abused.” Id. (citation omitted).

The Commonwealth objected to the Court’s ruling that Michael was incompetent, claiming that it was prejudiced in the presentation of its case. Given that Michael’s testimony had not even been listed as part of the Commonwealth’s evidence for the PCRA hearing, the prejudice to the Commonwealth from his not being able to testify on behalf of Jose Medina is impossible to discern. Since Michael was presented as Jose Medina’s witness, there was no “substantial right” of the Commonwealth that was affected by the Court’s ruling that he could not testify. Pa.R.C.P. 126.

Furthermore, had Michael been found competent, the Commonwealth would have been hurt, rather than helped, by his testimony. Although initially Michael testified that he did not know how he was transported for investigative questioning and court in 1991 and 1992,²⁷⁶ his testimony changed and ultimately included a detailed narrative that corroborated Hector’s testimony. Michael testified at the PCRA hearing that detectives had picked him and his brother up on the way to school and threatened the boys that if they did not testify at Jose Medina’s trial they would be taken from their home and placed in foster care or a juvenile facility. Specifically, Michael testified as follows:

“BY MR. SCOTT:

Q. Michael, I think you reviewed that document. And I direct you towards the bottom of Page 2. There was a question, and it says that -- let me read the question. “Michael, you also stated in your affidavit you testified that because were you [sic] threatened to be sent away from your grandmother if you didn’t say what they wanted you to; is that true?”

MS. MAHLER: I’m sorry. Where are you reading from?

A. Yes.

. . .

²⁷⁶ PCRA Tr. 273:9-275:2; 301:25-305:7, July 20, 2010.

A. My answer was "yes." They tried.
Q. They tried to --
A. They told us that if we don't do what we got to do, they was gonna take me away from my grandmom.
Q. Who told you that?
A. The detective that took care of the case back in '91.
Q. Is that the same detective that -- strike that.
THE COURT: Do you remember his name?
THE WITNESS: Not at all.
BY MR. SCOTT:
Q. You were going to school that morning, right --
A. Yeah.
Q. -- before you went to court?
A. We was supposed to go to school that morning, but they picked us up.
Q. Who had picked you up, do you remember?
A. The detective.
Q. The same detective who told you that they were going to take you away from your grandmother?
A. Yeah.
Q. And what did he do after that? Did he put you in his car?
A. Yes. Put us in the car and took us -- took us into the Homicide Unit.
BY THE COURT:
Q. Okay. Michael, none of us were there. So if you can, describe it for us, how it happened. That would be helpful.
A. We was -- we was walking around the corner to go to school. So they come pick us up -- the detective. Jumped in the car, asking us questions.
BY THE COURT:
Q. How did they get you to get into the car?
A. Just -- it was -- we knew him. We knew the detective. So it was like [w]e got to ask you more questions. So instead of us going back to our grandmom house, we just got in.
Q. Okay. And how did you know who he was?
A. Because he identified himself [sic].
Q. Pardon?
A. He identified himself [sic].
Q. Had you seen him before?
A. Yeah. The same -- same time when they took me in for -- for questioning the first time.
Q. You mean the night of the stabbing?
A. Yes.
Q. Okay. So it was the same detective that you talked to the night of the stabbing?
A. Yes.
...

- Q. Okay. So you said you and your brother were going to school. Describe it so that it's almost like we can see it.
- A. We was going to school. They picked us up and took us down to the Homicide Unit. At the same time, Maria was there.
- Q. She was already there?
- A. She was already there.
- Q. Then what happened?
- A. They started asking questions, telling us if we don't do the right thing, they were gonna -- they were gonna put us in group homes, things like that.
- Q. Okay. Was there any member of your family there?
- A. No.
- Q. Was there ever a member of your family there when you were questioned by detectives?
- A. No. It was just Maria.
- Q. And how many times do you remember getting questioned?
- A. A few times.
- Q. Okay. Did it always happen the same way other than the night of the stabbing, that you were going to school; or did it happen differently?
- A. I don't remember."²⁷⁷

Significantly, there was a vividness to Michael's testimony on this topic that was absent from his testimony about allegedly witnessing the stabbing and seeing Jose Medina with a knife. Michael's description mirrored and corroborated that of Hector and Maria. Michael's account of what homicide detectives did when he was a boy was the most spontaneous and fluid of all of his testimony, imbuing it with a ring of truth and tending to show that it was grounded in actual experience. Michael's account of viewing a murder completely lacked this character.

Given the major demonstrated problems with Michael's perception, memory, ability to communicate and respect for the oath that showed he was not competent to testify about those earlier events in 1991, out of fairness, the Court chose not to carve out an exception for the portion of Michael's testimony regarding the detective's conduct that seemed to be grounded in reality and committed to memory. Nevertheless, of all of Michael's testimony, his description of a detective threatening him and his brother was

²⁷⁷ PCRA Tr. 300:14-301:2; 301:10-303:21; 304:9-305:11, July 20, 2010.

the most credible and coherent. The Commonwealth was clearly not prejudiced by this Court excluding testimony that was helpful to Jose Medina.

2. The unauthenticated letters from Jose Medina, Sr. to Michael Toro were inadmissible and irrelevant.

After Michael was found incompetent to testify about the events surrounding the murder in 1991 and 1992, the Commonwealth attempted to introduce a letter purportedly written to Michael Toro from Jose Medina, Sr. postmarked September 20, 2008. (See Ex. C-5, C-6, C-18.) The Court excluded the letter because the Commonwealth failed to authenticate it.²⁷⁸ Even had the Commonwealth been able to meet the minimal authentication requirements, the letter was irrelevant to the issues before the Court because Michael had been found incompetent to testify about the events surrounding the murder in 1991 and 1992 so his testimony from that period was not before the Court as part of the PCRA hearing. Finally, even if the Commonwealth had been able to authenticate the letter, the substance of the letter would not have affected the Court's decision in this case.

Before the admissibility of any document can be addressed, the proponent must authenticate the document as being what it is purported to be. Pa.R.E. 901(a). The Commonwealth failed that preliminary step and instead tried to have the document translated and read into the record without having any witness testify that it was a letter written by Jose Medina, Sr. to Michael Toro.²⁷⁹ Rule 901(b) permits authentication to be done in a variety of ways but it nonetheless must be done. The Commonwealth skipped the foundational step of authentication and jumped to the second step of the letter's

²⁷⁸ PCRA Tr. 214:11-216:22; 218:25-219:2; 221:22-23, July 27, 2010; PCRA Tr. 100:24-101:12; 101:22-102:6; 113:24-114:18; 116:11-20, July 28, 2010; PCRA Tr. 4:25-5:5; 5:19-22; 6:22-7:1, Sept. 1, 2010.

²⁷⁹ PCRA Tr. 215:12-15, July 27, 2010; PCRA Tr. 100:24-101:12, 101:22-102:6, July 28, 2010.

relevance. Jose Medina, Sr. did not testify that he wrote the letter to Michael.²⁸⁰ The Commonwealth did not have Michael Toro authenticate the letter as being from Jose Medina, Sr. or even minimally that it was a letter he received from someone.²⁸¹ After the Court excluded the letter because it was not authenticated, the Commonwealth ultimately presented a detective who testified that he received the letters from a lieutenant at the prison who got them from Michael Toro's cell.²⁸² While this does not provide sufficient evidence to authenticate the letter, it at least provided some information as to the letter having come from Michael's cell.

Even had the Commonwealth been able to authenticate the letter, it was not relevant because Michael's testimony and recantation had been excluded. On December 7, 2006, Michael Toro had signed an affidavit recanting his trial testimony of having witnessed Jose Medina stab William Bogan and to having seen Jose Medina in the Chinese restaurant earlier with a knife making threats. (See Ex. C-3.) Michael claimed in the affidavit that a detective told him that if he "didn't help them or talk to them, they could put [him] in juvenile placement" and that the block captain Maria Caraballo was with detectives and told him what to say even though he had not seen the murder. (Id.) The Commonwealth's offer of proof was that a letter from Jose Medina, Sr. asking for help from Michael would show why Michael recanted his trial testimony. Even if Jose Medina, Sr. had not written the letter but Michael had received

²⁸⁰ PCRA Tr. 92:19-21, 100:19-20 (relating to Ex. C-5), July 28, 2010.

²⁸¹ The Court's ruling that Michael was incompetent was limited to the events surrounding the murder in 1991 and 1992 and would not have precluded his testifying as to receiving the letter on September 20, 2008.

²⁸² PCRA Tr. 94:10-16, 95:7-96:1, Sept. 2, 2010.

it, the Commonwealth claimed that the letter would have explained why Michael recanted.²⁸³

The Commonwealth's argument fails for several reasons. First, since the Court ruled that Michael was incompetent to testify as to the murder in 1991, evidence by Michael, similar to that of Hector, swearing that he had not seen Jose Medina do anything incriminating and had been threatened with juvenile placement by a detective was not evidence that could be used by Jose Medina to support his PCRA petition. Likewise, any evidence contradicting Michael's recantation would be irrelevant.²⁸⁴ Second, the proffered letter came in September 2008, nearly two years after Michael's December 7, 2006 signed affidavit recanting his trial testimony, so it would not explain his recantation: he had already recanted in a sworn affidavit supplied to Jose Medina's lawyer. Third, the letter includes no threats, no requests to lie and no specifics as to what Michael should say.²⁸⁵ The letter is simply the plea of a father asking "for the biggest favor in my life" in asking for Michael's continued help and trying to alleviate concerns that a court would hurt him, presumably for what he did as a child.

Thus, even if the Commonwealth had met the preliminary requirement of authentication and Michael's recantation was before the Court, the letter simply appears to be a father's request that Michael continue to help by testifying as to what happened when he was a boy. The proffered evidence was similar to the Commonwealth's

²⁸³ PCRA Tr. 218:10-24, July 27, 2010; PCRA Tr. 6:4-11, Sept. 1, 2010.

²⁸⁴ PCRA 219:4-6; 219:24-220:2; 221:22-23; 222:6-10; 223:10-15, July 27, 2010.

²⁸⁵ The Commonwealth also presented a letter from Jose Medina, Jr. to Michael Toro which the Court admitted. (See Ex. C-4.) The letter was also apparently written after both Michael and Hector's initial affidavits recanting and reporting police misconduct. In the letter Jose Medina explains that his new lawyer will probably be contacting Michael and addresses some of the mechanics of Michael being transported for the scheduled PCRA evidentiary hearing. The letter states, "Just be honest and everything should be fine." Id. Clearly, there is nothing improper about Jose Medina telling a witness to be honest.

evidence that after Hector Toro recanted and a PCRA petition was filed, Jose Medina, Sr. had gone to Maria Toro's home to get contact information for Hector and Michael who were the key witnesses for his son's PCRA evidentiary hearing. There is nothing untoward about a father lining up necessary witnesses for his son. The unauthenticated letter would not have persuaded the Court that Jose Medina, Sr. had pressured or threatened anyone just as the evidence of Jose Medina, Sr.'s request for contact information was unpersuasive on that point.

3. Jose Medina's letter to William Gomez was admissible.

On September 3, 2010, the last day of the PCRA hearing, the Commonwealth attempted to admit a September 9, 2009 letter from Jose Medina written to his cousin William Gomez. (Ex. C-9.) Defense counsel objected saying that the letter had not been authenticated. The Commonwealth responded that Jose Medina had been confronted with the letter on the stand and had denied writing it but they wanted it "admitted as substantive evidence as to credibility."²⁸⁶ Relying on these representations, the Court sustained the objection.²⁸⁷ These representations by both counsel were incorrect and are perhaps a testament to the length of the hearing: the letter had been authenticated and Jose Medina admitted he had written the letter to his cousin.²⁸⁸ Thus, the letter was permissible impeachment evidence as to Jose Medina's credibility.

On July 19, 2010, the first day of the PCRA hearing, the Commonwealth questioned Jose Medina about the letter. He admitted that he wrote the letter to his cousin who knows Hector Toro. The September 9, 2009 letter read in part:

²⁸⁶ PCRA Tr. 122:6-123:3, Sept. 3, 2010.

²⁸⁷ PCRA Tr. 122:25-123:3, Sept. 3, 2010.

²⁸⁸ PCRA Tr. 128:14-131:2; 132:6, July 19, 2010

“I’m just gonna have to stand and speak in the court room so that at least I can have it on the record, feel me? I do however want you to pay that kid a visit for me within the next week or so, just to make sure he makes it on the 30th. He knows²⁸⁹ you and he may feel comfortable with you. So within the next week or so holla at him aight. Find out if he’s spoken to anyone since July. Let me know when we speak ok!”

(Ex. C-9.) The Commonwealth’s questioning addressed whether Jose Medina had been asking his cousin to speak with Hector Toro before the hearing.²⁹⁰ Jose Medina testified that he was not sure if “the kid” referred to in the letter was Hector or if there had been a court date on September 30, 2009. Jose Medina also said he did not know whether his cousin ultimately contacted Hector about coming to court but that he believed Hector was willing to come to court to testify because Hector had been talking “back and forth” with Jose Medina’s counsel about the case.²⁹¹ While the Commonwealth’s questioning of Jose Medina about the letter was valid impeachment, it did not undermine the Court’s findings on Jose Medina’s credibility.

V. Legal Analysis

Jose Medina asserts that newly²⁹² discovered evidence entitles him to a new trial. See 42 Pa.C.S. §§ 9543(a)(2)(vi). He claims that Hector Toro’s testimony that he lied at trial and a detective coerced him is exculpatory evidence that would likely have compelled a different verdict at trial. He also claims constitutional violations stemming

²⁸⁹ PCRA Tr. 132:7-134:14, July 19, 2010.

²⁹⁰ PCRA Tr. 132:7-134:14, July 19, 2010.

²⁹¹ Id.

²⁹² The terms “newly discovered” and “after discovered” evidence are used interchangeably by the courts. Newly discovered evidence may encompass evidence that was in existence at the time of trial but unknown to the defense, as well as evidence of more recent vintage such as a recantation. In this case, there is newly discovered evidence of a recantation, recent in existence. There is also newly discovered evidence of Brady and Mooney violations that occurred at the time of trial but which were unknown to Jose Medina until Hector disclosed the coercion and false testimony to him at Graterford in October 2006. Whether the evidence is new or old, the timing requirements and legal analysis for both are essentially the same. Commonwealth v. D’Amato, 856 A.2d 806 (Pa. 2004).

from law enforcement misconduct: a detective withheld material evidence of his coercion and threats of child witnesses (Brady) and knowingly procured false testimony (Mooney) from Hector Toro. See 42 Pa.C.S. § 9543(a)(2)(i). Jose Medina argues that it is reasonably probable that the trial’s outcome would have been different had either this favorable material evidence of coercion and threats or evidence of the Commonwealth’s knowing presentation of false testimony, or both, been available to the jury. Both of these constitutional violations, Jose Medina alleges, “so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.” Id. The new evidence casts the error of child witnesses testifying without their competency being established in an even more prejudicial light than previously understood and mandates that the procedural errors related to competency be revisited. Commonwealth v. Lawson, 549 A.2d 107, 108, 112 (Pa. 1988). Jose Medina finally claims that this evidence demonstrates that “the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate,”²⁹³ necessitating a new trial. (See Mem. Law Supp. Jose Medina’s Supplemental Am. Pet. 8.)

²⁹³ Newly discovered evidence PCRA claims are not subject to the preliminary requirements for successive PCRA petitions set forth in Lawson which were developed to discourage repetitive petitions. 549 A.2d 107, 111-12 (Pa. 1988). Newly discovered evidence is evidence that cannot be “obtained at or prior to trial through reasonable diligence.” Commonwealth v. D’Amato, 856 A.2d 806, 823 (Pa. 2004); Commonwealth v. Washington, 927 A.2d 586, 595-96 (Pa. 2007). Consequently, claims stemming from the newly discovered evidence could not have been asserted in an earlier PCRA petition because they are supported by previously unknown facts. The principle underlying Lawson requirements, discouraging repetitive petitions, would not apply to newly discovered evidence claims. Cf. Commonwealth v. Beasley, 967 A.2d 376, 395 n.2. (Pa. 2009) (“On the matter of waiver, the miscarriage of justice standard operates as a bar to claims based upon the adjudication of a previous post-conviction petition in which the claims were not raised.”) Nevertheless, this Court finds that Jose Medina’s claims stemming from the newly discovered evidence of recantation and law enforcement misconduct demonstrate a strong prima facie showing “that the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate.” Commonwealth v. Szuchon, 633 A.2d 1098, 1100 (Pa. 1993) (citing Lawson, 549 A.2d at 111-12). See also Commonwealth v. Romansky, 702 A.2d 1064, 1065 (Pa. Super Ct. 1997) (holding that Petitioner’s claim that Commonwealth secured his conviction with

This Court found merit to all of these claims. Hector Toro's testimony that he lied and that a detective coerced and threatened him was credible and compelling on its own but also was corroborated by other credible witness testimony and evidence. The recantation, failure to provide material evidence, and knowing presentation of false testimony, each independently would have compelled a different verdict and warrant a new trial. In addition, the credible evidence of false testimony and coercion of child witnesses demonstrates the serious prejudice caused by the two child witnesses testifying without their competency ever being shown. The evidence strips the verdict of integrity and mandates a new trial. This Court agrees that Jose Medina's trial was "so unfair that a miscarriage of justice occurred that no civilized society can tolerate." Id.

In a PCRA matter, the petitioner bears the burden of proving both the technical qualifications and the merits of the claim by a preponderance of the evidence. 42 Pa. C.S. § 9543(a); 9545(b)(1); Commonwealth v. D'Amato, 856 A.2d 806, 811 (Pa. 2004).

The standard of review applicable to the PCRA court's determinations are settled:

"As a general proposition, an appellate court reviews the PCRA court's findings to see if they are supported by the record and free from legal error. The court's scope of review is limited to the findings of the PCRA court and the evidence on the record of the PCRA court's hearing, viewed in the light most favorable to the prevailing party."

Commonwealth v. Duffey, 889 A.2d 56, 61 (Pa. 2005) (citations omitted). "The PCRA court's factual determinations are entitled to deference, but its legal determinations are subject to . . . plenary review." Commonwealth v. Brian Hawkins, 894 A.2d 716, 722

perjured testimony implicated fairness of trial proceedings and satisfied Lawson). Moreover, Jose Medina has always maintained, and makes a strong prima facie showing, that he is innocent. See, e.g., Pro Se Pet. at 2 (asserting Medina is "innocent of the crime he has been convicted of"); Szuchon 633 A.2d at 1100 (Pa. 1993) (holding that a petitioner satisfies Lawson with strong prima facie showing of either unfair proceedings or innocence).

(Pa. 2006). See also Commonwealth v. Raymond Johnson, 966 A.2d 523, 532 (Pa. 2009). Thus, “[g]reat deference is granted to the findings of the PCRA court, and these findings will not be disturbed unless they have no support in the certified record.” Commonwealth v. Burkhardt, 833 A.2d 233, 236 (Pa. Super. Ct. 2003) (citation omitted) (affirming denial of relief where Brady violation was not shown). “Unless there are facts and inferences of record that disclose a palpable abuse of discretion the trial judge’s reasons should prevail.” Commonwealth v. McCracken, 659 A.2d 541, 550 (Pa. 1995) (citation omitted). Credibility determinations relating to newly discovered evidence recantation claims receive heightened deference. Commonwealth v. Loner, 836 A.2d 125, 141 (Pa. Super. Ct. 2003) (“[t]he deference normally due to the findings of the [PCRA] court is accentuated where what is involved is recantation testimony[.]”). See also Commonwealth v. Romero, 938 A.2d 362, 376 (Pa. 2007); Commonwealth v. Coleman, 264 A.2d 649, 651 (Pa. 1970).

A. Jose Medina’s petition satisfies all the technical prerequisites necessary to permit a review on the merits.

Jose Medina’s claim of newly discovered evidence was timely and met all other technical requirements. Every claim under the PCRA must satisfy four technical requirements:

1. The petitioner must currently be serving a sentence. 42 Pa. C.S. § 9543(a)(1)(i)-(iii).
2. The claim must not have been previously litigated. 42 Pa. C.S. § 9543(a)(3).
3. The claim must not be waived. Id.
4. The claim must be brought within one year of the conviction becoming final, or fit one of the timeliness exceptions appearing in 42 Pa. C.S. § 9545(b)(1)(i)-(iii).

1. Jose Medina's PCRA petition is timely.

If a PCRA petition is not filed within a year of when the judgment becomes final, the petitioner must show it falls within an exception to the one year deadline and was filed within 60 days of when it could first be presented. § 9545(b)(1), (2). Judgment became final on March 15, 2004,²⁹⁴ and Jose Medina's pro se petition was filed on December 5, 2006. This Court found that Jose Medina showed that his petition fits within two exceptions to the one year deadline because he did not know about the evidence and law enforcement prevented him from learning of the information earlier. Within 60 days of learning of this new evidence from Hector Toro, Jose Medina filed his Petition.

Two of the timeliness exceptions apply. 42 Pa.C.S. § 9545(b)(1). First, Hector's recantation and the evidence of law enforcement misconduct – coercing child witnesses and providing false testimony – are “the facts upon which the claim is predicated” and these facts “were unknown to the petitioner and could not have been ascertained by the exercise of due diligence.” 42 Pa. C.S. §9545(b)(1)(ii). Second, the detective never disclosed his misconduct of coercing and threatening child witnesses and procuring false testimony, implicating another timeliness exception when the:

“failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or the laws of this Commonwealth or the Constitution or laws of the United States.”

²⁹⁴ “[A] judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration of time for seeking the review.” 42 Pa.C.S. § 9545(b)(3). Jose Medina's conviction became final on March 15, 2004, ninety days after the Pennsylvania Supreme Court denied his petition for allowance of appeal on December 16, 2003. Commonwealth v. Medina, 841 A.2d 530, 468 EAL 2003 (Pa. 2003) (decision without published opinion).

42 Pa. C.S. §9545(b)(1)(i). The detective's failure to disclose this information to Jose Medina's counsel constituted "interference by government officials" with the presentation of the claim. 42 Pa. C.S. §9545(b)(1)(i).

The applicability of an exception does not end the analysis. Jose Medina must demonstrate that he brought his claim within 60 days of his first opportunity to do so. § 9545(b)(2) (See Pro Se Pet. 1) (citing 9545(b)(2)). It is uncontested that Jose Medina had not seen Hector Toro at any time since his 1992 trial until Hector's transfer to Graterford on October 18, 2006, and that Jose Medina's petition was filed on December 5, 2006. The petition is well within the 60 day time limit.

Jose Medina asserts that he did not become aware of the facts underlying his petition until after October 18, 2006. PCRA Tr. 53:12-54:10; 81:8-21, July 19, 2010. Jose Medina's credible testimony showed that he was not aware of the favorable evidence at his trial and he did not know that the prosecution was aware that it was using perjured testimony. Jose Medina had no way of knowing what the detective said to the Commonwealth's key child witnesses or that his threats were the reason the boys lied at trial. In addition, reasonable investigation could not have revealed it since even at the PCRA evidentiary hearing the Commonwealth's prosecutors claimed they had not known of the detective's conduct. If the Commonwealth's prosecutors did not know, Jose Medina and his counsel had no reason to look for this evidence and probably could not have found it if they had.

Hector Toro's credible testimony showed that he first revealed these facts to Jose Medina after October 18, 2006 when Hector Toro – then an adult – was transferred to Graterford Prison where Jose was incarcerated, and that Hector never

previously disclosed the facts to anyone outside his family. Jose Medina's credible testimony about the initial disclosure mirrors Hector's account.

The Commonwealth presented no credible evidence to contradict Hector Toro and Jose Medina's testimony on timing and confirmed that Hector Toro first arrived at Graterford on October 18, 2006. There was no evidence that both men had somehow met earlier or that Hector had disclosed this information to Jose or his family earlier. Any suggestions to that effect were not supported by evidence and are wholly unconvincing.

Jose Medina has been represented by counsel with very few gaps since his conviction in 1992 and would certainly have discussed this newly discovered evidence with counsel immediately upon learning it. Indeed, shortly after Hector's October 2006 disclosure to Jose Medina, his counsel Shannon Quill met with Hector and secured a notarized affidavit. (See Ex. C-1/P-7 Hector Toro Aff., Oct. 25, 2006.) Moreover, even when represented by counsel, Jose Medina has demonstrated that he is familiar with PCRA filing deadlines and requirements for PCRA relief during his extensive post-conviction history. For example, when his court appointed counsel completely failed to file his appeal, Jose filed it on his own and when the clerk neglected to docket the appeal, he filed a writ of mandamus to the Pennsylvania Supreme Court to have the appeal docketed. Had Hector Toro's disclosure come to light prior to October 18, 2006, this Court finds that Jose Medina would have timely filed a petition raising the issue.

The essence of the Commonwealth's challenge to timeliness is that Hector Toro and Jose Medina are not telling the truth or, alternatively, that the evidence does not satisfy the requisite elements of a newly discovered evidence claim. (Commonwealth's

Post Hr'g Br. 84-110.) These arguments are essentially about the merits of Jose Medina's petition. They are irrelevant to a determination of whether timing requirements have been met. Commonwealth v. Bennett, 930 A.2d 1264, 1270-72 (Pa. 2007) (holding that the petitioner is not required to prove the elements of an after-discovered evidence or Brady claim to satisfy the timeliness exception in § 9545(b)(1)(ii) (relating to facts "unknown")); Commonwealth v. Thomas Hawkins, 953 A.2d 1248, 1253 (Pa. 2008) (petitioner must plead and prove that facts underlying exceptions in § 9545(b)(1)(i)-(ii) were unascertainable with "due diligence").

Thus Jose Medina could not, with due diligence, have discovered the facts underlying his petition any earlier, and his petition was filed within 60 days of when it could have first been presented. This Court found that the petition was timely filed.

2. The PCRA claims have not been previously litigated or waived.

To have his claims reviewed on the merits, Jose Medina must prove by a preponderance of the evidence that his claim "has not been previously litigated or waived" and that "the failure to litigate the issue prior to or during trial . . . or on direct appeal could not have been the result of any rational strategic or tactical decision by counsel." §§ 9543(a)(3)-(4); Commonwealth v. Crawley, 663 A.2d 676, 678 (Pa. 1995).

A claim is "previously litigated" if:

"the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue; or it has been raised and decided in a proceeding collaterally attacking the conviction or sentence."

42 Pa.C.S. §§ 9544(a)(2)-(3). A claim is waived "if the petitioner could have raised it but failed to do so before trial, at trial . . . on appeal or in a prior state post conviction proceeding." 42 Pa.C.S. § 9544(b). But see Commonwealth v. Fiore, 780 A.2d 704,

711 (Pa. Super. Ct. 2001) (“Appellant was unable to raise his claim of after-discovered evidence during his appeals because the evidence was not discovered until after Appellant’s appeals had been concluded.”).

Jose Medina’s claims stemming from Hector’s disclosure have not been previously litigated either on direct appeal or collateral review. Cf. Commonwealth v. Bond, 630 A.2d 1281, 1282 (Pa. Super. Ct. 1993) (claims “discussed thoroughly” by Superior Court are finally litigated within meaning of § 9543(a)(3)). They have not been waived because the facts underlying Jose Medina’s petition were unknown to him until October 2006.

The Commonwealth has not argued that this claim of new evidence has been previously litigated, and since this evidence came to Jose Medina’s attention after his previous petitions had been resolved, it could not have been. Similarly, the Commonwealth has not advanced a waiver argument. Jose Medina could not previously have raised a claim based on evidence in the sole possession of a person he had not seen since his trial and about which he had not heard. Thus, the waiver bar is not applicable here.

Since Jose Medina’s petition was filed timely, he is serving a sentence²⁹⁵ and his claims raised have not been previously litigated or waived, the technical requirements of the PCRA are met and review on the merits is permissible.

²⁹⁵ Jose Medina is currently incarcerated and serving a life sentence without the possibility of parole.

B. Hector Toro’s credible recantation and evidence of law enforcement misconduct is newly discovered, exculpatory evidence that would have compelled a different verdict at trial.

Jose Medina asserts that his conviction should be overturned because Hector Toro’s disclosure that a detective secretly coerced and threatened young Hector Toro to lie at Jose Medina’s trial or risk being put in juvenile placement or foster care is newly available and exculpatory evidence. Hector Toro testified that in response to this pressure he lied about witnessing Jose Medina with a knife in the Chinese restaurant saying he would kill someone. Jose Medina asserts this new evidence would likely have compelled a different verdict at trial. This Court agrees.

PCRA petitions based on a witness’s recantation of trial testimony are treated as newly discovered evidence claims. D’Amato, 856 A.2d at 823-24; Commonwealth v. McCracken, 659 A.2d 541, 545 (Pa. 1995). When a petition is supported by recantation testimony, the PCRA Court must determine whether it satisfies the criteria of the common law test for newly discovered evidence, **and** whether the recantation testimony is credible. D’Amato, 856 A.2d at 823; McCracken, 659 A.2d at 545.

Under the PCRA a petitioner must plead and prove, by a preponderance of the evidence, “The unavailability at the time of trial of exculpatory evidence that has subsequently become available and would have changed the outcome of the trial had it been introduced.”²⁹⁶ 42 Pa.C.S. § 9543(a)(2)(vi). Pennsylvania courts interpret the PCRA as requiring that:

- (1) the evidence has been discovered after trial and it could not have been obtained at or prior to trial through reasonable diligence;
- (2) the evidence is not cumulative;

²⁹⁶ See Commonwealth v. Fiore, 780 A.2d 704, 713 (Pa. Super. Ct. 2001) (“The 1995 amendments to the PCRA changed the language in § 9543(a)(2)(vi) ‘would have **affected** the outcome at trial’ to ‘would have **changed** the outcome of the trial’.”) (emphasis in original).

- (3) it is not being used solely to impeach credibility; and
- (4) it would likely compel a different verdict.²⁹⁷

Commonwealth v. D'Amato, 856 A.2d 806, 823 (Pa. 2004); Commonwealth v. Washington, 927 A.2d 586, 595-96 (Pa. 2007).

Hector Toro's recantation testimony and evidence of the detective's threats could not have been obtained at trial, is exculpatory evidence but not cumulative, or offered solely for impeachment purposes, and the evidence would likely have compelled a different verdict. This Court finds Hector Toro's uncontradicted recantation testimony and description of a detective's threats credible by itself and corroborated by other evidence. The new evidence supports Jose Medina's requested PCRA relief of a new trial.

1. Hector Toro's testimony became available after Jose Medina's trial concluded and could not have been obtained at or prior to trial through reasonable diligence.

To warrant relief under the PCRA, newly discovered evidence including recantation testimony must have been unavailable at the time of trial, must have only become available after trial, and must not be obtainable at trial with reasonable diligence. 42 Pa.C.S. § 9543(a)(2)(vi); D'Amato, 856 A.2d at 823. Jose Medina has satisfied this requirement.²⁹⁸

As previously mentioned, the credible evidence at the PCRA hearing showed Jose Medina had no information that a detective coerced and threatened the boys causing Hector to lie until Hector disclosed it at Graterford fourteen years after the trial.

²⁹⁷ The same standard governs recantation evidence whether raised as a motion for a new trial or as a basis for post conviction relief under the PCRA. See, e.g., Commonwealth v. Coleman, 264 A.2d 649 (Pa. 1970) (applying four-prong test to defendant's motion for new trial); McCracken, 659 A.2d 541 (Pa. 1995) ('same'); Commonwealth v. Loner, 836 A.2d 125 (Pa. Super. Ct. 2003) (applying four-prong test to PCRA claim).

²⁹⁸ This requirement to a large extent mirrors the timeliness exception to the one year filing requirement. 42 Pa.C.S. § 9545(b)(1)(i), (ii).

There was no evidence that Hector had recanted earlier or at the time of trial other than telling the unidentified detective that he had not seen anything incriminating. The Commonwealth maintains that it had no information that the transporting detective coerced the boys, or any information that Hector testified falsely. Clearly, if the Commonwealth claims not to have known this, it would not be reasonable to expect that Jose Medina or his counsel would have access to that information. There was no evidence that, in the intervening years since trial, Jose Medina learned of the detective's coercion and threats or knew that Hector told anyone about lying at trial. The mere fact that Jose Medina knew Hector was falsely testifying to having seen him do something he had not done would not provide Jose sufficient information as to why Hector was lying. The detective's actions were kept secret from prosecutors, the defense team and the trial court.

Pennsylvania courts have explained that recantation testimony is, by definition, evidence that did not exist at the time of trial.

“True ‘after-discovered’ evidence is evidence that was existent but undiscovered at the time of trial as opposed to recantation evidence which did not exist at trial. . . . [A]fter-discovered evidence existed at the time of trial, it was just not discovered until later. Recantation is new evidence, withdrawing, or repudiating that which went before; by definition, this ‘new’ evidence was nonexistent at the time of trial.”

D’Amato, 856 A.2d at 826-27 (Eakin, J., concurring). Thus, Jose Medina has established that he did not know of the information at trial, could not have discovered it with reasonable diligence and only learned of it after trial.

Jose Medina's petition for PCRA relief is therefore distinguishable from cases where the record indicates the petitioner was aware of the alleged newly available evidence testimony at the time of trial. See, e.g., Commonwealth v. Washington, 927

A.2d 586, 596-97 (Pa. 2007) (co-defendant's post trial statement claiming he shot the victim was not newly discovered because defendant was present at shooting and the facts were revealed at defendant's sentencing); Commonwealth v. Miller, 350 A.2d 855, 857-58 (Pa. 1976) (information was not newly discovered because a witness disclosed it to the defendant who shared it with defense counsel prior to jury selection). Here, there was no evidence available to the defense to suggest young Hector Toro lied at trial due to a detective's threats and coercion.

2. Hector Toro's PCRA testimony is exculpatory evidence.

The Pennsylvania Supreme Court has defined exculpatory evidence as, that which "extrinsically tends to establish defendant's innocence of the crimes charged, as differentiated from that which, although favorable, is merely collateral or impeaching." Commonwealth v. Gee, 354 A.2d 875, 878 (Pa.1976) (citation omitted), adopted by Commonwealth v. Redmond, 577 A.2d 547, 552 (Pa. Super. Ct. 1990); Commonwealth v. Hicks, 411 A.2d 1220, 1222 (Pa. Super. Ct. 1979). The Pennsylvania Superior Court has described that exculpatory after-discovered evidence is evidence that, if offered at trial would negate evidence of the defendant's guilt rather than merely impeach a witness:

"The question of whether the proffered after-discovered evidence is, in fact, exculpatory is best illustrated by two cases which involve the same after-discovered evidence. A laboratory technician who frequently testified for the Commonwealth was discovered to have falsified her credentials. **In one case, the perjured lab technician offered the only evidence that a murderer also raped his victim. . . . Since the testimony of the false technician was the only evidence of rape, the state Supreme Court ordered a new trial.** The same lab technician's testimony was also the focus of a new trial request in [another case]. There the court found that other evidence amply established the elements of assault and battery, intent to ravish, and corrupting the morals of a minor. The abuser admitted that a handkerchief contained semen; thus, the only

issue which remained was when and how it got there. Therefore, the discovery that the lab technician's testimony was perjured was not exculpatory."

Commonwealth v. Bonaccorso, 625 A.2d 1197, 1200 (Pa. Super. Ct. 1993) (emphasis provided) (citing Commonwealth v. Mount, 257 A.2d 578 (Pa. 1969), Commonwealth v. Alston, 243 A.2d 404 (Pa. 1968)).

Here, Hector Toro's recantation testimony negates evidence of Jose Medina's guilt and adds facts helpful to his defense. It is powerful evidence that Jose Medina did not go into the Chinese restaurant before the murder with a knife and make threats to kill someone. Hector's testimony that the detective threatened him and his brother to testify falsely or be removed from their home is also strong evidence in favor of Jose's defense. Hector's testimony provides powerful impeaching evidence to that of Michael who claimed to have seen Jose Medina in the Chinese restaurant, although the evidence is not offered merely for its impeaching value. Hector's recantation also undermines both boy's trial testimony about what happened after they left the Chinese restaurant. Hector's testimony extrinsically tends to establish Jose Medina's innocence.

3. Hector Toro's PCRA testimony is not cumulative of other evidence offered at trial or offered solely to impeach his trial testimony.

To justify relief under the PCRA, newly discovered recantation testimony cannot be cumulative of other evidence offered at trial and cannot be offered merely for impeachment purposes. Commonwealth v. Schuck, 164 A.2d 13 (Pa. 1960) ("evidence...must not be cumulative or merely impeach credibility"). Hector Toro's recantation testimony is neither cumulative nor corroborative. With respect to whether recantation or other newly discovered evidence is cumulative, the Pennsylvania Supreme Court has held,

“[The] recantation is not merely cumulative or corroborative given the tenuous nature of the circumstantial evidence connecting Appellant to the crime and the inability of any other witness to make a positive identification of the perpetrator. In this case, where the only Commonwealth witness who identified the perpetrator has recanted his testimony, such evidence can not be considered cumulative or corroborative because the defendant claimed that he did not commit the crime in question. This was the essence of Appellant’s defense and the ultimate question in Appellant’s trial. Thus, [the witness’s] recantation is neither cumulative, corroborative, nor for impeachment purposes.”

Commonwealth v. McCracken, 659 A.2d 541, 549-50 (Pa. 1995) (emphasis provided)

(reversing order of the Superior Court and reinstating trial court order granting Appellant a new trial). Recantation testimony is cumulative of evidence presented at the trial where numerous witnesses have testified on the same facts offered through the proffered recantation testimony. See, e.g., Commonwealth v. Hammond, 953 A.2d 544, 562-63 (Pa. Super. Ct. 2008) (reversing order granting PCRA relief where third party statements at most showed victim was first aggressor and was cumulative of testimony by “numerous witnesses that defendant threw the first punch”).

The incriminating evidence against Jose Medina at trial consisted of: 1) child witnesses Hector and Michael saying they saw Jose Medina with a knife in a Chinese restaurant saying he was going to kill someone, 2) Michael’s equivocal testimony saying he did and did not see the stabbing, and 3) witness testimony that Jose Medina was in the general neighborhood (along with many others) around the time of the murder. There was no physical evidence of the knife, blood on Jose Medina’s white clothing, the stolen wallet, motive, prior relationship or any other evidence linking Jose Medina to William Bogan or his murder.

The Third Circuit’s ruling constrains this Court to analyze the newly discovered evidence in the absence of Michael’s trial testimony. When the Third Circuit held that

Jose Medina's counsel's performance was "ineffective" by violating clearly established competency law,²⁹⁹ it then analyzed the remaining evidence "without the testimony of [Michael] Toro"³⁰⁰ to determine whether counsel's error caused enough prejudice to require a new trial. Even though the Third Circuit did not find a new trial was mandated, its holding that Jose Medina's trial counsel's error in violating clearly established law has never been corrected so, like the Third Circuit, this Court must review the newly discovered evidence without Michael's testimony.

Hector's testimony is decidedly not redundant: no one testified at trial that a detective repeatedly coerced and threatened the boys to testify. Likewise, Hector Toro's testimony that he did not see Jose Medina do anything incriminating would be offered as evidence of Jose Medina's innocence.³⁰¹ Without Hector's incriminating testimony, and with Michael's testimony excluded, there would be insufficient evidence as a matter of law to convict Jose Medina. Indeed, only Hector and Michael gave evidence that Jose Medina was seen with a knife making threats. Without them, there was no evidence that Jose Medina had a motive, made threats or possessed a weapon. Indeed, the Commonwealth failed at trial and at the PCRA hearing to present any other evidence that Jose Medina was ever seen with a knife or making threats to kill anyone.

²⁹⁹ The Third Circuit held "Mr. Medina's trial counsel's failure to object to Marcos Toro's competency, under these circumstances, as required by Rosche and Mangini, fell below an objective standard of reasonableness." Medina v. Diuglielmo, 461 F.3d at 429 (citing Rosche v. McCoy, 156 A.2d 307 (Pa. 1959); Commonwealth v. Mangini, 425 A.2d 734 (Pa. 1981)).

³⁰⁰ Id. at 430.

³⁰¹ Hector's testimony is distinguishable from newly discovered evidence that is only be used to impeach trial testimony. See, e.g., Commonwealth v. Choice, 830 A.2d 1005, 1008-09 (Pa. Super. Ct. 2003) (affirming denial of PCRA relief because third party testimony contradicting a witness's "unequivocal identification of Appellant at trial" could only impeach trial testimony); Commonwealth v. Galloway, 640 A.2d 454, 456 (Pa. Super. Ct. 1994) (that witness's testimony was refreshed through hypnosis is only relevant to witness's credibility); Commonwealth v. Detman, 770 A.2d 359 (Pa. Super. Ct. 2001) (affirming denial of new trial where third party allegations that witness falsely implicated defendant in conspiracy would merely impeach the witness and witness's credibility was fully explored at trial).

Moreover, Officer Fetters, who interviewed Jose Medina close in time to when Hector and Michael claimed he was in the Chinese restaurant, testified to facts contradicting their testimony: Officer Fetters said Jose Medina had no knife and was not drunk. The only other evidence places Jose Medina, along with many others, generally in the neighborhood of the murder.

Even if Michael's testimony were included in the analysis, this Court reaches the same decision. Michael's testimony was riddled with contradictions including on the key issue of whether he even saw the stabbing. Hector's new evidence of the detective's covert threats helps explain the many contradictions in Michael's testimony. If the boys were pressured to testify falsely, it is no small surprise that Michael's story is incoherent and ever-changing in the details. Likewise evidence of the detective's conduct suggests a different reason for Michael being so emotional and reluctant to testify on the stand. His emotional demeanor at the original trial may have been interpreted by the jury as the trauma of a boy who witnessed a murder when instead it may have been a boy who was threatened by a detective to implicate someone in a murder or risk losing his home and family.

The evidence was in this case was tenuous: Hector Toro is the only other witness, aside from the unreliable and arguably excluded Michael, providing incriminating evidence. Hector Toro's recanting testimony and information about the detective's pressure is not cumulative.

4. Hector Toro's recantation of the trial testimony he gave as an 11-year-old child and description of a detective's coercion would compel a different verdict.

To be entitled to relief under the PCRA based on recantation testimony, Jose Medina must demonstrate, by a preponderance, that Hector Toro's recantation testimony would "likely compel a different verdict" at trial. Commonwealth v. D'Amato, 856 A.2d 806, 823 (Pa. 2004). "[T]he PCRA court as fact finder is in a superior position to make the initial assessment of the importance of [recantation] testimony to the outcome of the case . . ." and assesses the recantation evidence against the evidence actually presented at trial. Id. at 826 (citing Commonwealth v. Roy Williams, 732 A.2d 1167, 1181 (Pa. 1999)). It is beyond dispute that where the only evidence of a defendant's guilt is the testimony of a witness who later reveals his testimony was false, the jury's verdict would be different had it not relied on the false testimony.

The Pennsylvania courts have found a new trial appropriate where, as in this case, evidence of the defendant's guilt at trial without the perjured testimony is tenuous, or newly discovered evidence is relevant to the petitioner's defense and contradicts the Commonwealth's case in chief.

In McCracken, "the limited evidence connecting Appellant to the crime" made the witness's "recantation of such nature and character that a different verdict w[ould] likely result at a retrial." 659 A.2d at 545. At McCracken's trial for murder, robbery and other charges, a Commonwealth witness testified as the only eyewitness that McCracken entered and left the deli at the time of the robbery. Id. at 543. Seven years after the trial, the witness revealed that he had lied when he identified the defendant as the perpetrator. Id. at 543-44. The Supreme Court reinstated the trial court's order granting

McCracken a new trial because with the Commonwealth's sole identifying witness recanting would have compelled a different verdict. This is true even given circumstantial evidence that McCracken wore clothing similar to the culprit's and had gun residue on his hand. 659 A.2d at 542, 545. See also Commonwealth v. Fiore, 780 A.2d 704, 714 (Pa. Super. Ct. 2001) (reversing denial of new trial where previously unavailable statements would change outcome of conspiracy verdict if believed by jury).

At Jose Medina's trial, young Hector Toro's testimony was key; without it there was only very limited circumstantial evidence connecting Jose Medina to the murder and not a shred of forensic evidence that he killed William Bogan. This is true even if Michael's testimony were included in the analysis. Hector's testimony strongly undermines the veracity of Michael's already weak testimony. A jury that knew a detective repeatedly pressured and threatened both young boys would not likely believe Michael's already emotional and wavering testimony. Jose Medina's defense that he was visiting the neighborhood from Reading to attend a friend's daughter's birthday combined with evidence of his good character would likely have led to an acquittal.

At trial, 11-year-old Hector Toro was one of two child witnesses who gave testimony incriminating Jose Medina. This Court holds that if the jury knew Hector Toro did not see Jose Medina with a weapon or making threats, that he did not see him at all the night William Bogan was killed, and that a detective threatened young Hector and Michael to testify or be removed from their home, the jury would have given a different verdict.

Unlike McCracken there was not a shred of forensic evidence whatsoever linking Jose Medina to the murder and to this day no murder weapon has ever been found.

Clearly, without Hector Toro's perjured testimony, the remaining evidence against Jose Medina is far less incriminating than the evidence that remained in McCracken. If the Supreme Court in McCracken required a new trial, then Jose Medina must be given a new trial.

The Pennsylvania courts have granted new trials where, as in this case, child witnesses have recanted their perjured trial testimony and the trial testimony was key evidence in securing the defendant's conviction, or was the only evidence of the defendant's guilt. The Pennsylvania Supreme Court in Commonwealth v. Mosteller, granted the defendant a new trial where the Commonwealth's case rested solely on the identification testimony of a 15-year-old child witness who later recanted. 284 A.2d 786, 788-89 (Pa. 1971). Noting the central role the child's testimony played at trial, the Court held,

"[The child witness] gave the **only** testimony which could possibly have led to appellant's conviction. Not an iota of other corroborating evidence was offered. To the contrary, the testimony of Frieda's mother and the medical evidence supported appellant's version of the incident and the recantation testimony. . . . [W]here as here the defendant's conviction is based completely on testimony of the child prosecutrix and the truth of that testimony is open to serious question because of the testimony of a disinterested medical witness, a subsequent recantation of testimony as supported by this record necessitates a new trial."

284 A.2d at 788-89 (emphasis in original). In Commonwealth v. Krick, the Pennsylvania Superior Court found a new trial was appropriate where a 12-year-old victim witness testified at trial and later recanted her trial testimony because she accused the defendant of sexual assault under pressure from her father and family acquaintances. 67 A.2d 746, 748-49 (Pa. Super. Ct. 1949) (holding that recantation was newly discovered evidence and trial court's denial of new trial was abuse of discretion).

With Hector's credible recantation and Michael's testimony not to be considered due to the lack of testing for competency, the only remaining evidence simply puts Jose Medina in the general neighborhood which is insufficient to support a conviction. "It is well established that a showing of **mere** presence at the scene of a crime is insufficient to support a conviction: evidence indicating participation in the crime is required." Commonwealth v. Keblitis, 456 A.2d 149, 151 (Pa. 1983) (emphasis in original) (mere presence in marijuana garden accessible to others held insufficient to convict on drug charges). See also Commonwealth v. Fields, 333 A.2d 745 (Pa. 1975) (reversing second-degree murder conviction where appellant and gunman both walked up to victim and fled after shooting but no partnership was shown); Commonwealth v. Hargrave, 745 A.2d 20, 23 (Pa. Super. Ct. 2000) (reversing conviction for burglary where only evidence was appellant's proximity to broken store window and box of stolen goods), appeal denied, Commonwealth v. Hargrave, 760 A.2d 851 (Pa. 2000); Commonwealth v. Jones, 459 A.2d 11, 13 (Pa. Super. Ct. 1983) (reversing burglary conviction and citing collected cases where presence was insufficient to uphold a conviction).

Given the weak circumstantial evidence linking Jose Medina to the murder, his case is distinguishable from those in which direct and circumstantial evidence established the petitioner's guilt at trial, making recantation evidence unlikely to compel a different verdict. See, e.g., Commonwealth v. Buehl, 658 A.2d 771, 775, 776-77 (Pa. 1995) ("overwhelming" evidence of guilt including two admissions by defendant and forensics evidence linking defendant to murders); Commonwealth v. Wilson, 649 A.2d 435, 448-49 (Pa. 1994) (recantation statements would not change outcome of trial); Commonwealth v. Holmes, 905 A.2d 507, 511 (Pa. Super. Ct. 2006) (recantation of

third witness did not compel different verdict where testimony of two other witnesses established defendant was shooter); Commonwealth v. Kevin Johnson, 841 A.2d 136, 138, 141 (Pa. Super. Ct. 2003) (witness's testimony that he did not actually know whether defendant was shooter would not compel different verdict since second eyewitness saw defendant shoot victim and ballistics evidence linked defendant to crime); Commonwealth v. Gallman, 838 A.2d 768, 771-72 (Pa. Super. Ct. 2003) (statements that victim had a gun would not affect verdict where defendant admitted victim was unarmed and circumstantial evidence showed victim was shot in the back).

This case is also distinguishable from cases in which purported recantation testimony would not change the outcome of trial given that the proffered recanting witness never made inculcating statements against the defendant at trial or the recantation did not relate to the ultimate issue of guilt. Commonwealth v. Bond, 819 A.2d 33, 41, 49-50 (Pa. 2002) (proffered recantation would not have affected the verdict where statements were not used in any way to convict); Commonwealth v. Hammond, 953 A.2d 544, 560-61, 563 (Pa. Super. Ct. 2008) (third party statements that did not establish victim had a gun when defendant shot him would not lead to a jury self-defense finding or compel different verdict).

Without Hector's testimony to incriminate Jose Medina, the remaining evidence most certainly would compel a different verdict even if the law permitted Michael's problematic testimony to be included in the analysis.

C. This Court found Hector Toro’s recantation and description of detective coercion completely credible on its own and in light of the evidence as a whole.

With respect to the credibility of recantation testimony, the Pennsylvania Supreme Court has made clear that the “PCRA court must, in the first instance, assess the credibility and significance of the recantation in light of the evidence as a whole.” Commonwealth v. D’Amato, 856 A.2d 806, 825 (Pa. 2004) (PCRA court erred by failing to determine credibility of witness’s recantation testimony and dismissing claim without evidentiary hearing). “The deference normally due to the findings of the [PCRA] court is accentuated where what is involved is recantation testimony[.]” Commonwealth v. Loner, 836 A.2d 125, 141 (Pa. Super. Ct. 2003) (citing Commonwealth v. Lee, 385 A.2d 1317, 1320 (Pa. 1978)) (affirming denial of PCRA relief and determination that recantation was not credible). Thus, “an appellate court may not interfere with the denial or granting of a new trial where the sole ground is the alleged recantation of state witnesses unless there has been a clear abuse of discretion.” Commonwealth v. McCracken, 659 A.2d 541, 549 (Pa. 1995) (citing Commonwealth v. Coleman, 264 A.2d 649, 651 (Pa. 1970)).

“It is the fact-finder’s function to resolve inconsistencies and conflicts in testimony, and credibility issues are solely within the province of the fact-finder. Where a PCRA court’s credibility determination is supported by the record, it is binding on the reviewing court.” Commonwealth v. Romero, 938 A.2d 362, 376 (Pa. 2007) (citing Commonwealth v. Smith, 416 A.2d 494, 496 (Pa. 1980); Commonwealth v. White, 734 A.2d 374, 381 (Pa. 1999)). This is because the “credibility of recantation evidence is one which is better resolved following a full evidentiary hearing where the court is able

to observe the manner and demeanor of the witness as he delivers his recantation testimony in an adversary proceeding.” Commonwealth v. McLucas, 548 A.2d 573, 576 n.7 (Pa. Super. Ct. 1988) (affirming denial of post conviction relief because recantation claim was not credible). It is within the PCRA court’s discretion to believe or disbelieve part or all of a witness’s recantation testimony based on its observation of the recanting witness. See, e.g., McCracken, 659 A.2d at 548-49 (Pa. 1995) (affirming credibility determination); Coleman, 264 A.2d at 651 (“We cannot say that [the court’s] decision to refuse to believe [the witnesses] now, after a full hearing on which [it] was able to evaluate the demeanor of the witnesses and the reasons for their inconsistent statements was an abuse of discretion.”)

1. Hector Toro’s testimony was credible, corroborated and uncontradicted.

As this Court already detailed in its factual findings, Hector’s testimony that a detective transported him and his brother without family knowledge on the night of the murder and threatened the boys to cooperate in incriminating Jose Medina or risk placement in a juvenile or foster home was completely convincing. Hector told the detective he had not seen anything relating to the stabbing. Hector credibly described in detail that the detective later repeatedly parked near the entry to the boys’ school, intercepted them and threatened them to testify as instructed. Hector buckled under the detective’s apparent authority to remove them from their home and lied at the trial about seeing Jose Medina with a knife threatening to kill someone and about subsequent

events with his brother that had not occurred. Hector's demeanor as he testified underscored and bolstered his credible testimony.³⁰²

The Pennsylvania courts consider whether other evidence in the record corroborates a witness's trial or recantation testimony. See, e.g., McLucas, 548 A.2d at 575 (Pa. Super. Ct. 1988) (affirming trial court dismissal of claims under PCHA in part because recanting daughter's trial testimony was corroborated by three other witnesses). The Pennsylvania Supreme Court in Mosteller found that evidence corroborating the child witness's recantation, and the absence of evidence contradicting the recanting witness's testimony, militated in favor of finding the testimony credible. There the Court reasoned,

“[N]ot only is there nothing to contradict Frieda's recantation, there is evidence from her great aunt that Frieda admitted a month prior to trial that she fabricated the story. Additionally, Frieda persisted in her retraction despite having been informed that she was thereby subject to criminal charges for perjury and a substantial prison term. This was a clear declaration against interest entitled to considerable credibility, unlike the normal retraction by a co-conspirator who is already in prison and realistically has little to lose by attempting to free his partner.”

284 A.2d at 789 (Pa. 1971) (citing Commonwealth v. Coleman, 264 A.2d 649 (Pa. 1970); See also Commonwealth v. Collins, 259 A.2d 160 (Pa. 1969)).

Hector's testimony was corroborated by the Commonwealth's witnesses and other evidence in the record. His mother, a Commonwealth witness at the PCRA hearing, testified she learned of the detective's secretive questioning and pressuring shortly after it occurred and described the emotional turmoil it caused to her family. Hector's recantation was also corroborated by evidence from the trial, including: the

³⁰² This Court recognizes that recantation testimony should be scrutinized carefully. Commonwealth v. Coleman, 264 A.2d 649, 651 (Pa. 1970). Therefore, these determinations were made after consideration of all the evidence and post-hearing briefs.

absence of family members at interrogations and court proceedings; the substitution of Maria Caraballo as family; statements that at trial the boys were nervous or scared and feared retaliation; Michael's emotional breakdown without calls made to inform family; the bizarre details and inconsistencies in the boys' testimony; Hector's description of Jose Medina being drunk when compared with Officer Fetters description that he was not; Hector's contradictory testimony after the boys left the restaurant being consistent with his not having seen anything; and Hector's denying he met with a detective when he clearly had.

Jose Medina's newly discovered evidence of recantation and prosecutorial misconduct was uncontradicted at the PCRA hearing. The Commonwealth witnesses testified that the department's procedure for interrogating child witnesses is to notify their legal guardian, get permission and invite them to attend. The procedure when a child was needed to testify in court was to issue a subpoena in advance to be signed by the child's legal guardian who would be invited to be present in support during the proceeding. No one testified to issuing subpoenas or having seen them after they were issued. Although law enforcement and the prosecuting attorney at trial were aware of procedures for child witnesses, there was no evidence that those procedures were followed.

The Commonwealth did not present one witness who spoke directly with the family and secured permission to interview the boys. Witnesses agreed that no adult Toro family members were present at the questioning or court proceedings. The mysterious failure to follow child witness interviewing and court appearance procedures

went unexplained. The Commonwealth's decision not to contact Michael's family when he experienced major trauma mid-trial was never explained.

The Commonwealth conceded that Hector and Michael were always transported by law enforcement officers. Nevertheless, during the nine day evidentiary hearing, the Commonwealth did not present one witness who admitted to transporting the boys nor to knowing the identity of the law enforcement officer who did. Though law enforcement did in fact bring Hector and Michael Toro to the homicide division, and to Jose Medina's trial, the procedures designed to protect the vulnerability of these young boys were not followed. This undisputed evidence supports Hector Toro's testimony that he was secretly questioned by a detective who had the opportunity to intimidate him on the night of the murder investigation. It is consistent with his testimony that a detective picked him and his brother Michael up from school unannounced, and used the opportunity to coach and threaten him into falsely incriminating Jose Medina.

Essentially, the Commonwealth agrees that the boys were transported by an unknown officer who failed to follow appropriate procedures and chose to exclude their family's involvement. But the Commonwealth asserts, without any evidence to support its position, that this unknown detective must not have done anything else wrong. The Commonwealth insists that Hector Toro cannot be believed today as an adult but he should be believed as a child after an unidentified detective covertly transported the boys without their family knowing.

Not only did this Court find Hector's testimony completely credible by itself, it was corroborated by his mother and other unexplained facts from the trial record. Hector's chilling account that a detective coerced two scared boys into testifying went completely

unrebutted. The only evidence came in the form of an unpersuasive attack on Hector's and his mother's credibility.

2. The Pennsylvania courts have granted a new trial where, as here, a child witness was pressured to provide perjured testimony, and the child later recants that testimony.

In Mosteller, the Pennsylvania Supreme Court reversed the trial and appellate courts' denial of a new trial where the 15-year-old child witness recanted her testimony and credibly testified that her family members pressured her to lie at trial.

"She stated under oath that her testimony at trial had been untrue, and stressed, ' . . . [that her father] did not do it According to [the child witness], her grandmother and her uncle had pushed her into testifying at trial. She had merely told her sister that 'my father got after me,' and her sister then relayed this information to their mother. She was scared to tell the truth at trial because her . . . 'grandmother and them was in court, and if I turned around and told the other story, that he didn't touch me, then I didn't know what they would think.'"

Commonwealth v. Mosteller, 284 A.2d 786, 787 (Pa. 1971).

Hector Toro's recantation is distinguishable from situations in which a child witness recants but is motivated by reasons other than giving a truthful version of the facts. In Commonwealth v. Loner, the Pennsylvania Superior Court affirmed the PCRA court's determination that the recanting witness – 15 years old at the time of trial and 20 years old at the time of the recantation – was not credible because the witness had a motive to lie during her recantation testimony but not at trial. 836 A.2d 125, 139-42 (Pa. Super. Ct. 2003). In affirming the PCRA court's determination, the Superior Court reasoned that the witness's recantation testimony was for the PCRA court to accept or reject. 836 A.2d at 136, 141. See also Commonwealth v. Riley, 326 A.2d 384, 392-96 (Pa. 1974) (affirming trial court determination that "recantation" of 6-year-old was not credible in part because child testified he "recanted" to please his father);

Commonwealth v. Thompson, 412 A.2d 630 (Pa. Super. Ct. 1979) (affirming trial court determination that recantation by 11-year-old was not credible where child confirmed trial testimony and “was motivated and under pressure” to lie at recantation hearing).

Nor is Hector Toro’s recantation motivated by an interest in the outcome of Jose Medina’s trial, or any other ulterior motive that would cause him to recant untruthfully. See, e.g., Commonwealth v. Romero, 938 A.2d 362, 376-77 (Pa. 2007) (affirming denial of PCRA relief where witness falsely recanted because of desire to save petitioner from capital sentence and fear of retaliation for testifying at trial); Commonwealth v. Washington, 927 A.2d 586, 597 (Pa. 2007) (affirming PCRA court determination that witness recanted to exonerate his co-defendant and was not credible).

As in Mosteller, Hector Toro testified that he was coerced into testifying by the detective and explained he was recanting his trial testimony to tell the truth. As an adult, Hector Toro is no longer influenced by the motive to lie that he had as a child. Hector has nothing to gain by recanting other than his desire to correct a wrong. He explained how living with his guilt has affected him during the eighteen years since the trial:

“it been haunting me for awhile because I ain’t seen -- I didn’t seen nothing, and I wasn’t there when the incident happened And it’s -- it’s been bothering me because, just like this whole time, I’m lying and it’s hurting me, like, you know. I kept telling my mother that I can’t keep going on with this because it keeps bothering me. Sometime I sit -- I sit in my house and I -- all I think is that. You know, I just wanted to come here and get it out and get that weight lift (sic) off my shoulders so I can move on with my life.”

PCRA Tr. 31:14-16; 32:11, July 20, 2010.

3. The circumstances of Hector Toro's recantation and description of a detective's coercion indicate that it is credible.

The Pennsylvania courts have also considered the circumstances of a witness's recantation when determining whether it is credible. See, e.g., Mosteller, 284 A.2d at 789 (Pa. 1971) (witness who persisted in retraction notwithstanding that she faced imprisonment for perjury was credible); McCracken, 659 A.2d at 542-44, 546-47 (Pa. 1995) (recantation credible where witness recanted in a statement to defendant's attorney and at a recantation hearing).

Hector explained that he had long felt guilt over his role in falsely implicating Jose Medina. In his first words after being sworn in at the PCRA hearing he stated, "It's just that I wanted to get this off my shoulders, something that's been on me for years.... It keeps bothering me. Like it's something like a dark cloud over my shoulder." PCRA Tr. 10:11-21, July 20, 2010. Since Hector was only temporarily housed at Graterford until he was assigned to SCI Houtzdale so his contact with Jose Medina would have been limited in time. Hector consistently stood by his recantation after he was transferred from Graterford and even after he was paroled and remained under the Commonwealth's supervision. The only time he balked was after homicide detectives paid a surprise visit to his mother's home while he was on state parole. His concerned mother interrupted Hector's visit with his brother in the hospital and begged him to come home immediately so he could answer the detectives' questions. At the PCRA hearing he testified that he was late for work and signed a statement detectives gave him but testified that the statement was not true. Whatever pressure -real or imagined - Hector felt during the detectives' visit, did not undermine his consistent sworn statements and his convincing testimony at the PCRA hearing.

Where a witness recants his trial testimony, and then allegedly retracts that recantation, the PCRA court – in its role as fact finder – determines whether the recantation or the retraction is credible. Commonwealth v. Anderson, 353 A.2d 384, 386 (Pa. 1976) (affirming trial court’s finding that recantation was not believable because it had the opportunity to observe witness’s demeanor and credibility); Commonwealth v. Williams, 846 A.2d 105, 108 n.2 (Pa. 2004) (witness retracted recantation at the PCRA hearing mooting out defendant’s claim); Commonwealth v. Riley, 326 A.2d 384, 385-86 (Pa. 1974) (affirming trial court’s denial of new trial because child retracted recantation at a court hearing).

In court, Hector stood by his earlier recantation which had consistently been memorialized in signed statements spanning two years and which he spoke about in great and believable detail. The Court found the circumstances surrounding the alleged retraction of his recantation made it unreliable.

The Court found the circumstances leading to Hector’s recantation believable. Hector’s demeanor and testimony in court describing the false testimony and his long term guilt over his role in falsely implicating Jose Medina were completely convincing.

D. When police question children under circumstances like those 11-year-old Hector experienced, courts scrutinize the statements, acknowledging their unreliability, and exclude those that are coerced.

Hector’s recantation was completely credible even without taking into account the interrogation methods used by law enforcement. Hector’s recantation makes sense when analyzed in the context of law enforcement pressure he experienced as a scared young boy.

Federal and state courts have extensively examined what interrogation methods are so coercive as to violate due process guarantees, requiring that the statements made be excluded as evidence because they are so unreliable. Courts have also found that in some situations an individual may make statements to law enforcement without understanding the full consequences of those statements, rendering those statements unreliable. The law reflects a particular concern with interrogations of children. The law requires that the determination of whether a child's statements are coerced or involuntary must take into account the child's immaturity and vulnerability when faced with the power of adult officers. The vast majority of case law on the topic of officers questioning child witnesses grew out of circumstances involving juvenile defendants since logically they are the most likely to challenge police conduct in the context of their criminal cases. However, the constitutional principles governing due process guarantees for criminal defendants apply equally to coercive techniques used against witnesses that would affect the fairness of a criminal defendant's trial. See Webb v. Texas, 409 U.S. 95, 98 (1972); Jennings, 311 A.2d 720, 721-22 (Pa. Super. Ct. 1973).

In this case, the detective's coercive and intimidating methods with Hector and Michael mirror those that the courts have found to result in unreliable or involuntary statements, particularly when used with children. This case law is instructive in explaining why the detective's coercive techniques caused Hector to perjure himself and support his present day recantation.³⁰³

³⁰³ Separate and apart from the law discussed here, this Court found Hector Toro's recantation testimony credible for the reasons discussed elsewhere in this Opinion.

1. The law recognizes that children are particularly vulnerable when law enforcement officers question them.

The United States Supreme Court in J.D.B. v. North Carolina has recently and unambiguously affirmed that it views children differently than adults when they are questioned by police because they are more vulnerable and susceptible to pressure. 180 L. Ed. 2d 310, 323 (U.S. 2011) (citing Roper v. Simmons, 543 U.S. 551, 569 (2005); Haley v. Ohio, 332 U.S. 596, 599 (1948); Gallegos v. Colorado, 370 U.S. 49, 54 (1962)). The Court emphasized that its observations are not narrowly applicable to a specific child but that they apply to children “as a class.” J.D.B., 180 L. Ed. 2d at 323.

In a case with strikingly similar facts to this one, the United States Supreme Court addressed the question of whether a police investigator’s questioning of a 13-year-old child was appropriate under the law and held that a child’s age is relevant to whether he would feel that he could stop the questioning or leave. Id. at 318-19. The Supreme Court in J.D.B. found that the circumstances in which the teenager was questioned were significant: a 13-year-old was pulled out of class twice so that the “police investigator assigned to the case” could question him, the investigator did not give the teen the chance to speak to his grandmother – his legal guardian – or aunt, or try to contact them, and J.D.B. was questioned for thirty to forty-five minutes and confessed to theft after the investigator “warned” that he could put the teen in juvenile detention. Id. at 319-20. The investigator did not tell J.D.B. he could leave or refuse to answer questions until after he had confessed. Id. at 320.

The J.D.B. Court explained that age impacts children’s behavior as a class when they are questioned by police because,

“[a] child’s age is far more than a chronological fact. It is a fact that generates common-sense conclusions about behavior and perception. Such conclusions apply generally to children as a class. . . . The same wide basis of community experience that makes it possible, as an objective matter, to determine what is to be expected of children in other contexts, likewise makes it possible to know what to expect of children subjected to police questioning.”

Id. at 323, 325 (quotations omitted). Knowing that a child is questioned by police therefore “yields objective conclusions” including “that children are most susceptible to influence and outside pressures” Id. at 323, 325 (citations and quotations omitted). The Supreme Court remanded the case to consider the teen’s age as one of the relevant factors in determining whether the child would have felt free to leave the interrogation.

The United States Supreme Court has established principles governing the constitutional rights of juvenile defendants who make statements when interrogated by law enforcement, and has described circumstances that lead to coerced or involuntary statements by children that jeopardize due process. Hector Toro’s statements as a child were made under circumstances that courts have found would render them unreliable and involuntary. If presented in the context of police questioning a juvenile defendant, the statements would likely have been suppressed as violating due process. By extension, using Hector Toro’s coerced statements violated Jose Medina’s due process rights. At a minimum, this case law supports the Court’s earlier finding that Hector’s recantation is credible since Hector as a child was subjected to unreasonable pressure, and he “cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in

his early teens.” Haley, 332 U.S. 596, 599 (1948) (reversing defendant’s conviction where his confession was obtained in violation of his right to due process).

2. Courts scrutinize statements children make to law enforcement without a parent or lawyer present since children are susceptible to suggestibility and may be ignorant of the consequences of their statements.

Even when the circumstances of the interview are not deemed coercive, the law recognizes that children, because of their immaturity, are easily manipulated and less capable of understanding the full import of their statements to law enforcement officers. The law views children as ill equipped when they are in police custody, and courts have scrutinized statements they make to law enforcement without the opportunity to consult with a parent, interested adult, or attorney. Relevant cases, while occurring in other contexts, illustrate in what circumstances the courts have found children to have made statements involuntarily or without understanding their consequences. They provide additional support for why Hector’s testimony as a child was easily influenced, and bolster his present day recantation.

Even when law enforcement does not use overt coercion, courts have held that a child’s youthfulness and ignorance make his waiver of his right to silence invalid and his statements inadmissible at trial. See Fare v. Michael C., 442 U.S. 707 (1979) (holding that totality of the circumstances applies to question whether juveniles knowingly and voluntarily waived Fifth Amendment rights). In holding that a 15-year-old boy whose parents or attorney were not present did not knowingly and voluntarily waive his Fifth Amendment rights before he confessed, the United States Supreme Court explained,

“If counsel was not present for some permissible reason when an admission was obtained, the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced

or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.”

In Re Gault, 387 U.S. 1, 55 (1967).

In Gallegos v. Colorado, a 14-year-old boy’s confession was held to be coerced and invalid because it was obtained after he was held in custody for five days without being permitted to contact a parent or an attorney. 370 U.S. at 49, 50, 55. It did not matter that the boy did not request to speak with his parents or a lawyer, or that he volunteered the statements he gave to police:

“[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. That is to say, we deal with a person who is not equal to the police in knowledge and understanding of the consequences of the questions and answers being recorded and who is unable to know how to protect his own interests ”

370 U.S. at 54.

Pennsylvania courts applying the totality of circumstances test have focused on the presence of a parent or interested adult in determining whether a child’s statement should be suppressed. Commonwealth v. Carter, 855 A.2d 885, 891 (Pa. Super. Ct. 2004) (“Certainly, the fact that Appellant was sixteen years of age and no interested adult was present is a factor that weighs in Appellant’s favor when examining the totality of the circumstances...”). Recently, the Superior Court reversed the denial of a motion to suppress a 15-year-old’s inculpatory statements made two hours after his arrest. In the Interest of: T.B., 11 A.3d 500, 503, 509 (Pa. Super. Ct. 2010). The Superior Court examined the juvenile’s age, intelligence, “his lack of consultation with an interested adult immediately prior to the interrogation, and the fact that no adult was present or informed of [his] rights before the police interviewed him.” Id. at 509. Applying the

totality of the circumstances test, the Court determined that the teen's waiver of his Fifth Amendment rights was unintelligent and unknowing, and reversed the trial court's denial of the suppression motion. Id.

In another context, Pennsylvania courts have recognized that an otherwise competent child witness can be rendered incompetent by taint by interviewers through "the implantation of false memories or the distortion of real memories caused by interview techniques of law enforcement, social service personnel, and other interested adults, that are so unduly suggestive and coercive as to infect the memory of the child, rendering that child incompetent to testify." Commonwealth v. Delbridge, 855 A.2d 27, 35 (Pa. 2003) (citations omitted). "The core belief underlying the theory of taint is that a child's memory is peculiarly susceptible to suggestibility so that when called to testify a child may have difficulty distinguishing fact from fantasy." Id. at 34-35. Courts consider the totality of the circumstances, including (but not limited to):

"(1) the age of the child; (2) the existence of a motive hostile to the defendant on the part of the child's primary custodian; (3) the possibility that the child's primary custodian is unusually likely to read abuse into normal interaction; (4) whether the child was subjected to repeated interviews by various adults in positions of authority; (5) **whether an interested adult was present during the course of any interviews**; and (6) the existence of independent evidence regarding the interview techniques employed."

Commonwealth v. Judd, 897 A.2d 1224, 1229 (Pa. Super. Ct. 2006) (emphasis provided).

All of these cases recognize that the power dynamic introduced when law enforcement officers question children may influence and contaminate the children's statements, making them unreliable particularly when adult family members or advocates are not present to balance it. The contrived exclusion of Hector Toro's family

throughout the interrogation process calls into question the reliability and voluntariness of his statements. Indeed, the Commonwealth's failure to abide by well established procedures designed to protect child witnesses by providing them with guidance and support from their family raises serious concerns in this case. Certainly, an 11-year-old and 12-year-old testifying as the main witnesses in a neighborhood murder should have had their family fully informed and present to support and protect them throughout the process. The persistent effort to exclude the young boys' family supports the other evidence that unfair play was involved.

3. Children's statements that are coerced by law enforcement questioning are unreliable and inadmissible for any purpose at trial.

Courts have held that when statements are coerced, they are too untrustworthy to be used in court. To determine whether a statement is coerced in violation of due process, courts consider "the totality of all the surrounding circumstances -- both the characteristics of the accused and the details of the interrogation." Dickerson v. United States, 530 U.S. 428, 434 (2000) (citation omitted). Relevant circumstances may include the child's age, immaturity, experience, the time and duration of police questioning, and whether a parent was present during questioning. See, e.g., Gallegos v. Colorado, 370 U.S. 49, 49-54 (1962); Haley, 332 U.S. 596, 597-601 (1948) (discussing the "age of petitioner, the hours when he was grilled . . . the callous attitude of the police. . ."). Cf. Commonwealth v. Moses, 287 A.2d 131, 133 (Pa. 1971) (discussing "age, maturity and intelligence of the individual involved. . . . And where the accused is of tender years, the attending circumstances must be scrutinized with special care.")

The United States Supreme Court held that a 15-year-old boy's confession was coerced in violation of due process when he was questioned without his mother present, shortly after midnight, for approximately five hours by six different officers who questioned him one at a time or in pairs, and the boy was not given the opportunity to speak with an attorney. Haley, 332 U.S. at 600. The Court reasoned,

“A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 a. m. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him.”

Id. at 599-600. In another case the Supreme Court considered law enforcement's “length of the questioning, the use of fear to break a suspect, [and] the youth of the accused” and held that it was impossible for the 14-year-old boy to provide a voluntary confession because, among other things, he was not allowed to talk to a parent or other “friendly adult.” Gallegos, 370 U.S. at 52-53. The Court reasoned, “[c]onfessions obtained by secret inquisitorial processes are suspect” and that such a situation is,

“so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear.”

Id. at 50, 52, 55 (emphasis in original).

The United States Supreme Court has discussed that coerced confessions are not admissible at trial for any purpose because these involuntary statements are “inherently untrustworthy.”³⁰⁴ Dickerson, 530 U.S. 428, 433 (2000) (citations omitted). The Court explained,

³⁰⁴ Courts distinguish between involuntary coerced statements that are inadmissible for any purpose and statements obtained in violation of the “prophylactic” Miranda requirements that are admissible for

“[a] free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt . . . but a confession forced from the mind of the flattery of hope, or by the torture of fear, comes in so questionable a shape . . . that no credit ought to be given to it; and therefore it is rejected. . . . We have never abandoned this due process jurisprudence and thus continue to exclude confessions that were obtained involuntarily.”

Dickerson, 530 U.S. 428, 433, 434 (2000) (citation omitted). See also Commonwealth v. Bennett, 450 A.2d 970, 971-72 (Pa. 1982) (“Coerced statements of an accused are **inherently** unreliable; they have **no** probative value and are, for all purposes, a nullity. Use of coerced statements, thus, is and ought to be barred for **all** purposes, including impeachment.”) (Flaherty, J., concurring) (emphasis in original); In Re Gault, 387 U.S. 1, 45 (1967) (“The principle, then, upon which a confession may be excluded is that it is, under certain conditions, **testimonialily untrustworthy**”) (citations omitted) (emphasis in original).

As in the case of a juvenile defendant whose coerced confession is unreliable, young Hector Toro’s coerced statements implicating Jose Medina compromised the reliability of the trial proceedings. That Hector Toro’s own constitutional rights are not at issue does not negate the untrustworthiness of his statements. Moreover, in assessing the credibility of his recantation as an adult, the law recognizes that the coercive circumstances of how he was interrogated as a child show that his statements then were unreliable.

impeachment. “Although statements taken in violation of only the prophylactic Miranda rules may not be used in the prosecution’s case in chief, they are admissible to impeach conflicting testimony by the defendant.” Michigan v. Harvey, 494 U.S. 344, 350 (1990).

4. Law enforcement questioned Hector Toro under circumstances that show his statements were coerced and unreliable, and that he did not understand the consequences of his statements.

The entire circumstances surrounding Hector Toro's questioning made him susceptible to pressure from adult police officers.³⁰⁵ He was only 10 years old, someone had just been murdered, the questioning occurred after midnight in the homicide unit and he had no adult family present. Under these circumstances Hector was presented with the ultimatum that he implicate someone in a murder and then "go home" or risk being put in juvenile detention or foster care. After this occurred and no one intervened, the same detective later presented Hector and his brother with the same false choice, and secretly intercepted them on the way to school rather than going to their home where their grandmother could monitor the situation. Even when Hector ultimately testified, he may very well have believed his testimony would not have significant consequences beyond ensuring that he would be able to return to his grandmother's home rather than being placed in a juvenile or foster facility. Moreover, when all of this occurred, no one behaved as though there was anything inappropriate

³⁰⁵ Independently of untrustworthiness, courts will exclude confessions from evidence where police deception offends "basic societal notions of fairness". Commonwealth v. Jones, 322 A.2d 119, 126 (Pa. 1974) (holding that Commonwealth satisfied its burden of showing defendant's will was not overborne). Thus,

"The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves."

Spano v. New York, 360 U.S. 315, 320-21 (1959) (unanimously reversing first-degree murder conviction where law enforcement used third party to elicit confession). This case certainly presents such a scenario. It would offend general principles of decency and fair play to condone a detective's violating protective procedures for children and secretly threatening a scared young boy after a murder with the possibility of being taken from his home unless he testifies to something he insists he did not see. The dearth of other evidence in the case amplifies the wrong and increases the risk that society will lose with a wrongful conviction.

about the boys being isolated from their family and questioned, so Hector may easily have concluded that the detective had the power he implied he had.

These circumstances through a child's eyes are coercive. In Kaupp v. Texas, three police officers took 17-year-old Kaupp from his home dressed only in underwear in the early morning hours, placed him into handcuffs, drove him to the scene of the crime and then to a police station where police officers questioned him about a murder. 538 U.S. 626, 629-32 (2003). The Supreme Court held these circumstances constituted an arrest of the boy under the Fourth Amendment because, even though he cooperated with police, a reasonable person would not feel free to leave. Id. at 630-32. There is no reason to think Kaupp's answer to the officers' questions was "more than a mere submission to a claim of lawful authority." Id. at 631 (quotations omitted). Likewise, though the context was one of interrogation in this case, Hector's compliance with a detective's covert directives, under the circumstances, was an understandable submission to the detective's claim of lawful authority.

Hector's testimony was in itself completely compelling. Legal precedents show that other courts view the types of practices that were used with the children in this case as providing unreliable statements. This Court agrees.

E. Prosecutorial misconduct at Jose Medina’s criminal trial so undermined the truth determining process that no reliable adjudication of his guilt or innocence could have occurred.

- 1. The prosecution withheld favorable evidence that young Hector Toro never saw Jose Medina with a knife saying he would kill someone, and that law enforcement questioned him in violation of procedure and coerced him into incriminating Jose Medina (Brady).**

Jose Medina claims the Commonwealth violated his right to due process by withholding evidence material to his innocence. 42 Pa.C.S. 9543(a)(2)(i); Brady v. Maryland, 373 U.S. 83 (1963) (requiring disclosure of favorable evidence regardless of good or bad faith). To support this claim he must show, by a preponderance, that: (1) the prosecution willfully or inadvertently withheld evidence; (2) it was favorable to him because of its impeachment or exculpatory value; and (3) the withheld evidence was material because there is a reasonable probability the outcome of trial would be different had it been known. See Napue v. Illinois, 360 U.S. 264, 269 (1959) (Brady applies to exculpatory and impeachment evidence); Lambert v. Blackwell, 387 F.3d 210, 252 (3d Cir. 2004) (same). He must also demonstrate that he did not know about and could not have uncovered the evidence at trial with reasonable diligence, and that under the circumstances of this case, withholding the evidence “so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place” at trial. Sattazahn, 952 A.2d at 658; 42 Pa. C.S.A. § 9543 (a)(2)(i). Jose Medina has satisfied this burden.

- a) **The prosecution is responsible when law enforcement officers working on its behalf fail to disclose favorable material evidence: at least one detective knew he coerced child witnesses by threatening them and violating child witness procedures and knew Hector Toro testified to something he insisted he had not seen.**

The prosecution has an affirmative, continuing duty to disclose evidence material to a defendant's guilt or punishment even if the defendant does not ask for it, and must do so "as it is discovered". U.S. v. Agurs, 427 US 97, 107 (1976); Commonwealth v. Montgomery, 626 A.2d 109, 112 (Pa. 1993). See also Pa.R.C.P 573(D); Kyles v. Whitely, 514 U.S. 419, 437 (1995) (prosecution should not fail to disclose "at the earliest feasible opportunity . . . evidence or information which tends to negate the guilt of the accused or mitigate the offense charged . . ."). The Pennsylvania Supreme Court has held, that "the prosecution's Brady obligation clearly extends to exculpatory evidence in the files of police agencies of the same government bringing the prosecution." Commonwealth v. Burke, 781 A.2d 1136, 1142 n.5 (Pa. 2001) (finding a Brady violation where police officers were aware of undisclosed favorable evidence even when prosecutors were "completely unaware of the relevant statements"). See also Commonwealth v. Sullivan, 820 A.2d 795, 803 (Pa. Super. Ct. 2003) (same); Pelullo, 399 F.3d 197, 216 n.20 (3d Cir. 1995) ("The prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it.")

The Pennsylvania Supreme Court in Burke adopted the holding of Kyles v. Whitely which extended the prosecution's duty to disclose favorable information to include police officers:

"[i]n Kyles, the United States Supreme Court specifically rejected the notion that Brady does not apply to evidence 'known only to police

investigators and not to the prosecutor.’ As the Supreme Court explained in Kyles:

‘To accommodate [the view that the prosecution is not accountable for undisclosed evidence known only to the police] would . . . amount to a serious change of course from the Brady line of cases. In the State’s favor it may be said that no one doubts that police investigators sometimes fail to inform a prosecutor of all they know. But neither is there any serious doubt that “procedures and regulations can be established to carry [the prosecutor’s] burden and to insure communication of all relevant information on each case to every lawyer who deals with it”. . . .[T]he prosecutor has the means to discharge the government’s Brady responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government’s obligation to ensure fair trials.”

Burke, 781 A.2d at 1142 (citing Kyles, 514 U.S.at 438; Strickler v. Greene, 527 U.S. 280-81 (Pa. 1999)).³⁰⁶

The Third Circuit has held similarly that the prosecution violates Brady requirements when it fails to disclose favorable evidence within the prosecutor’s actual knowledge **or** within the knowledge of others “acting on the government’s behalf in the case, including the police.” United States v. Risha, 445 F.3d 298, 303 (3d Cir. 2006) (citing Kyles, 514 U.S. at 437). Prosecutors have an affirmative obligation “to learn of any favorable evidence known to the others acting on the government’s behalf in the case” when agencies conduct a joint investigation or share labor or resources. Pelullo, 399 F.3d 197, 216, 218 (3d Cir. 2005) (citing Kyles, 514 U.S. at 437). Courts refuse to “draw a distinction between different agencies under the same government, focusing instead upon the ‘prosecution team’ which includes both investigative and prosecutorial personnel.” United States v. Perdomo, 929 F.2d 967, 970 (3d Cir. 1991). Applying this

³⁰⁶ The prosecution is not required to bring evidence available from non-governmental sources to the defense’s attention. See Commonwealth v. Paddy, 800 A.2d 294, 305 (Pa. 2002) (citing United States v. Clark, 928 F.2d 733, 738 (6th Cir. 1991)).

standard, the Third Circuit held that the court’s “inquiry into the prosecution’s knowledge need not stop at the prosecutor himself but should also extend to whether any of the ... police officers knew of [the undisclosed favorable evidence]. . . .” Id.

Here, the Philadelphia detectives who investigated the murder of William Bogan were part of an agency “of the same government bringing the prosecution” – the Commonwealth of Pennsylvania and the City of Philadelphia. See Burke, 781 A.2d at 1143. Thus, the prosecution is responsible for any failure by detectives or other officers investigating William Bogan’s murder to disclose material evidence to Jose Medina’s defense counsel. The Commonwealth violated Jose Medina’s due process rights when the detective failed to disclose that Hector Toro insisted he did not see Jose Medina do anything incriminating and that he coerced and threatened the boys into testifying. The prosecution cannot escape liability for this Brady violation with its claim that it was unaware of the withheld information.

In Thornton the Third Circuit rejected the prosecution’s assertion that it was not aware of, and not responsible for DEA agents withholding evidence that it paid witnesses to testify against the defendants. The court reasoned,

“That is hardly an acceptable excuse. The prosecutors have an obligation to make a thorough inquiry of all enforcement agencies that had a potential connection with the witnesses. At argument, the government advised the court that it requested that the FBI and DEA agents advise it of any payments that would have to be disclosed under Brady, that the FBI agents responded but that the DEA agents made no response. There is no indication that the prosecutors made any follow-up inquiry. In light of the non-disclosure by the DEA agents in this case, we believe that the prosecutors have an obligation to establish procedures, such as requiring written responses, which will ensure that the responsible agents are fully cognizant of their disclosure obligations.”

U.S. v. Thornton, 1 F.3d 149, 158 (3d Cir. 1993) (citing Perdomo, 929 F.2d at 970-71) (emphasis provided).

The prosecution in Jose Medina's trial was obligated to make an inquiry of the law enforcement officers connected to Hector Toro, including detectives who interviewed him and brought him to trial, to obtain evidence that should be disclosed to Jose Medina. The prosecution's assertions that they were never aware of any improper detective activity or this favorable evidence is no barrier to liability for a Brady violation since police officers, including the unidentified transporting detective, were aware of this evidence at the time of trial and failed to disclose it to Jose Medina's counsel.

b) The undisclosed evidence was favorable to Jose Medina because of its exculpatory and impeachment value.

A petitioner asserting a claim under Brady v. Maryland must demonstrate that the suppressed evidence is favorable because of its impeachment or exculpatory value. See Napue v. Illinois, 360 U.S. 264, 269 (1959) (Brady applies to exculpatory and impeachment evidence); Lambert v. Blackwell, 387 F.3d 210, 252 (3d Cir. 2004). Here, evidence that Hector Toro did not see Jose Medina with a knife before the murder and that police officers threatened and coached him into testify that he had, constitutes both exculpatory and impeachment evidence. It is clearly favorable exculpatory evidence as previously discussed. It also has significant impeachment value. The testimony of both boys was contradictory and reluctant. Both boys were described as looking scared. If the jury knew that they had been threatened to testify under penalty of being removed from their home, the boys' fear would be interpreted as incited by the detective's threats and the contradictory testimony likely would be interpreted as being due to their not having witnessed things as they described. The case against Jose Medina was already

weak. Threats by detectives to influence and extract the frightened boys' testimony would have dealt a major blow to the Commonwealth's case.

c) The undisclosed evidence was material to Jose Medina's guilt or innocence: there is a reasonable probability that had it been introduced, the outcome of trial would have been different.

Withheld evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."³⁰⁷ Strickler, 527 U.S. 263, 280 (quoting Bagley, 473 U.S. 667, 682 (1985)). This standard is lower than that applicable to Jose Medina's newly discovered evidence recantation claim; in a Brady claim, he need not show the withheld evidence would have compelled a different verdict at trial but that there was a reasonable probability that it would.

The alleged Brady evidence "must be evaluated in the context of the entire record" to determine whether it creates a reasonable doubt about the defendant's guilt. Commonwealth v. Copenhefer, 719 A.2d 242, 259 (Pa. 1998). If the evidence does raise a reasonable doubt, a new trial is appropriate. Id. Conversely,

"if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. . . . In order to be entitled to a new trial owing to the prosecution's failure to disclose evidence bearing on the credibility of its witnesses, appellant must demonstrate that the reliability of the witness may well be determinative of his guilt or innocence."

Id. Jose Medina has satisfied this standard by a preponderance of the evidence.

To show a Brady violation occurred Jose Medina does not need to prove that he would have been acquitted or that the undisclosed evidence would have left the

³⁰⁷ The Supreme Court borrowed the "reasonable probability" standard from Strickland v. Washington, 466 U.S. 668, 694 (1984), which defined the level of prejudice needed to find ineffective assistance of counsel.

Commonwealth with insufficient evidence to convict him. Kyles, 514 U.S. at 434-35 (1995) (granting habeas relief on basis of Brady claim). He only needs to show that the evidence undermines confidence in the verdict rendered at trial. Id. at 434, (quoting Bagley, 473 U.S. at 678).³⁰⁸ As the United States Supreme Court has explained,

“[The] touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. **The question is not whether the defendant would more likely than not have received a different verdict** with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. **A “reasonable probability” of a different result is accordingly shown when the government’s evidentiary suppression “undermines confidence” in the outcome of the trial.**

...

The [materiality analysis] is not a sufficiency of evidence test. A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict. **One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.**”

Kyles, 514 U.S. at 434-35 (emphasis provided).

In United States v. Agurs the Court explained,

“If, for example, one of only two eyewitnesses to a crime had told the prosecutor that the defendant was definitely not its perpetrator and if this statement was not disclosed to the defense, no court would hesitate to reverse a conviction resting on the testimony of the other eyewitness. But if there were fifty eyewitnesses, forty-nine of whom identified the defendant, and the prosecutor neglected to reveal that the other, who was without his badly needed glasses on the misty evening of the crime, had said that the criminal looked something like the defendant but he could not be sure as he had only had a brief glimpse, the result might well be different.”

³⁰⁸ See also Strickler v. Greene, 527 U.S. 263, 300 (1999) (Souter, J. concurring in part and dissenting in part) (noting that the term “reasonable probability” is misleading because “probability” is naturally read as the cognate of “probably”).

427 U.S. 97, 113 n.21 (1976).

Similarly, in Kyles the undisclosed evidence included statements from eye witnesses that police took after the murder, inconsistent statements of the government's informant, and evidence linking the informant to another unrelated murder. 514 U.S. at 422, 428, 429. The Court held a new trial was required because the undisclosed evidence contradicted the testimony of key eyewitnesses at trial and would have undermined the value of the witness' trial testimony. Id. at 441. It did not matter that there was sufficient evidence to convict the defendant because in reaching the verdict the jury would have relied on the unchallenged trial testimony. Id. at 435.

The Pennsylvania Superior Court has found that when a Commonwealth officer intimidates a witness into withholding favorable testimony, a defendant's due process rights are violated. In Commonwealth v. Jennings, the prosecution told the defense's principle witness, a young boy, that it could charge him as a participant in the general assault, "a role which twenty to thirty other youths had also played, and for which no one had been prosecuted theretofore" and that he could incriminate himself if he testified. 311 A.2d 720, 721-22 (Pa. Super. Ct. 1973). The prosecutor's remarks led the witness to "state on the stand that he was 'intimidated' and 'scared of' the prosecutor." The defendant argued that the young witness had observed a fight and "would have given evidence tending to prove that [the defendant] did not participate in the assault upon [the victim]." Id. at 721 n.2. The Superior Court found that the prosecutor's conduct "could have had no other effect on the witness . . . except to convince him that the price of his testimony was his arrest regardless of the nature of his testimony" and such intimidation "constituted a denial of the appellant's Fourteenth

Amendment rights to due process and a fair trial” in violation of Brady v. Maryland. Id. at 721-722. Cf. Webb v. Texas, 409 U.S. 95, 98 (1972) (“judge’s threatening remarks [regarding the dangers of perjury], directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment” because the “unnecessarily strong terms used by the judge could well have exerted such duress on the witness’ mind as to preclude him from making a free and voluntary choice whether or not to testify.”)

The undisclosed evidence in this case more severely undermined the verdict than the scenario described by the Supreme Court in Agurs and Kyles. The credibility of the two child witnesses, Hector and Michael, was central to the prosecution’s case. Any information that one of them claimed not to see anything and that both were pressured by a detective to testify or risk juvenile placement would go directly to their believability. Jose Medina’s trial counsel attempted to undermine Michael Toro’s credibility by showing that, in the preliminary hearing, Michael both claimed and denied that he saw Jose Medina stab William Bogan. Medina, 461 F.3d at 429. He also highlighted inconsistencies in both boys’ testimony at trial. The suppressed evidence would have provided the jury with an alternate explanation for the boys’ inconsistent testimony – namely that it was perjured and police officers coerced the boys into making the statements. See, e.g., U.S. v. Perdomo, 929 F.2d at 971-72 (undisclosed evidence would have presented a new and different ground for impeachment and was material). In light of the trial record, the “value” of the testimony of the two eyewitnesses “would have been substantially reduced or destroyed” by information that the detective secured the testimony through threats, making the state’s case “markedly weaker” given the

evidence as a whole. Kyles, 514 U.S. at 441. This is true even if there had been sufficient other evidence upon which to convict Jose Medina – which there was not. Id. at 435 (verdict was undermined in spite of the possibility that “the jury might have found the eyewitness testimony of [other witnesses] sufficient to convict.”).

Had the evidence been disclosed, the jury would have been entitled to conclude that the prosecution narrowly focused its investigation on Jose Medina, that its strongest evidence was fabricated, that Jose Medina in fact intended to go to a friend’s daughter’s birthday party, and that he had no knife, stolen wallet or blood on his white sweatshirt because he was not the murderer. Thus, the failure to disclose evidence of the detective’s conduct undermines confidence in the jury’s verdict. Even if the jury never learned of the coercion, evidence that young Hector and Michael Toro were questioned and made to testify at a murder trial without parental support, and in violation of established procedures, would certainly have called into question the reliability of their testimony and would have provided the defense with a different ground for impeaching both boys’ trial testimony.

Finally, the materiality inquiry calls for consideration of the totality of the circumstances, including the consequences of non-disclosure on the defense’s trial preparation. Perdomo, 929 F.2d at 971. Had defense counsel possessed the evidence, not only would he have been able to impeach both boys about the detective’s coercion but he may have prepared for trial differently and conducted additional investigation.

Jose Medina’s is not a case where there was overwhelming evidence of his guilt such that the undisclosed evidence would have had no impact upon the outcome of

trial. See e.g., U.S. v. Thornton, 1 F.3d 149, 159 (3d Cir. 1993) (affirming denial of new trial because with overwhelming evidence establishing defendant's guilt, no reasonable probability existed that disclosure of witness payments would affect outcome of trial). To the contrary, the evidence was weak and, indeed, Jose Medina's conviction has twice been vacated due to weaknesses in the evidence and challenges related to Michael's competency. Although not necessary to this Court's decision, Michael's trial testimony should not even be considered, leaving only Hector's testimony. Had defense counsel been provided with the additional weapon of this exculpatory and impeaching evidence, it is hard to conceive that the outcome would have been anything other than an acquittal. The detective's failure to disclose what happened raises reasonable doubts about Jose Medina's guilt, undermines confidence in the verdict and requires that Jose Medina receive a new trial.

d) Jose Medina could not have discovered with reasonable diligence that a detective coerced and threatened the boys and questioned them in violation of established procedures for child witnesses.

As already discussed extensively in earlier sections, Jose Medina has already satisfied the requirement that he did not know and could not have uncovered the suppressed evidence with reasonable diligence. See Sattazahn, 952 A.2d at 658. There is no evidence in the record showing that the defense knew that young Hector Toro was questioned in violation of established procedures designed for children testifying at trial or lied because he was being coerced. The evidence was first revealed to Jose Medina at the time that Hector Toro approached Jose Medina in 2006 to recant his trial testimony and at the evidentiary hearing before this Court. The Commonwealth's prosecutors maintain that they were unaware of the detective's

conduct. If the misconduct was not obvious to the prosecuting attorneys, Jose Medina had even less reason to know of, or find out about it.

2. The Commonwealth knowingly presented young Hector Toro's false testimony to the jury and the trial court in violation of due process (Mooney).

Jose Medina's petition for PCRA relief asserts that the Commonwealth violated his due process rights by presenting Hector Toro's perjured testimony at trial and that the Commonwealth's actions so undermined the truth-determining process at trial that no reliable adjudication was possible. (Pro Se Pet. 2-4, 6-8.) This Court agrees.

When the Commonwealth secures a conviction using testimony it knows or should know is false, it violates a defendant's Fourteenth Amendment due process rights. Mooney v. Hollohan, 294 U.S. 103, 112 (1935); Lambert v. Blackwell, 387 F.3d 210, 242 (3rd Cir. 2004) (citing Agurs, 427 U.S. at 103).

"[D]eliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice. . . . [T]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears. [This is true] irrespective of the good faith or bad faith of the prosecution. When the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule. . . . A new trial is required if the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury"

United States v. Giglio, 405 U.S. at 153-54 (1972) (citations and quotations omitted).

The prohibition against the use of false testimony is rooted in basic notions of justice.

Thus, due process is not satisfied:

"if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation."

294 U.S. at 112. The same rules apply when, although the government does not solicit the perjured testimony, it fails to correct it when it emerges at trial. Napue v. Illinois, 360 U.S. 264, 269 (1959).

To obtain relief under the PCRA due to the prosecution's knowing use of false testimony, Jose Medina must show, by a preponderance, that: a trial witness committed perjury, the government knew or should have known of the perjury, the testimony went uncorrected at trial, and there is a reasonable likelihood that the false testimony could have affected the verdict. 405 U.S. at 153-54. See also Commonwealth v. Romansky, 702 A.2d 1064, 1064, 1067-68 (Pa. Super. Ct. 1997). Just as with Brady violations, to warrant relief, the Mooney violation must have "in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place" at trial. 42 Pa. C.S.A. § 9543 (a)(2)(i).

a) Young Hector Toro committed perjury at Jose Medina's criminal trial.

As discussed above, Hector Toro credibly testified that, in truth, he never saw Jose Medina with a weapon, announcing that he intended to "kill somebody" on the night that William Bogan was killed or any other events that related to murder. Jose Medina has satisfied his burden of demonstrating the perjury by a preponderance of the evidence.

b) The government knew Hector Toro committed perjury: an unnamed detective acting on behalf of the Commonwealth obtained his false testimony by threatening and coercing him.

The credible PCRA evidence showed that an unnamed detective knew that Hector insisted he had not seen anything incriminating and used 11-year-old Hector Toro's perjured testimony in violation of Jose Medina's due process rights. Prohibitions against providing false testimony apply to law enforcement officers; Jose Medina need not prove that the particular prosecuting attorney at trial knew the testimony was perjured.

The United States Supreme Court in Mooney v. Holohan applied the prohibition against using false testimony to "prosecuting officers" and the "State" generally; Mooney applies to the actions of law enforcement.³⁰⁹ The Mooney Court explained,

"[T]he action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of its laws, may constitute state action within the purview of the Fourteenth Amendment. That Amendment governs any action of a State, 'whether through its legislature, through its courts, or through its executive or administrative officers.'"

Mooney, 294 U.S. at 112-13 (1935) (citations omitted). Accord Lambert, 387 F.3d 210, 242, 252, 266 (3d Cir. 2004) (referring to "the government" as entity maintaining a Mooney duty); Napue, 360 U.S. at 269 (1959) (discussing Mooney duty of "representatives of the state"). See also Giglio, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government.") (citing Restatement (Second) of Agency § 272).

³⁰⁹ The United States Supreme Court has identified the use of false testimony as one situation in which Brady applies. See United States v. Agurs, 427 U.S. 97, 103 (Brady v. Maryland applies to the knowing presentation of false testimony and suppression of favorable evidence).

The Third Circuit has made clear that when law enforcement officers procure false testimony and present it at trial, the state is liable for the resulting Mooney violation even if the prosecuting officers do not know the testimony is perjured. Curran v. Delaware, 259 F.2d 707, 712-13 (3d Cir. 1958) In Curran, a police detective falsely testified that the statements presented at trial were the only statements the defendants gave to police but in fact the defendants had given multiple statements to police, some of which the police destroyed before trial. 259 F.2d 707, 709-10 (3d Cir. 1958). Rejecting the State’s argument that it was not liable for the perjury because the “prosecuting officers” did not procure it or know about it, the court explained,

“Without further interpretation of the Mooney decision, we conclude that this issue has been settled by Pyle v. State of Kansas,

An examination of the record in the Pyle case discloses, as the learned Judge below pointed out, that **the prosecuting officer was in no wise a party to or cognizant of the perjured testimony given by certain witnesses of the State of Kansas or of the fact that the law enforcement officers had taken steps to procure false testimony favorable to the prosecution.** We conclude, as did the court below, that the knowingly false testimony of Detective Rodenheiser under the circumstances of the case at bar was sufficient to cause the defendants’ trial to pass the line of tolerable imperfection and fall into the field of fundamental unfairness. In addition when we consider that the defendants were deprived of inquiry on the issue of why statements given by them were destroyed, we can entertain no doubt that the court below did not err in determining that the [habeas] writ should issue. On the whole record we find that the defendants were denied due process of law as guaranteed to them by the Fourteenth Amendment.”

Curran v. Delaware, 259 F.2d 707, 713 (3d Cir. 1958) (citing Pyle v. Kansas, 317 U.S. 213 (1942)). See also Commonwealth v. Wilder, 337 A.2d 564, 567 n.6 (Pa. 1975) (“The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State’s Attorney, were guilty of the nondisclosure.”) (citations omitted); Limone v. Condon, 372 F.3d 39, 47 (1st Cir. 1997) (holding that “[i]t strains credulity to

suggest that FBI agents and police officers, duly sworn to uphold the law, do not fall within the compass of [Mooney/Napue] proscriptions”); Accord Giglio, 405 U.S. 150, 150-54 (1972) (government’s failure to correct a witness’ perjured trial testimony denying he had a leniency agreement violated Mooney even though prosecuting trial attorney asserted he was unaware of, and not involved in the leniency agreement).

In Commonwealth v. Hallowell, the Pennsylvania Supreme Court rejected the Commonwealth’s argument that a defendant bringing a claim under Mooney cannot prevail unless there is evidence that “the **particular** assistant district attorney at the trial was aware of the perjured and misleading testimony” as well as the Commonwealth’s argument that the “law does not require the prosecutor to reveal perjured and misleading testimony when he is unaware of it, for such would be impossible.” 383 A.2d 909, 911 (Pa. 1978) (affirming order granting new trial where prosecution provided false testimony that co-defendant had no leniency agreement with the State) (emphasis in original).

The United States Supreme Court has held that where a petitioner alleges that “prosecuting authorities” convicted him using perjured testimony obtained by coercion and threats, this allegation “if proven, would entitle petitioner to release from his present custody.” Pyle, 317 U.S. 213, 215-16 (1942) (reversing denial of writ of habeas corpus), discussed in United States v. Oxman, 740 F.2d 1298, 1307-11 (3d Cir. 1984). Pyle alleged Kansas law enforcement authorities “coerced and threatened” one witness into giving false testimony that harmed the petitioner’s defense and suppressed the favorable testimony of two others through “threat and coercion.” Pyle, 317 U.S. at 214-215. See also 259 F.2d at 712-714.

Jose Medina has proven, by a preponderance, that prosecuting authorities used perjured testimony against him under circumstances more egregious than those in Curran, Hallowell, or Pyle. This case presents the atypical scenario where the detective was actively attempting to secure false testimony and succeeded. Hector Toro's credible testimony was that the detective directed him to "say what he was telling me to say to a judge", that the detective angrily pointed to a piece of paper that he said Hector must testify about, that Hector was repeatedly threatened with being "locked up" if he did not cooperate and that Michael was crying during these interactions. (See P-7/C-1, Hector Toro Aff., Oct. 25, 2006, ¶¶ 10-12; PCRA Tr. 35:22-36:10; 53:5-6; 53:12-25; 54:18-55:2; 55:5-56:3, July 20, 2010.) The detective knew that his threats accomplished his goal of getting false testimony because after the boys testified as he instructed, he drove them back to their neighborhood and congratulated them that they had done a "good job." (See Ex. P-3, Hector Toro Statement.)

There are circumstances on the record that not only corroborate Hector Toro's uncontradicted and credible description of the detective coercing him to testify falsely but that should have alerted others from the prosecution team that something was wrong. It was peculiar to have the complete absence of any family members involved or present when the boys' testimony played a central role in a trial for a murder that occurred in their own neighborhood. Both boys appeared terrified and reluctant to testify, there was a suggestion of threats and still no one on the prosecution team testified to reaching out to their family. At trial, Hector mysteriously denied even speaking with a detective which was obviously false since he had been sitting with that same detective in the room adjoining the courtroom prior to testifying. Both boys

testified in such a contradictory manner that their testimony suggested they had not seen the events. When the trial court suggested Michael testify later when he refused to answer questions, the assistant district attorney acknowledged that she knew his testimony would not likely improve by responding, “He won’t be any better tomorrow.” Trial Tr. 93:7-11. Then, when Michael broke down on the stand, a detective met with him. The assistant district attorney described that Michael was sobbing and pleading, “I can’t go back. I can’t go back.”³¹⁰ But again, his family was not called. Nevertheless, the law is clear that others from the prosecution team did not need to be aware based on these unusual events that false testimony was being procured. The detective’s conduct alone was sufficient to constitute a violation.

Hector Toro’s credible testimony about the unnamed detective’s procurement and knowing presentation of his perjured testimony at Jose Medina’s trial establishes that a law enforcement officer, working on behalf of the Commonwealth, knew young Hector Toro’s testimony was perjured and committed a fraud on the trial court and the jury by presenting it against Jose Medina. Even if this Court were to accept the Commonwealth’s PCRA evidence that the prosecuting attorney at Jose Medina’s trial did not know young Hector Toro’s testimony was perjured, the Commonwealth is still responsible when a member of the prosecution team knowingly procures false testimony.

Just as with a Brady violation, the Commonwealth does not escape responsibility for a violation of Mooney by claiming that its prosecuting trial attorney was ignorant of Hector Toro’s perjured testimony or the threats used to obtain it. To do otherwise, would permit the Commonwealth to abdicate responsibility and encourage other

³¹⁰ Trial Tr. 102:21-22; PCRA Tr. 35:3-7, Sept. 2, 2010.

members of the prosecution team to turn a blind eye to wrongdoing. The principles behind Mooney are not based on any goal of punishing or blaming a particular person for allowing false testimony to be presented but rather are rooted in constitutional due process guarantees that trials must be fair, and convictions not obtained through the prosecution's knowing use of false testimony. If any member of the team cheats in this regard, the outcome cannot be trusted as being fair.

c) Hector Toro's perjured testimony was material: there is a reasonable likelihood that it affected the verdict at Jose Medina's trial.

Perjured testimony is material under Mooney if "there is any reasonable likelihood that the false testimony could have affected the verdict." Lambert, 387 F.3d at 242 (citation omitted). See also Napue, 360 U.S. at 271; Giglio v. U.S., 405 U.S. at 154.³¹¹ Just as with a Brady violation this standard is lower than that applicable to Jose Medina's newly discovered evidence recantation claim; he need not show the absence of perjured testimony would have compelled a different verdict at trial.

The United States Supreme Court has applied the materiality standard articulated in Brady v. Maryland, to claims that false testimony was knowingly presented at trial. The terms "reasonable likelihood" and "reasonable possibility" are treated as synonyms:

"Although this [reasonable likelihood] rule is stated in terms that treat the knowing use of perjured testimony as error subject to harmless-error review, it may as easily be stated as a materiality standard under which the fact that testimony is

³¹¹ Justice Souter argued in Strickler that the difference between the "reasonable probability" standard used in Brady claims (where the good or bad faith of the prosecutor is immaterial) and the "reasonable likelihood/reasonable possibility" standard is slight. Strickler, 527 U.S. at 300 (Souter, J. concurring in part and dissenting in part). See also Chapman v. California, which established there is little, if any difference between the "harmless beyond a reasonable doubt" standard and the "reasonable likelihood/reasonable possibility" standard articulated in Napue. 386 U.S. 18, 24 (1967).

perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt.”

Bagley, 473 U.S. at 679-80. To determine its materiality, perjured testimony “must be evaluated in the context of the entire record” to determine whether it creates a reasonable doubt about the defendant’s guilt. United States v. Agurs, 427 U.S. 97, 112 (1976); Commonwealth v. Copenhefer, 719 A.2d 242, 259 (Pa. 1998) (same). See also Commonwealth v. Romansky, 702 A.2d 1064, 1072 (Pa. Super. Ct. 1997). Here, Hector Toro’s perjured testimony is material and not harmless.

Perjured testimony is reasonably likely to have affected the verdict at trial when it bears on the credibility of the witness and when it may have affected whether the jury believed the defendant’s testimony. In Giglio the Court found that the perjured testimony was material because “the Government’s case depended almost entirely on [the witness’s] testimony”, and without it “there could have been no indictment and no evidence to carry the case to the jury.” 405 U.S. at 154. The government’s key witness’s credibility was “an important issue in the case.” Id. at 155. Since the witness lied at trial and stated he did not have a leniency agreement with the Government, the defendant was entitled to a new trial. Id. at 154-55. See also Napue, 360 U.S. at 270 (with knowledge of leniency agreement jury “might well have concluded that [the witness] had fabricated testimony in order to curry the favor of the [attorney] prosecuting the case . . .”).

The Pennsylvania Superior Court and Third Circuit have found perjured testimony material under similar circumstances. In Commonwealth v. Romansky, a witness falsely testified he was never charged with the theft at issue and was not testifying against Romansky to avoid prosecution. 702 A.2d 1064, 1065, 1072 (Pa.

Super. 1997). His testimony was reasonably likely to have affected the jury's verdict because Romansky had alleged the witness was the one responsible for the theft and evidence implicated the witness in the theft. Id. at 1065, 1071-72. The witness's credibility was therefore a key factor in the case, and the jury may have acquitted had it known the witness was lying. Id. Perjured testimony was also material in Curran v. Delaware where a police detective falsely testified that statements of defendants presented at trial were their only statements to police. 259 F.2d 707, 709-10. Had the jury known the defendants gave additional statements – some of which the police destroyed – defense counsel could have argued police officers selectively presented evidence favorable to the Commonwealth, while excluding less favorable evidence. Id. at 711-12. Since police officers' testimony "is usually given credence by members of the jury" the false testimony by the police detective must have caused the jury to disbelieve the defendant's testimony on the key issue of consent in Curran's trial for sexual assault. Id. at 712.

Here, like in Giglio and Romansky, Hector's testimony was crucial at trial. If the jury had known Hector Toro lied, there would have been little left of the case against Jose Medina. Hector's trial testimony was critical to demonstrating that Jose Medina had a plan and weapon. Hector's testimony also bolstered Michael's otherwise problematic testimony. Testimony that Hector and Michael both saw Jose Medina with a knife threatening to kill would be more likely to be believed than if just one child said it. Likewise, Michael's claim that he saw Jose Medina carry out that threat by stabbing William Bogan would be less likely to be believed if supported by Hector's testimony of seeing him with a knife. Conversely, if Hector testified that he did not see Jose Medina

in the restaurant with the knife making threats, then Michael, who was with him, probably did not either. Hector's recantation testimony would impeach Michael's already inconsistent testimony. Michael said he both did and did not see Jose Medina stab the victim. If Hector said Jose was never in the Chinese restaurant with a weapon, Michael's testimony would lose veracity. Hector and Michael Toro were the only witnesses connecting Jose Medina to the murder and their testimony went to the ultimate issue of guilt or innocence. Finally, if, consistent with the Third Circuit's ruling, Michael's testimony is not considered, and Hector's testimony is known to be fabricated, then the only legitimate verdict would be an acquittal. Here, there is more than a reasonable likelihood that Hector Toro's perjured testimony affected the verdict at Jose Medina's trial.

3. The Commonwealth's failure to disclose favorable evidence and knowing use of perjured testimony at Jose Medina's trial so undermined the truth-determining process that no reliable adjudication of his guilt or innocence could have taken place.

The constitutional violations of suppression of evidence (Brady) and use of perjured testimony (Mooney) that Jose Medina alleges must have "so undermined the truth determining process that no reliable adjudication of guilt or innocence could have taken place" in order to mandate a new trial. 42 Pa.C.S. § 9543 (a)(2)(i). See also Commonwealth v. Fletcher, 986 A.2d 759, 784 (Pa. 2009) (affirming judgment of conviction and death sentence and denying PCRA relief).

Here, the suppression of evidence and the use of perjured testimony independently and collectively meet this standard. Nothing is more important to the integrity of a verdict than the jury receiving reliable and truthful evidence. In this case there was a dearth of evidence to begin with, so that when that evidence is tainted the

consequences are magnified. The detective's misconduct – terrifying the only two child witnesses with the loss of their family if they did not testify and knowingly allowing the perjured testimony of at least one child witness – undermined the truth determining process and prevented any reliable adjudication of Jose Medina's guilt or innocence. The constitutional violations here are far more egregious than those found to undermine the truth determining process in other cases. See, e.g., Commonwealth v. Thomas, 578 A.2d 422, 428-29 (Pa. Super. Ct. 1990) (conviction based on inadmissible hearsay undermines confidence in verdict); Commonwealth v. Perlman, 572 A.2d 2, 4-5 (Pa. Super. Ct. 1990) (claim involving sufficiency of evidence "necessarily implicates the truth-determining process" and "raises a question whether an 'innocent individual' has been convicted.").

The totality of the new evidence that Jose Medina presents in support of this PCRA petition demonstrates that a miscarriage of justice occurred at his trial. It is more likely than not that no reasonable juror would have found Jose Medina guilty beyond a reasonable doubt had this new evidence been available at trial.

F. To avoid a miscarriage of justice, evidence of a detective's coercion of two child witnesses and the recantation of one child witness requires reevaluating court rulings relating to the failure to establish competency of the child witnesses.

Evidence that a detective threatened two child witnesses, and that one child witness now admits to testifying falsely, casts the legal error of failing to test whether both child witnesses were competent in a new and even more disturbing light. The two children's testimony constituted the entire evidence³¹² against Jose Medina; without it,

³¹² Maria Caraballo's testimony simply placed Jose Medina in the general neighborhood and would be insufficient evidence upon which to convict Jose Medina as a matter of law. Commonwealth v. Keblitis, 456 A.2d 149 (Pa. 1983).

he would not have been convicted. The new evidence shows that the trial court's failure to assess whether their testimony was grounded in their own experience and memory, and to test the children's understanding of their duty to testify truthfully, was more than procedural error; it substantively affected the trial's outcome. This error permitted the Commonwealth to present the boys' testimony as the primary evidence against Jose Medina without a determination as to its integrity. The new evidence³¹³ requires this Court to evaluate the entire record, including the failure to test the children's competency, and to grant Jose Medina a new trial to prevent a miscarriage of justice.

This Court recognizes that the issue of both boys' competency was raised in earlier state and federal proceedings. However, the earlier courts that evaluated the lack of a proper competency determination at trial did so in the absence of the alarming evidence that a detective threatened the two young boys that they would be removed from their home if they did not testify against Jose Medina and that one of them now says this pressure led him to lie. This new information goes to the heart of why competency in children must always be established before they testify to protect against situations where vulnerable child witnesses are pressured, misled or tainted into testifying falsely. The Court must evaluate the failure to establish Hector and Michael's competency against the backdrop of law enforcement's pressures and Hector's

³¹³ As discussed above, Lawson does not bar newly discovered evidence claims brought in a subsequent PCRA petition. Newly discovered evidence claims are supported by information that could not be obtained at or prior to trial with reasonable diligence whereas Lawson precludes repetitive PCRA petitions alleging claims that could have been brought in an earlier petition but were not. See Lawson, 549 A.2d 107, 109-10 (dismissing fourth petition claiming ineffective assistance filed after "boilerplate motions" for a new trial, post trial motions, multiple direct appeals and petitions for allowance of appeal). "In Pennsylvania, much of the discussion of serial post-conviction review was motivated by instances in which boilerplate allegations of deficient stewardship were treated as 'magic words' supporting the affordance of review." Commonwealth v. Beasley, 967 A.2d 376, 393 n.9 (Pa. 2009) (distinguishing a second petition that is the first opportunity to allege ineffective assistance of counsel at sentencing from "abusive litigation").

recantation because it demonstrates that “the proceedings resulting in [Jose Medina’s] conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate.” Commonwealth v. Lawson, 549 A.2d 107, 108, 112 (Pa. 1988).

The new evidence strips the verdict of its reliability and the prejudice to Jose Medina from the numerous court errors at trial and afterward has never been corrected. The trial court never established that the child witnesses were competent; the Third Circuit overlooked the Superior Court’s Medina I finding of prejudice from Michael’s testimony and its directive that a new trial be granted if ineffectiveness was found; no state or federal court addressed the trial court’s failure to establish the competency of the two child witnesses; and the state courts never addressed defense counsel’s ineffectiveness for failing to challenge Hector’s competency or any resulting prejudice.

Even absent the new evidence of coercion and perjured testimony, each one of these oversights by the courts independently warrants a new trial. 549 A.2d at 108, 112. The new evidence shows that these procedural errors had substantive implications that a competency hearing would have uncovered two decades ago: Hector did not witness any events relating to William Bogan’s murder and did not understand that his duty to tell the truth in court was more important than submitting to pressure by a law enforcement officer to tell a lie. Commonwealth v. Koehler, 737 A.2d 225, 239 (competency requires the witness have the ability to “perceive an event with a substantial degree of accuracy” and be “mindful of his or her duty to tell the truth under oath.”). The new evidence requires the errors related to the children’s competency to be revisited.

1. The new evidence shows the trial error of allowing two children untested for competency to provide the main incriminating evidence denied Jose Medina due process and amounted to a miscarriage of justice.

The judge and defense counsel erred by not ensuring that 11-year-old Hector and 12-year-old Michael were competent before they provided the sole evidence that led to Jose Medina's conviction. Hector's PCRA testimony that he never saw what he testified about and that he was pressured underscores the prejudice this trial error caused.

In Lawson, the Pennsylvania Supreme Court announced that there are limited circumstances where the interest in hearing a petitioner's claim will "override" the waiver and final litigation requirements of the PCRA. 549 A.2d at 112. A second or subsequent PCRA petition may be heard "for the purpose of avoiding a demonstrated miscarriage of justice" if a petitioner demonstrates either "(a) that the proceedings resulting in his conviction were so unfair that a miscarriage of justice occurred which no civilized society can tolerate, or (b) that he is innocent of the crimes charged."

Commonwealth v. Szuchon, 633 A.2d 1098, 1100 (Pa. 1993) (citing Lawson, 549 A.2d at 777).³¹⁴ Justice Papadakos explained in his concurrence in Lawson that a "miscarriage of justice" is "synonymous, with . . . prejudice", and occurs

"where it is demonstrated that a particular omission or commission was so serious that it undermined the reliability of the outcome of the proceeding. **Where a conviction can be shown to result from a breakdown in the adversary process**, the conviction rendered is unreliable. Such a conviction is

³¹⁴ The Lawson "miscarriage of justice" standard is distinct from, and less narrow than, the standard as applied to habeas petitions entertained in the federal courts in spite of a petitioner's failure to exhaust state remedies. See Commonwealth v. Beasley, 967 A.2d 376, 391-93 (Pa. 2009) (citing Dretke v. Haley, 541 U.S. 286 (2004)). Under Lawson, a miscarriage of justice is shown if the proceedings are unfair OR the defendant is innocent, while the federal habeas standard requires a showing of both elements. Id.

obviously prejudicial to the defendant and, if allowed to stand, is a miscarriage of justice.”

549 A.2d at 112 (Justice Papadakos concurring) (citing Commonwealth v. Pierce, 527 A.2d 973 (Pa. 1987)) (emphasis provided). This standard “was left purposely imprecise and did not foreclose the review of strong claims challenging the fundamental fairness of trials.” Commonwealth v. Beasley, 967 A.2d at 393, 395 (reversing trial court judgment denying relief on second PCRA ineffective assistance claim and remanding for further findings in the interest of justice). The term “miscarriage of justice” itself “signif[ies] a high degree of fundamental unfairness” 967 A.2d at 395. The Lawson Court intended to institute “ample safeguards to assure that a person convicted of a crime is provided ample opportunity to assert a legitimate complaint” but also to protect the “finality of judgments fairly reached.” 549 A.2d at 108, 112.

Jose Medina’s claims implicate both Lawson exceptions that permit successive review. First, he claims that the use of the children’s testimony in his trial “constitutes a miscarriage of justice and requires a new trial.” (See Mem. Law Supp. Jose Medina’s Supplemental Am. Pet. 8 (citing Commonwealth v. Romansky, 702 A.2d 1064 (Pa. Super. Ct. 1997))). At nearly every post conviction stage, his pro se petitions have challenged the trial court’s and his lawyer’s failure to address the competency of both child witnesses, Michael and Hector. Second, Jose also has steadfastly asserted his innocence at every stage with his not guilty plea at trial³¹⁵ continuing through post trial proceedings including this petition. (Pet. for Post Conviction Review Act [Sic.], 2.) This

³¹⁵ His trial counsel strongly suggested that Jose Medina had asserted his innocence as early as the night of the murder because he argued to use Jose’s post arrest statement to the detectives even if the prosecution chose not to use it at trial. Trial Tr. 3:6-6:10. The prosecution never introduced Jose’s statement. Moreover, Jose Medina’s conduct on the night of the murder was consistent with innocence: even after being stopped by the police, he entered a bar in full view of the police and remained in the area. One would expect that a person dressed in white who had committed a stabbing might immediately leave the area but certainly would after being stopped, questioned and released by police.

Court will focus on the first Lawson exception that unfair proceedings led to a miscarriage of justice rather than the innocence prong³¹⁶ but recognizes that without Hector and Michael's testimony, there would have been insufficient evidence as a matter of law to convict Jose Medina. Commonwealth v. Keblitis, 456 A.2d 149 (Pa. 1983).

The Pennsylvania Superior Court has found that a miscarriage of justice occurs where a defendant is deprived of his constitutional rights during trial. In one of the leading cases applying the principles of Lawson, the Pennsylvania Superior Court vacated a defendant's conviction and remanded for a new trial because it was reasonably likely that the witness's false testimony affected the jury's verdict. Commonwealth v. Romansky, 702 A.2d 1064, 1065 (Pa. Super. Ct. 1997) (holding that Brady and Mooney claims were cognizable although asserted in second PCRA petition because they implicated a miscarriage of justice). In Romansky, the witness lied at trial about a deal he made with the prosecution promising him leniency in exchange for his testimony and the prosecution did not disclose either the deal or the perjured testimony. Fairness of trial proceedings is compromised and a miscarriage of justice occurs where the Commonwealth "uses false testimony to obtain a conviction." Id. Likewise, in Commonwealth v. Williams the Superior Court held that the Commonwealth's failure "to adhere to the terms of [a] plea agreement would provide grounds for PCRA relief as it

³¹⁶ The Lawson standard is satisfied when a defendant is innocent of the crime for which he is convicted – separate and apart from a situation where unfair trial proceedings resulted in a miscarriage of justice. See, e.g., Williams, 660 A.2d 614, 619 (Pa. Super. Ct. 1995) (holding that petitioner's claim that he could not be identified as the perpetrator asserted a "colorable claim of innocence" but denying relief on the merits); Commonwealth v. Cummings, 619 A.2d 316 (Pa. Super. Ct. 1993) (holding that trial counsel's failure to raise insanity defense implicates defendant's innocence and satisfies Lawson but denying relief on the merits); Commonwealth v. Dukeman, 605 A.2d 418, 432 (Pa. Super. Ct. 1992) (holding that trial counsel's failure to raise issue of entrapment and identification would be miscarriage of justice).

would be a miscarriage of justice for a person to relinquish cherished constitutional rights based on a promise that was not kept.” 660 A.2d 614, 619 (Pa. Super. Ct. 1995).

In this case, the evidence shows that the trial errors of failing to ensure child witnesses were competent before they testified denied Jose Medina his constitutional due process rights. Cf. Drope v. Missouri, 420 U.S. 162 (1975) (holding that the defendant was denied due process when state courts failed to inquire into his mental competence to stand trial despite evidence and testimony creating a sufficient doubt as to competence); Pate v. Robinson, 383 U.S. 375, 385 (1966) (“We believe that the evidence introduced on [defendant’s] behalf entitled him to a hearing on this issue [of competence]. The court’s failure to make such inquiry thus deprived [defendant] of his constitutional right to a fair trial.”); Jermyn v. Horn, 266 F.3d 257, 283 (3d Cir. 2001) (“Due process requires the trial court to inquire sua sponte as to the defendant’s competence in every case in which there is a reason to doubt the defendant’s competence to stand trial.”). Compounding that major error was law enforcement misconduct far more egregious than the due process violation involving an adult witness in Romansky that led to a new trial. The new evidence in this case shows that competency hearings for the child witnesses would not have been mere technicalities but would have revealed that at a minimum Hector Toro had not seen Jose Medina do anything incriminating and likely Michael Toro had not either; had their competency been tested this information would have come to light two decades ago.

Pennsylvania law requires that the trial court must establish child witnesses are competent before they can testify. Rosche v. McCoy, 156 A.2d 307, 310 (Pa. 1959); Commonwealth v. Dowling, 883 A.2d 570, 576 (Pa. 2005). The law is clear that “a

child's competency to testify is a threshold legal issue that the trial court must decide" and a competency hearing must be held outside the presence of the jury.

Commonwealth v. Calvin Washington, 722 A.2d 643, 646-47 (Pa. 1998) (reversing a rape conviction because court's competency hearing held in front of jury with judge's admissibility ruling possibly affecting jury's credibility determination). The law recognizes that children, unlike adults, are not presumed to be competent and the courts are to serve a gate-keeping function to ensure that their testimony is based on actual experience, accurate memory, an ability to communicate clearly and an understanding of the real life significance that testifying in court involves. Specifically, the trial court is required to determine whether a child witness:

- "(1) ha[d] the capacity to observe or perceive the occurrence with a substantial degree of accuracy;
- (2) ha[d] the ability to remember the event which was observed or perceived;
- (3) ha[d] the ability to understand questions and to communicate intelligent answers about the occurrence; and
- (4) ha[d] a consciousness of the duty to speak the truth."

Commonwealth v. Mazzoccoli, 380 A.2d 786, 787 (Pa. 1977); See also, Commonwealth v. Koehler, 737 A.2d 225, 239 (Pa. 1999); Pa.R.E. 601(b) (1)-(4) (stating the rules similarly). This was not done in this case for either Hector or Michael Toro.

Hector and Michael's young age alone required competency testing but there were additional signs that should have alerted the trial court and counsel to be particularly cautious. The assistant district attorney told the judge that Hector and Michael were both nervous, that Michael had been crying, and that she was "supposedly told by the police" that Michael was afraid to testify because "his family fears some kind of retaliation." Trial Tr. 7:2-8:1. She further mentioned that "although Hector was not an emotional person, Michael was." Trial Tr. 7:24-25.

Nevertheless, when 11-year-old Hector testified about events that took place when he was 10, his competency was not tested fully on all four areas required by the competency test and those few questions that were asked were asked in front of the jury.³¹⁷ Trial Tr. 39:15-41:7; Calvin Washington, 772 A.2d 643 (Pa. 1998). Hector was not asked about his perception or memory of the events – seeing Jose Medina in the Chinese restaurant – about which he ultimately testified. He was asked a few questions about his understanding of the truth and generally provided clear answers except when asked whether he knew “what it means to say, ‘I promise to tell the truth?’” he said “No.” Trial Tr. 40:15-17.

A number of things in Hector’s testimony should have prompted further concern. The story he told was rather bizarre: he said he saw a drunk Jose Medina walk into a Chinese restaurant with a 13-15” “Rambo” knife, announce, “Today I am going to kill somebody with this knife”, order a cheeseburger and walk out. Hector’s testimony about what happened when he left the Chinese restaurant changed repeatedly on many details suggesting that he did not experience or remember the events. Significantly, on the issue of competency, Hector confused his own experience with his brother’s experience: he admitted that he testified to hearing something when he was in the house but conceded that he had not experienced it, rather his brother had. Trial Tr. 47:4-12; 52:24-53:12.

These cues suggest that something was wrong with Hector’s testimony, calling into question whether he actually had experienced anything relating to the murder.

³¹⁷ This is not to say that Hector’s ability to accurately perceive the events related to his coercion by the detective should have been tested, since neither the judge nor defense counsel could have known about the coercion at the time of trial. Nevertheless, the detective’s threats and coercion may have been revealed during the competency questioning about whether Hector saw Jose Medina in the Chinese restaurant on the night of the murder.

Hector's credible PCRA testimony that he had not seen Jose Medina that night and that he had been coerced by the detective to lie help to make sense of his peculiar testimony at the original trial. Had Hector's perception and memory of the events been tested with more questions at a competency hearing, his failure to witness anything incriminating would have been uncovered much earlier.

Hector also denied talking to the detective but it came out that he clearly had spoken with him. Trial Tr. 58:1-59:14. Hector's lying about talking to a detective about his testimony makes sense if he had been threatened and did not want to do anything that would prompt the detective to remove him from his home. Hector's belief that the detective had enormous power likely outweighed the judge's apparently generic request to tell the truth, even if Hector was, generally, mindful of this duty. This makes sense when viewed through the prism of his experience as an 11-year-old child. Over the span of a year, a detective had been able to repeatedly take Hector and Michael for questioning and to court without family or school approval, and make threats about removing the boys from their home unless they testified as he directed. No one – court, counsel or family – intervened to curtail the detective's apparent power. It would be reasonable for a young boy to believe that the detective not only had power but would make good on his threats. Hector was familiar with the power of police officers from his neighborhood on the night of the murder and knew police had arrested both his parents who were serving prison sentences. Hector described his mindset:

“It's like you tell the kid, I'm gonna take you away from your parents. You're gonna do whatever that person is asking to say or do because you don't want to leave your family. I already lost like my mother and my father. They was incarcerated. I was living with my grandmother.”³¹⁸

³¹⁸ PCRA Tr. 54:19-55:2, July 20, 2010.

Hector's experience with a courtroom and oaths was less informed. Jose Medina's trial was likely the first time he had ever stepped into a courtroom, much less testified. Hector described his experience as an 11-year-old walking into the courtroom and being sworn in:

"A man in uniform guided me into a booth next to the judg[e] and handed [me] a bible. I can now say I was sworn in but I didn't know any of this at the time it was happening nor why I was brought the[re.]"

(Ex. P-3.) The judge's simple request to tell the truth without more would not have been likely to override this young boy's belief that the detective's orders were more important. It is certainly not surprising that a young boy might perceive his obligation to do as the detective ordered as overriding any oath given in court. Without thorough questioning on this issue in court, Hector did exactly that: he succumbed to law enforcement pressure to lie rather than understanding that the duty to tell the truth in court should override that pressure. Had the trial court addressed the boys' understanding and the significance of their obligation to speak truthfully under oath in court, the perjury may have been avoided.

Not only did the trial court not establish all of the requirements for either boy, there is now credible evidence from Hector showing that had the trial court tested his competency with respect to his perception of any of the events surrounding the murder of William Bogan this likely would have revealed that Hector had not perceived Jose with a knife in the Chinese restaurant, nor did he experience the other events about which he testified. His not having perceived any such events explains his contradictory trial testimony; he was making up details for something he never witnessed. Moreover,

Hector's credible PCRA testimony undermines Michael's competency and his testimony that he saw Jose Medina with the knife in the restaurant.

The problems with Michael's competency have been detailed at length by other courts reviewing this case and need not be repeated here. Notably, these courts were limited to the trial record which did not include questions in the four areas necessary to establish competency. Nonetheless based on that record, the Federal Magistrate Judge, the District Court, and the Third Circuit all concluded that under Pennsylvania law counsel was deficient for failing to challenge Michael's competency.

Prior courts focused primarily on counsel's failure to challenge Michael's competency. Their analysis dealt with Michael's apparent incompetency at many different levels. One portion of Michael's testimony was boldly problematic:

- “Q. [By the prosecution] Do you know what it means to tell the truth?
- A. [By Marcos Toro] Yes.
- Q. What does it mean?
- A. (No response.)
- Q. Let me ask it the other way. Do you know what it means to tell a lie?
- A. No.
- Q. Do you know the difference between telling the truth and telling a lie?
- A. No.”

Trial Tr. 83:8-17. In evaluating Michael's answers in light of Pennsylvania law, the District Court held, “[t]here is a reasonable probability that . . . the trial court would have found Marcos incompetent. For the trial court to do otherwise could well have been an abuse of discretion” 373 F. Supp. 2d 526, 542-45, 550 (citing Mazzaccoli, 380 A.2d at 788, where the Pennsylvania Supreme Court reversed a trial court's finding that a 15-year-old who gave answers nearly identical to Michael's was competent). As this

Court has already described, its finding that Michael was not competent³¹⁹ was consistent with other courts' concerns that Michael was not competent. (See Ct. Order, July 21, 2010.)

Michael's answers to some questions are telling in light of the new evidence of detective's threats:

"Q. Do you get in trouble for telling a lie?

A. Yes.

Q. What about when you tell the truth? If you tell the truth, is that a good thing to do?

A. No.

THE COURT: It is not good to tell the truth?

THE WITNESS: Yes."

Trial Tr. 85:13-20. Michael's answers on these questions were never explored further. His answers may have meant that he did not understand the difference between truth and a lie or understand the significance of his taking the oath. Alternatively, Michael may have been divulging that it was not good to tell the truth because of the detective's threats. Had the court probed the boys' understanding of their duty to tell the truth in court it may have revealed what the detective had done.

Michael's emotional breakdown should also have signaled concern. After failing the few competency questions that were asked, Michael later quit responding to questions altogether leading the judge to suggest that he be replaced with another witness. The assistant district attorney admitted his testimony would not improve. Michael finally broke down on the stand necessitating a break in the proceedings. There was an unusual scene that followed in the bathroom where the judge was

³¹⁹ The Court relied on the trial court record bolstered with post trial statements and the PCRA evidentiary hearing including Michael's responses to questions, behavior, understanding and demeanor in finding that Michael currently is not competent to testify about the events surrounding the murder of William Bogan.

informed that a detective went in to talk to a sobbing Michael without the assistant district attorney and over defense counsel's strenuous objections. The trial judge directed that someone call 911. Yet when Michael's testimony resumed, no questions were asked related to his competency much less what led to his breakdown. In light of Hector's new evidence of the detective's threats, it is unfortunate that no inquiry was made. While Michael's emotion may have been interpreted by the judge and jury to be consistent with that of a boy traumatized by having witnessed a murder, the testimony from Hector and Maria Toro shows that it could have been due to Michael being threatened with losing his family if he did not testify to seeing a murder he had not seen.

Judges and counsel naturally tend to take on a protective role when children are compelled to testify in court. This solicitude should not be permitted to compromise the paramount function of the courts to seek the truth. Moreover, counsel and judges should not bypass rules in order to make it "easier" for children to testify lest they risk having unreliable or imaginary stories obfuscate the truth seeking process. The reason the law mandates competency testing in children is not to create an unnecessary procedural barrier to their testifying but to protect trials from being compromised by children testifying about an experience they did not actually have, answering in order to please the questioner, relating someone else's experience as their own, or adopting a story they heard as the truth. The Pennsylvania Supreme Court has discussed some of the other competing policies beyond protecting the child:

"One is that a party should not be denied justice because reliance necessarily must be placed upon the testimony of a child of tender years. But on the other hand, experience has informed us that children are peculiarly susceptible to the world of make-believe and of suggestions. Care must be exercised to keep the balance true as between these conflicting claims."

Rosche v. McCoy, 156 A.2d 307, 310 (Pa. 1959).

This case vividly shows children are not protected, nor is justice served, when they are enlisted as tools by one side or the other to provide false testimony that has profound consequences, saddling them with the guilty knowledge of their role in the outcome. The greatest protection for children and for the integrity of the courts is for courts to adhere to procedural rules to ensure that children who testify meet reliability requirements.³²⁰ Only then, can the child's testimony lead to a verdict that society can trust.

The prejudice caused by the failure to ensure that Hector and Michael were competent is manifest. Since the only incriminating evidence came from child witnesses that the law does not presume competent and who received improper pressure by law enforcement, Jose Medina was deprived of due process. Hector's credible testimony in this case that he never even experienced the things he testified to at trial and that he succumbed to law enforcement officer's instructions to lie, shows that the failure to establish competency was not just a procedural violation but led to a fundamentally unfair trial and conviction based on false testimony from at least one child witness.

³²⁰ There is a distinction between a court's gatekeeping role to ensure the testimony is reliable and a credibility determination by the factfinder. Courts are required to test for competency to assess whether the evidence is reliable enough to be used by the fact-finder who then determines credibility. See Pa.R.E.104(a) (court determines the qualifications of a person to be a witness); 104(e) (once admitted, parties may challenge credibility of evidence); 601(b) (immaturity may disqualify witness if minimum competency requirements not met); Commonwealth v. Calvin Washington, 772 A.2d 643 (Pa. 1998) (judge's admissibility ruling should be outside of jury's hearing so it will not affect jury's credibility determination); Commonwealth v. Seese, 517 A.2d 920, 922 (Pa. 1986) ("the question of a witnesses credibility has routinely been regarded as a decision reserved exclusively for the jury"); Commonwealth v. Payton, 392 A.2d 723, 726 (Pa. Super. Ct. 1978) (distinguishing a trial court's determination of a child witness's competency from later determination of the credibility of witness's testimony by the fact-finder).

2. The law required the Third Circuit to defer to the Superior Court's prior finding that there was prejudice from Michael Toro's testimony.

In 1995, the Superior Court in Medina I directly decided that the prejudice from Michael's testimony was "self-evident" since he was the sole eyewitness and held that "[i]f counsel's assistance is ineffective ... a new trial must be granted." Medina I at 22, 24. The Third Circuit's decision that trial counsel's performance "in failing to request a competency hearing outside the presence of the jury was ineffective" but that Jose Medina was "not prejudiced by his trial counsel's performance" was made on the false premise that the state courts had never determined whether such an error would constitute prejudice. 461 F.3d at 432-33. Appellate error occurred when the Third Circuit inadvertently failed to implement the Superior Court's Medina I ruling that a new trial must be granted if counsel's performance in failing to challenge Michael's competency was found deficient. Thus, the Third Circuit erroneously supplanted its analysis of prejudice for that of the Pennsylvania Superior Court. Medina v. Diguglielmo, 461 F.3d at 432-33. Had the Third Circuit known that the Superior Court had ruled on the issue of prejudice in Medina I, it would have deferred to that ruling, as the law requires, unless the ruling violated clearly established federal law. Consequently, Jose Medina would have been granted a new trial by the Third Circuit in 2006.

The Superior Court first addressed the issue of whether Mr. Medina's trial counsel was ineffective for challenging Michael's competency in Medina I in 1995. Ineffective assistance of counsel (IAC) claims require that a petitioner prove:

- 1) trial counsel's performance was deficient, and
- 2) that the deficiency prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687 (1984). The first is often referred to as the ineffectiveness prong and the second, the prejudice prong. The underlying claim must also be of “arguable merit.” Commonwealth v. Jasper, 587 A.2d 705, 709 (Pa. 1991); Medina I at 20, 23.

The Superior Court in Medina I acknowledged that if any one of three circumstances existed, there was no need to remand an ineffective assistance of counsel claim to the trial court for an evidentiary hearing because the claim would not be successful: 1) if the claim lacked arguable merit, 2) if there was an objectively reasonable basis for counsel’s conduct, or 3) there was no prejudice from the error. Medina I at 23-24. The Superior Court in Medina I found none of these three circumstances existed. First, the Superior Court found that there was “at least arguable merit to appellant’s contention that his trial counsel was ineffective for failing to object to the competency of the juvenile, Michael [Marcos] Toro” because the law required competency hearings for children under age fourteen. Medina I at 20, 22. Second, the Medina I Court also found that the prejudice was self-evident. Id. at 22. Third, the Court could not determine from the record that there was an objectively reasonable basis for trial counsel’s strategy of not challenging competency. Id. at 22, 24. In analyzing these three circumstances, the Superior Court ruled specifically on the issue of prejudice before finding that the case needed to be remanded for an evidentiary hearing to determine what rationale counsel had for his actions:

“We are constrained to agree, however, that **there is** at least **arguable merit** to appellant’s contention that his trial counsel was ineffective for failing to object to the competency of the juvenile, Michael Toro.

...

We cannot determine from the record whether a reasonable basis existed for this approach by appellant's counsel. With Michael as the only eyewitness to the stabbing, **and the prejudice from his testimony being self-evident, the issue is significant.**

...

We are mindful that **an evidentiary hearing is unnecessary where** 'the allegation lacks arguable merit; an objectively reasonable basis designed to effectuate appellant's interests existed for counsel's actions or inactions; or **appellant was not prejudiced by the alleged error by counsel.**

...

We cannot determine from the record in this case, however, **whether appellant's trial counsel possessed a reasonable basis for his failure to explore Michael Toro's competency.** Although it may have been part of his strategy or tactics, we cannot conclude that such a strategy was reasonable based solely on the record before us. Accordingly, we remand for an evidentiary hearing.

The judgment of sentence is vacated, at least for the time being, and the case is remanded for an evidentiary hearing on appellant's claim that he received ineffective assistance by counsel. If trial counsel's assistance is found to be effective, the judgment of sentence may be reimposed. **If counsel's assistance is ineffective, however, a new trial must be granted."**

Id. at 20-24 (emphasis provided, internal citations omitted).

After the remand, the trial court found that counsel's performance was not deficient or ineffective. The Superior Court in Medina II focused solely on the issue of whether counsel's strategy had a reasonable basis and affirmed the trial court's finding that counsel's performance was not deficient. However, Medina I's finding of prejudice remained intact and constitutes the law of the case. See Commonwealth v. Medina (Medina II), 835 A.2d 833, No. 3224 EDA 2002, slip op. (Pa. Super. Ct., Sept. 17, 2003) (unpublished but attached).

Jose Medina filed a habeas petition challenging numerous issues but the federal courts focused their attention most comprehensively on whether the state courts'

determinations that counsel's performance was not ineffective violated clearly established federal law. Every federal court to address the issue concluded that defense counsel's failure to challenge Michael's competency constituted deficient performance and that Medina II's finding to the contrary violated "clearly established federal law." Medina v. Diguglielmo, 461 F.3d 417, 428-29 (3d Cir. 2006); Medina v. Diguglielmo, 373 F. Supp. 2d 526, 541 (E.D. Pa. 2005); R&R, C.A. No. 04-128, 18 (Jan. 13, 2005). The Magistrate Judge, District Judge and Third Circuit all agreed that Jose Medina had proven the first prong of Strickland that his trial counsel was ineffective.

The issue of whether the ineffective performance caused prejudice to Jose Medina was viewed differently by the federal courts who reviewed the case. The prejudice prong requires:

"The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Strickland, 466 U.S. at 694.

The Magistrate Judge acknowledged that Medina I "language would appear to indicate that the Superior Court found prejudice as required by Strickland." The Magistrate cited Medina I's language that the prejudice from Michael's testimony as the only eyewitness at trial was self-evident and noted that the Medina I Court would not have remanded the case for a hearing if there was no prejudice. R&R at 19. In an abundance of caution, the Magistrate concluded that even if the state courts had not made a finding of prejudice, he found prejudice because "there was a reasonable

probability that, absent [Michael's]³²¹ testimony, the jury 'would have had a reasonable doubt respecting guilt.'" Id. at 20, citing Strickland, 466 U.S.at 695.

The District Court addressed the prejudice prong of the Strickland standard de novo, inadvertently believing that the prejudice issue had never been decided by a Pennsylvania state court in this case:

"Medina II concluded that the performance of Medina's trial counsel, Daly, was not deficient and, therefore, never reached the prejudice prong of Strickland. Because Medina II never reached the prejudice prong of the Strickland analysis, nor did any other state court, my review of the prejudice prong of Strickland is a de novo review rather than a deferential review under the "unreasonable application" clause of AEDPA. Wiggins, 539 U.S. at 534."

Id. at 540 n.9, 550. It is true that the Medina II Superior Court had not addressed prejudice but the Medina I Superior Court had found prejudice, thereby requiring the federal courts to give deferential review to that finding. Medina I at 22. However, since the District Court found prejudice in its de novo review, there was no harm from this oversight. Id. at 550.

When the Third Circuit addressed the issue of prejudice it likewise decided the issue on its own without taking into account, or even addressing, the Pennsylvania Superior Court's Medina I decision holding that the prejudice from Michael's testimony was self-evident. 461 F.3d at 430-33. Specifically, the Third Circuit affirmed "the District Court's determination that Mr. Daly's performance in failing to request a competency hearing outside the presence of the jury was ineffective" but reversed the District Court's Order granting relief because it "concluded that Mr. Medina was not prejudiced by his trial counsel's performance."³²² 461 F.3d at 432-33. Earlier on, the

³²¹ Court opinions have referred to the older brother as both Marcos and Michael.

³²² The Third Circuit, in addressing the issue of prejudice wrote, "Even without the testimony of [Michael] Toro, there was more than sufficient evidence to convict Mr. Medina." Id. at 430. However, the prejudice

Third Circuit had noted that the Medina I Superior Court “instructed” that “If counsel’s assistance was ineffective...a new trial must be granted.” Id. at 424-25.

Notwithstanding the Superior Court’s finding on prejudice and its corresponding instruction that there be a new trial if ineffectiveness was found, the Third Circuit decided the prejudice issue de novo without any deference as the law requires to the Superior Court’s Medina I finding of prejudice. The Third Circuit’s decision overlooking Medina I’s holding that Michael’s testimony constituted prejudice violated the law of the case and federal habeas law doctrines.

The law of the case doctrine refers to “the concept that a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a judge of a higher court in the earlier phases of the matter.”

Commonwealth v. Starr, 664 A.2d 1326, 1331 (Pa. 1995). The doctrine is made up of several “related but distinct” rules including:

- (1) Upon remand for further proceedings, a trial court may not alter the resolution of a legal question previously decided by the appellate court in the matter;
- (2) **Upon a second appeal, an appellate court may not alter the resolution of a legal question previously decided by the same appellate court;** and
- (3) Upon transfer of a matter between trial judges of coordinate jurisdiction, the transferee trial court may not alter the resolution of a legal question previously decided by the transferor court.

Id. (emphasis provided).

analysis is distinct from a sufficiency of the evidence analysis. The prejudice analysis requires the reviewing court to focus on whether counsel’s deficient performance resulted in a “probability sufficient to undermine confidence in the outcome.” Strickland v. Washington, 466 U.S. 668, 694 (1984). The District Court correctly framed the issue as one of whether without Michael’s testimony there was a “reasonable probability...that the outcome would have been different” and emphasized that this standard is less than a preponderance of the evidence standard. 373 F. Supp. 2d at 550-52. For a petitioner claiming ineffective assistance of counsel, “[t]his standard is not a stringent one.” Jacobs v. Horn, 395 F.3d 92, 105 (3d Cir. 2005) (internal quotations omitted). By contrast, the sufficiency of the evidence standard is much more difficult for a PCRA petitioner to meet because the reviewing court must examine all of the evidence and all reasonable inferences in the light most favorable to the Commonwealth to determine whether the jury could have found “that each element of the offense charged was supported by evidence and inferences sufficient in law to prove guilt beyond a reasonable doubt.” Commonwealth v. Jackson, 485 A.2d 1102, 1103 (Pa. 1984).

In Starr, the law of the case doctrine was invoked to grant a new trial to a criminal defendant after a second trial court rescinded the original trial court's acceptance of his waiver of counsel. Id. at 1331, 1340-41. Citing a desire to protect the "settled expectations of justice" and "maintain consistency during the course of a single case," the Pennsylvania Supreme Court held that the second trial court's changing the earlier trial court's decision was inappropriate absent "exceptional circumstances such as where there has been an intervening change in the controlling law, a substantial change in the facts or evidence giving rise to the dispute in the matter, or where a prior holding was clearly erroneous and would create a manifest injustice if followed." Id. at 1331-32. Thus, the Superior Court's Medina I ruling that the prejudice from Michael's testimony was such that if counsel's performance was deficient a new trial was required, remained the law of the case on that issue. Medina I at 22-23.

In addition, when a federal court reviews a determination by a state court, federal habeas law precludes the federal court from disturbing a state law holding unless the state's decision was "objectively unreasonable" and violates clearly established federal law:

"when a federal court reviews a state court's ruling on federal law, or its application of federal law to a particular set of facts, the state court's decision must stand unless it is 'contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' When a federal court reviews a state court's findings of fact, its decision must stand unless 'it was based on an unreasonable determination of the facts in light of the evidence presented in a State court proceeding.'"

Lam v. Kelchner, 304 F.3d 256, 263 (3d Cir. 2002) (quoting 28 U.S.C. §§ 2254(d)(1), (2) (AEDPA)).

The Third Circuit could not overturn the Pennsylvania Superior Court Medina I's determination of prejudice even if it believed it was "incorrect or erroneous." Wiggins v. Smith, 539 U.S. 510, 520-21 (2003). The Third Circuit could only disturb the Medina I finding that the prejudice from Michael's testimony was "self-evident," if it found that it was "contrary to, or an unreasonable application of, clearly established Federal law" or "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Lam, 304 F. 3d at 263 (citing 28 U.S.C. §2254(d)(1), (2)). The Third Circuit never made such a finding nor did it even address Medina I's prejudice determination. The Third Circuit's analysis focused on Medina II's finding that counsel's performance was effective. Medina I's finding on prejudice was likely overlooked given the voluminous record of fifteen years of post trial proceedings. While the oversight is not surprising given this case's protracted history, it nonetheless must be remedied. The Superior Court's ruling on prejudice and directive that a new trial must be granted if trial counsel's performance was found to be ineffective controls, and must be implemented.

The lack of continuity in Jose Medina's representation by court-appointed counsel combined with a large record that grew as the procedural history stretched into decades of travel through various state and federal courts, contributed to this error. The sheer volume of present day courts' caseloads means that even the most diligent of courts will inevitably make errors in their review of massive records. While such lapses are apt to occur, when they do, it is incumbent upon the courts to immediately remedy them. Moreover, court mistakes cannot operate to deprive a defendant serving a life sentence the relief to which he is due based on an error that was not his doing.

As the United States Supreme Court held in Cone v. Bell, when court decisions are based on an erroneous reading of the record that causes issues on appeal to be overlooked, that error must be corrected and the issues addressed. 173 L. Ed. 2d 701 (2009). In Cone v. Bell, the Supreme Court addressed a lengthy state and federal post conviction record where lower courts misread the record to the defendant's detriment. Id. at 707-08. The defendant had been convicted of murder and brought a post conviction claim that the prosecution failed to reveal material evidence related to his guilt (Brady). Id. at 707. The state appellate court dismissed the claim under the mistaken impression that the issue had previously been addressed. Id. at 711. A higher court discovered the mistake but failed to correct it by addressing the Brady issue on the merits or remanding the case for review. Id. at 713-714. The Supreme Court held that court oversight in reading the record could not operate to strip a defendant of rights and meaningful review of his properly raised claims and remanded the case for a full determination on the merits of his claim. Id. at 722.

In accord with Cone v. Bell, it is incumbent on the courts to remedy the misread record that denied Jose Medina of a correct decision on the merits. If the Third Circuit was unaware of its error, Jose Medina who was no longer represented by counsel in the habeas matter could not be expected to recognize the complex law governing federal comity to state courts or comply with any timing requirements to address the mistake. The only fair outcome at this stage is to correct the error and implement the Superior Court's Medina I order that found prejudice "self-evident" and explicitly directed that "[i]f counsel's assistance is ineffective...a new trial must be granted." Medina I, at 22, 24. Independent of the new evidence presented in the PCRA petition, Jose should be

granted a new trial based on the Superior Court's finding that there was prejudice from Michael's testimony as the only eyewitness coupled with the Third Circuit's finding that counsel had been ineffective for failing to challenge Michael's competency. The new evidence makes the delayed implementation of the Superior Court's directive all the more urgent.

3. Jose Medina's repeated claim that Hector Toro's competency was not demonstrated at trial was erroneously denied appellate review.

Jose Medina's challenge that the younger Hector's competency was never tested was denied appellate review. Jose Medina raised the issue in his pro se direct appeal and his pro se federal habeas petition. He claimed that the trial judge's failure to determine whether both child witnesses were competent before allowing them to testify violated his due process rights. He also asserted his lawyer was ineffective for failing to challenge Hector's competency. Even though the judge and his lawyer never established whether Hector was competent, the reviewing courts never tackled either issue. Instead, the courts narrowly focused on the older brother Michael's testimony and on whether trial counsel was ineffective for failing to challenge his competency. Conceivably, in ruling on that issue, the courts determined that addressing the independent obligation of the trial judge to address Michael's competency was redundant or unnecessary. Hector's testimony was neglected in the review. To this day, federal and state courts have not addressed the trial court's independent obligation to establish competency for both Hector and Michael or trial counsel's ineffectiveness for failing to challenge Hector's competency.

When representing himself in pro se filings, Jose Medina raised the issues of the judge, and his lawyer, not focusing on Hector's competency. The purpose of competency law is to ensure that child witnesses under 14 years old are not permitted to testify until it is established that their testimony is based on their own experience and memory, they comprehend and can articulate their experience, and they understand their obligation to be truthful under oath. Commonwealth v. Mazzoccoli, 380 A.2d 786, 787 (Pa. 1977). See also Commonwealth v. Koehler, 737 A.2d 225, 239 (Pa. 1999). It is the trial judge's independent obligation to ensure that this is done as an element of due process. Rosche v. McCoy, 156 A.2d 307, 310 (Pa. 1959); Commonwealth v. Dowling, 883 A.2d 570, 576 (Pa. 2005); Jermyn v. Horn, 266 F.3d 257, 283 (3d Cir. 2001) ("Due process requires the trial court to inquire sua sponte as to the defendant's competence in every case in which there is a reason to doubt the defendant's competence to stand trial.").

Perhaps the blatant problems with Michael's competency and his role as the sole eyewitness diverted attention away from the younger Hector's testimony and competency. However, the same law that required 12-year-old Michael's competency be established by the judge and his counsel, applied to the younger 11-year-old Hector. Hector—the sole remaining incriminating witness—was not determined by the judge to be competent and Jose Medina's counsel failed to challenge his competence. The concerns that the courts have had about Michael's competency not having been established apply to Hector's competency as well. Whether caused by lawyer or court error, the prejudice was significant: if Hector's testimony had been stricken for having

not been established as competent evidence, the outcome of Jose Medina's trial would have been different.

The federal courts found that Jose Medina's lawyer performed below objectively reasonable standards in not challenging Michael's competency with the District Court stating that if Michael's competency had been challenged, "[t]here is a reasonable probability that. . .the trial court would have found Marcos incompetent. For the trial court to do otherwise could well have been an abuse of discretion" 373 F. Supp. 2d at 544-45, 550. See also Medina v. Diguglielmo, 461 F.3d 417, 428-29 (3d Cir. 2006) (holding in accord with District Court on the issue of counsel's deficient performance). Presumably the same reasoning that led these courts to conclude that his lawyer performed below acceptable standards when he did not challenge Michael's problematic testimony would apply to his responsibilities with respect to Hector's testimony. The fact that Hector's testimony did not by itself raise the blatant issues that Michael's did, does not eviscerate counsel and the court's duty to ensure that all four elements of child competency were present. This is precisely why the law requires testing of all child witnesses under 14 years of age: they are not presumed competent. Rosche v. McCoy, 156 A.2d 307, 310 (Pa. 1959).

Yet the federal and state courts did not review these defects raised by Jose Medina relating to counsel's and the court's failure to establish that Hector was competent to testify at the original trial. The Superior Court focused on Michael's competency and his counsel's performance. Medina I at 19, 22-24. The Magistrate recommended a new trial based on counsel's ineffectiveness for not challenging Michael's competency without addressing the trial court's responsibility to establish both

boys' competency, nor counsel's ineffectiveness for not challenging Hector's competency. R&R at 6. The District Court mentioned the omission, stating that the Magistrate's characterization of the claims "disregards [Jose Medina's] pro se claim that the trial court violated his due process rights when it failed to conduct a sua sponte inquiry into the competency of the Toro brothers" and noting that Jose never challenged the Magistrate Judge's characterization. 373 F. Supp. 2d at 538 n.6. The District Court further explained that "it was not necessary to discuss whether the trial court should have conducted a competency hearing sua sponte" for Hector and Michael because the District Court granted Jose Medina a new trial based on trial counsel's failure to challenge Michael's testimony. Id.

The Third Circuit also recognized that Jose Medina had raised the issue of the trial judge's failure to establish both boys' competency as the law requires. However, the Third Circuit stated after Jose Medina won a new trial from the District Court his lawyer should have preserved his challenge to these issues by filing a protective cross appeal following the Commonwealth's appeal of the District Court's decision. Medina v. Diguglielmo, 461 F.3d 417, 426-27 (3d Cir. 2006). Because Jose Medina's counsel did not, the Third Circuit concluded, "this claim has been abandoned or forfeited." Id. The Third Circuit – in a technical twist given its acknowledgement that no court addressed Jose Medina's challenge to the trial judge's failure to establish Hector's competency – then reinstated Jose's sentence based in large part on the existence of Hector's testimony.³²³ The Third Circuit evaluated the record without Michael's testimony, having

³²³ Even though the Third Circuit discussed other witnesses' testimony following its discussion of Hector's, that evidence would not have been sufficient to convict. Moreover, the proper analysis for prejudice is not sufficiency of the evidence but rather whether "a particular omission or commission was so serious that it

found counsel erred in not challenging his competency, but then relied upon the younger Hector's testimony (whose competency likewise had not been established) in holding that Jose Medina was not prejudiced by the error. Id. at 430.

The law required that Hector's competency should have been tested, it was not tested and this error was never reviewed or corrected. The irony is that Hector's testimony untested for competency played a central role after his older brother's testimony was excluded for not having been tested for competency. Denying Jose Medina review of Hector's untested competency had monumental implications: the Superior Court and the Third Circuit kept Jose Medina's conviction in place because of Hector's testimony. Just as the basic legal requirement for child witnesses aimed at ensuring their competency and safeguarding the fundamental truth telling process at trial was bypassed, so was review of that error. Had these challenges been addressed, a new trial likely would have been granted long ago since the incriminating evidence was from two child witnesses not established as competent. Hector's credible testimony that a detective pressured him to lie shows that the trial error of overlooking Hector's competency, and absence of appellate review and remedy of the error, constituted a profound injustice.

undermined the reliability of the outcome of the proceeding." 549 A.2d at 112 (citing Pierce, 527 A.2d 973 (1987)) (Justice Papadakos concurring) (quotations omitted).

VI. Conclusion

There was something amiss about the reluctant and contradictory testimony of 11-year-old Hector Toro and 12-year-old Michael Toro that formed the basis of Jose Medina's conviction for murder. Steps to test child witnesses before they testified were skipped at trial. Hector Toro, now an adult, divulged his guilty secret that provides the missing pieces to complete the puzzle. He did not witness Jose Medina do anything incriminating on the night of William Bogan's murder. Hector Toro and his brother, Michael, were taken in for questioning by a detective after midnight following the murder, without family permission, knowledge or support. That detective threatened Hector Toro and his brother that if they did not testify as instructed they would end up in juvenile detention or a foster home. The same detective intercepted the boys on their way to school repeatedly and brought them in for questioning and to testify, making the same threats, again without their family knowing. Hector Toro finally confessed in 2006 that he lied about seeing Jose Medina and incriminated him in the murder because he believed the detective would take him and his brother from their home if they did not cooperate. Without the children's testimony there was no other evidence that would have led to Jose Medina's conviction: no knife, no blood on his white clothing, no stolen wallet, no motive and no prior relationship.

The credible evidence that two child witnesses who provided the primary incriminating evidence against Jose Medina were coerced and that one has recanted is significant in the context of a trial record that lacked any other reliable evidence to support a conviction. Hector Toro's credible new testimony on its own warrants a new trial. But in light of the other errors that relate directly to the competency of the child

witness testimony, there is no fair alternative short of a new proceeding. Even before Hector Toro testified that he was pressured into lying, previous courts had ordered a new trial based solely on the prejudicial errors stemming from Michael Toro's untested competency given the documented red flags in his testimony. Yet the same procedural errors that occurred with Michael Toro also occurred with his younger brother, Hector. Now the evidence shows that Hector Toro, untested for his competency, testified to witnessing something he had not experienced.

Jose Medina's protests, over the last two decades, that child witness procedures were ignored at his trial are now infused with new meaning: these protections would have prevented the false testimony that led to his conviction. The improper conduct that was committed in this case breeds contempt for our justice system and compromises our ability to rely on the verdict as being a just outcome. The law requires, and all those involved deserve, the fairness of a new trial. In the interest of justice, this Court vacates Jose Medina's conviction and orders a new trial.

New evidence that one child was threatened into lying, a trial filled with errors relating to the child witnesses, and the absence of proper appellate review are all circumstances that undermine the confidence that any community can have in the integrity of Jose Medina's conviction. Sacrificing procedural safeguards and fundamental fairness to obtain a conviction not only increases the likelihood that innocent persons are convicted but also that a guilty party remains at large. "Society wins not only when the guilty are convicted but when criminal trials are fair: our system of the administration of justice suffers when any accused is treated unfairly. . . ."

Commonwealth v. Wilder, 337 A.2d 564-567 n.7 (Pa. 1975) (citing Brady v. Maryland,

373 U.S. 83 (1963)). The law mandates a retrial for Jose Medina where all relevant and competent evidence is presented, and procedural and legal requirements are followed with fidelity. Only then will there be a verdict that has integrity.

BY THE COURT:

Lisa M. Rau, J.

DATED: August 2, 2011