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Supreme Court of Texas.
In the Matter of M.P.A.
No. 10-0859.

January 10, 2012.

Appearances:

Dustin Howell of Baker Botts, LLP, for Petitioner. F. Clinton Broden of Broden & Mickelson, for Peti tioner.

James V. Murphy and John Gauntt, Jr. of Bell County Attorney's Office-Juvenile Division, for Respondent.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument In the Matter of M.P.A.

MARSHAL: May it please the Court, Mr. Howell and Mr. Broden will present argument for the Petitioner. The Petitioner has reserved four minutes for rebuttal. Mr. Howell will open with the first eight minutes and Mr. Broden will present the rebuttal.

ORAL ARGUMENT OF DUSTIN HOWELL ON BEHALF OF THE PETITIONER

ATTORNEY DUSTIN HOWELL: May it please this honorable Court, at stake in this case is the liberty of M.P.A., a young man who at the age of 16 was convicted of a crime based on the now recanted testimony of the alleged victim. The jury then sentenced M.P.A. to 20 years imprisonment based on expert testimony the State now admits was false and for which that expert was disciplined by the Board of Examiners and Psychologists. M.P.A. has now served over 12 years of that sentence. He comes before this Court seeking habeas corpus relief on three independent grounds. One, the State's use of false testimony, which violated due process, two, actual innocence and three, ineffective assistance of counsel. I will be addressing the State's use of false testimony, yes.

JUSTICE EVA M. GUZMAN: Go ahead; I was going to ask you a jurisdictional question, but I'll wait a few minutes.

ATTORNEY DUSTIN HOWELL: My co-counsel will be addressing our actual innocence claims and ineffective assistance of counsel if the Court has questions. In order to obtain habeas corpus relief on the basis of State's use of false testimony, M.P.A. has to establish two things by a preponderance of the evidence. One, that the State, whether knowingly or unknowingly, used false testimony during his trial and two, that this testimony contributed to the sentence he received. In other words, that this was harmful error.

JUSTICE DAVID M. MEDINA: The Able test I presume you're talking about that. What if that's excluded from this hearing? What impact did it have on your client?

ATTORNEY DUSTIN HOWELL: The Able Assessment was the sole basis for Dr. Willoughby's conclusion that M.P.A. was a pedophile with a high risk to reoffend and that is a main pillar of the State's argument to set up its argument to get a 20-year sentence in this case. That's what makes M.P.A. a long-term threat in the view of the State.

JUSTICE EVA M. GUZMAN: Do we look at what would have happened had he testified truthfully because had he testified truthfully, he would not necessarily have to have discussed the criticism by the BYU professors that would probably come up in a cross examination context or do we just ignore the false testimony? How do we review his testimony?

ATTORNEY DUSTIN HOWELL: The question here is whether had he represented these studies properly, would this testimony still be?

JUSTICE EVA M. GUZMAN: But he didn't have to represent the studies at all, correct?

ATTORNEY DUSTIN HOWELL: Correct.

JUSTICE EVA M. GUZMAN: It might have been thrown out for being unreliable had he not done that, but what does testified truthfully really mean?

ATTORNEY DUSTIN HOWELL: Well, the problem here is that the BYU study was his sole basis for his diagnosis of pedophilia. So if he did not have the support of the Able Assessment, then he could not have reached that conclusion and that's a conclusion that the State relies on to make its argument that he poses a long-term threat.

JUSTICE EVA M. GUZMAN: So had he testified truthfully under the case laws that existed at the time, his testimony would have been excluded as unreliable because he could point to no literature?

ATTORNEY DUSTIN HOWELL: That's correct, Your Honor, and you bring up an important point here, which is what the state of the law was at the time of this case and the State likes to focus on the fact that, and the court of appeals noted that Daubert Law was still evolving, but that's actually not an accurate depiction of the state of the law. The court sees in 1999, by that time, this Court had already decided Robinson and Gammill and Havner. The court of appeals had decided Kelly and Neno and those cases solidified the state of the law with regards to reliability of expert evidence.

JUSTICE DAVID M. MEDINA: That seems to be the primary argument, a first argument anyway in the amicus brief filed by the Innocence Project.

ATTORNEY DUSTIN HOWELL: Yes.

JUSTICE DAVID M. MEDINA: And so the evidence shouldn't have been admissible in the first place, correct?

ATTORNEY DUSTIN HOWELL: That's correct under any state of the law.

CHIEF JUSTICE WALLACE B. JEFFERSON: Just a question of timing, the briefs say that the BYU criticism or those articles were right at the time of trial or right before. When were they published in relation to when this case was tried?

ATTORNEY DUSTIN HOWELL: The BYU studies were published in July of 1999. That was a month before M.P.A. actually received the Able Assessment from Dr. Willoughby and about three months before his trial. And the State will note well maybe that's too high of a bar to expect a lawyer to know about that, but certainly by the time Dr. Willoughby testified at this trial, he was aware of it and aware of it well enough to misrepresent its results and this error contributed to the sentence that M.P.A. received.

JUSTICE NATHAN L. HECHT: There's no quibbling about probably or likely is there? There seems to be some little difference in the standard of review articulating that is there one?

ATTORNEY DUSTIN HOWELL: The standard of review here is an abuse of discretion. Whether or not it would have been error, whether or not it was wrong for the habeas court to deny--

JUSTICE NATHAN L. HECHT: But it contributed to the sentence.

ATTORNEY DUSTIN HOWELL: Yes.

JUSTICE NATHAN L. HECHT: There's no question about it probably or likely contributed.

ATTORNEY DUSTIN HOWELL: When I said, more than likely, what I'm referring to is M.P.A.'s burden, which is to prove the facts giving rise to his relief by a preponderance of the evidence.

CHIEF JUSTICE WALLACE B. JEFFERSON: And as I understood your argument with respect to Willoughby, it's not really an abuse of discretion standards because you're saying that as a matter of law, the testimony was false and a trial court wouldn't have discretion to admit false testimony, correct?

ATTORNEY DUSTIN HOWELL: That's correct. And so then the question becomes whether or not that false testimony contributed to the sentence that M.P.A. received.

CHIEF JUSTICE WALLACE B. JEFFERSON: And that wouldn't be an abuse of discretion standard either. I mean we would have to sort of weigh the record.

ATTORNEY DUSTIN HOWELL: The question of harm is something that the Court does review. It's a legal question.

JUSTICE EVA M. GUZMAN: But there are some credibility issues as it relates to the testimony of the two alleged victims and the trial court made some findings on their credibility. So what if Dr. Willoughby's testimony was not there, then how do we get to the heart of the issue, which is how did it contribute versus the actual testimony of the minors?

ATTORNEY DUSTIN HOWELL: It's important here to keep in mind what M.P.A.'s burden is here and it's not that we have to disprove every possible scenario that might justify the sentence that he received. It's simply that once this false testimony came in, it had an impact on the decision that the jury made. And here because Dr. Willoughby's testimony and his conclusion that M.P.A. was a pedophile with a high risk to reoffend, because that was so central to the State's case and because it was elicited from an expert and because it was reiterated over and over again over the course of the State's summation, which the Court can see in tab three of the bench

book is the entirety of the closing arguments. It's undeniable that this had an impact or at least, at the very least, it was more likely than not to have had an impact on that decision.

JUSTICE EVA M. GUZMAN: And trial counsel's statements that he thought it had zero impact on the ineffective assistance of counsel aspect.

ATTORNEY DUSTIN HOWELL: Right. It's not surprising that Mr. Barina would make that argument considering he was responding to an allegation that he was ineffective at trial, but certainly all this Court has to look at is the factors he articulated in the past, which are the emphasis that testimony receives, whether or not it was cumulative and whether or not it was elicited from an expert. And if this also goes against what this Court and every court that's recognized, its addressed expert testimony has recognized just how influential expert testimony is on juries and it's the whole reason the Daubert Standard exists.

JUSTICE DAVID M. MEDINA: Does it matter at all if he had an ineffective assistance of counsel here? I mean you had testimony that wasn't true and was used to convict somebody. Shouldn't that be enough?

ATTORNEY DUSTIN HOWELL: It is enough for our piece of our argument. The ineffective assistance is wholly independent of this piece of the claim. All that we have to prove is that there was false testimony, which there was here. There's no dispute, but misrepresented these results from the test and from the error rates that Dr. Able himself had published.

JUSTICE EVA M. GUZMAN: Well, there's a harmless error analysis that you have to go to even though there was false testimony. I mean it's presumed to be error and then you have to get to the harmless error aspect of it and are you saying that there is authority for your broad rule that says, any time there's false testimony, you automatically presume harm?

ATTORNEY DUSTIN HOWELL: I'm not arguing, Your Honor, that we automatically presume harm.

JUSTICE EVA M. GUZMAN: That's what I thought I heard you say.

ATTORNEY DUSTIN HOWELL: What I'm saying here is that we do have to establish harm. That's a component of the claim and Ex-parte Chabot, which is a Court of Criminal Appeals' decision addressing false testimony, the piece of that says that, the question is, whether the state knowingly or unknowingly used false testimony. The next part of that, in order to be entitled to a due process habeas claim, you do have to demonstrate harm so it's not automatic in this case, but in this case it is established because of the effect that this sort of testimony has.

JUSTICE EVA M. GUZMAN: Is your strongest argument in that context the 65 versus 85 percent number that was articulated by Dr. Willoughby with respect to classifying him as a pedophile?

ATTORNEY DUSTIN HOWELL: Not necessarily, Your Honor, and I can see my time is winding down, but if I can take a second to address this because there are a couple of important pieces to it. One is that that certainly is a component, that he misrepresented this error rate, but that's not the only misrepresentation. He also said that, these BYU studies had supported his conclusion that he was a pedophile when, in fact, they had rejected it and the error rate that he cited was only tested on a general population. When these BYU researchers actually subjected this same test to a population of adolescents, they concluded that its ability to discriminate non-offenders from offenders was not significantly better than chance.

JUSTICE EVA M. GUZMAN: Well, I guess I was looking at it as contribute it to the sentence, what the jury, they heard 65 versus 85. I mean it seems to me that would have a significant impact.

ATTORNEY DUSTIN HOWELL: Certainly, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, counsel.

ATTORNEY DUSTIN HOWELL: Thank you.

ORAL ARGUMENT OF F. CLINTON BRODEN ON BEHALF OF THE PETITIONER

ATTORNEY F. CLINTON BRODEN: May it please the Court.

JUSTICE EVA M. GUZMAN: May I ask you the jurisdictional question? 56.01(a) of the Family Code speaks to cases arising from juvenile court.

ATTORNEY F. CLINTON BRODEN: Correct.

JUSTICE EVA M. GUZMAN: This arises from a district court. Do you contend we have jurisdiction under 56.01(a) or simply under the Government Code 22.001?

ATTORNEY F. CLINTON BRODEN: Well, under the Family Code and under the Constitution in the habeas context and this is an appellate court in the habeas context.

JUSTICE EVA M. GUZMAN: And that was in your brief?

ATTORNEY F. CLINTON BRODEN: Yes.

JUSTICE EVA M. GUZMAN: So you stand by that argument?

ATTORNEY F. CLINTON BRODEN: I do. I've been a criminal defense attorney for 20 years and I'll tell the Court very candidly, it's rare that I represent an innocent person. I can say without any reservation that I do so in this case. And even though M.P.A. is entitled to relief based on the false testimony of Dr. Willoughby as far as getting a new punishment hearing, without a finding of innocence by this Court, this young man will spend the rest of his life as a registered sex offender for having committed acts, which the overwhelming evidence now shows he didn't commit.

CHIEF JUSTICE WALLACE B. JEFFERSON: Overwhelming evidence?

ATTORNEY F. CLINTON BRODEN: Overwhelming, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Or conclusive. I mean there's a recantation and there are credibility determinations made by the district court and there are circumstances about how the recanting happened. So how is that overwhelming or approaches something close to conclusive?

ATTORNEY F. CLINTON BRODEN: Well, we first need to look at the standard and if you use the standard articulated in Ex-parte Elizondo by the Court of Criminal Appeals, M.P.A. has to show by clear and convincing evidence that when you look at the evidence adduced at the habeas hearing whether a jury would then acquit M.P.A. when that evidence is juxtaposed against the evidence adduced at the trial. And by clear and convincing, it's very important that it's a high standard and I certainly acknowledge that and M.P.A. has acknowledged that all along, but it's an intermediate standard. Judge Baird in Ex-parte Elizondo made it a point to note that the clear and convincing evidence is an intermediate standard. So it's a high standard, but by no means is it an impossible standard to meet. So when I say overwhelming--

JUSTICE NATHAN L. HECHT: What role does the habeas court's determination that the recantations were not credible? What role does that play in the analysis?

ATTORNEY F. CLINTON BRODEN: Candidly, Your Honor, certainly the trial court's credibility determination under the case law deserves a great deal of deference, but that doesn't mean absolute, unreviewable deference no matter what the facts of the case are.

JUSTICE NATHAN L. HECHT: Well, I'm curious about how the standard plays out because it seems to me if you tried this case and the victim and her father say it didn't happen and that was the evidence before the jury and the prosecutor was trying to put on evidence that it did happen because she'd said, so earlier, it seems very unlikely that a jury would convict anybody under those circumstances.

ATTORNEY F. CLINTON BRODEN: I agree, I've seen it happen in family assault cases where the wife reconciles or I guess the husband reconciles and there's evidence to the contrary, but certainly in this case when you take the recantations and again it's not only the recantations of these two, one adult child and one 16-year-old child, but it's the overwhelming corroboration that corroborates their recantations.

JUSTICE DALE WAINWRIGHT: And why wasn't the trial judge convinced then?

ATTORNEY F. CLINTON BRODEN: Your Honor, I obviously can't speak for the trial judge and one of the problems when you talk about giving deference and how much deference is, there are very generic findings made by the trial court written by the state that found that the recantations were not necessarily credible. If you look at the facts and the findings by the trial court, you really can't discern in light of the totality of circumstances why the trial court reached that conclusion.

JUSTICE EVA M. GUZMAN: But if we look at the Keeter case, which sort of is very instructive on the issue of rejection of recantations and the factors articulated in the Keeter case, many of them are present here, the pressure by the family members, etc. Analyzing this under that authority, what does that do to your argument?

ATTORNEY F. CLINTON BRODEN: It's very easy to take Keeter and that's the state's argument, but I say when you look in Keeter, in Keeter, there was a child, one child who recanted who was still a child, a young child at the time she recanted and her claim was her 3-year-old sister made her make these false allegations. It's a far cry from here when you have 18-year-old S.A. about to enter college, living on her own, coming into court and explaining how this all came about. Her mother had stolen money from her employer in Bell County, took her and her brother to Florida in violation of a court order and said, to this little 8-year-old, if you don't stick to this story, if you don't tell people this, your mommy is going to jail. Well, what do you think an 8-year-old is going to do? But at the time she testifies as an 18-year-old, she's an adult. A.A. is 16 years old at the time of the habeas hearing and he comes into court and very vividly describes the meeting in his grandmother's living room in Muscatine, Iowa where Lavana, the mother, got these children and told them what to say and as I said, there's tons of corroboration. This isn't Lavana's first rodeo.

JUSTICE NATHAN L. HECHT: But help me with this again though. It seems to me if the issue is if all of this evidence had been before the first jury, could any reasonable jury convict beyond reasonable doubt or adjudicate? It seems to me the answer is pretty clearly no, they couldn't. But if the question is, is any of this really credible, are these people telling the truth because people recant all the time, then we have to give a lot of deference to the trial judge who was sitting there watching them it looks like to me.

ATTORNEY F. CLINTON BRODEN: Again, Your Honor, I can't argue with the deference you have to give the trial judge, but again, it's not complete and absolute deference. And if this Court look at this record and looks at the totality of the facts, not only recantations, but the corroboration, it can find that the trial court abused its discretion.

JUSTICE PHIL JOHNSON: But aren't we just substituting our judgment for the trial judge that was looking if we do that. The trial judge is looking at the people and listening to them, seeing the lawyers, hearing the way

the questions are asked. When we're up here looking at a record and you want us to say the trial judge got it wrong. That's the bottom line of what you're asking us to do, correct?

ATTORNEY F. CLINTON BRODEN: That is the bottom line, but I would suggest to you, Your Honor, that what you're suggesting is, in fact, absolute discretion and this Court does not give absolute discretion no matter the circumstances, no matter how reasonable the findings are to the trial court.

JUSTICE PHIL JOHNSON: Let me ask one other thing and that is you said that, the findings that were made and entered by the trial court were drafted by the state, but doesn't the trial court usually ask one side or the other to draft the findings, the fact and conclusions of law, isn't that a pretty standard practice in the trial court?

ATTORNEY F. CLINTON BRODEN: It is, but then when you have generic findings and you get a question as to why the trial court did, why it did something it did, I'm sort of left to throw up my hands and say I don't really know because the findings are so generic.

JUSTICE PHIL JOHNSON: Of course, the trial court had to make a decision whether to sign those or whether to alter them.

ATTORNEY F. CLINTON BRODEN: Correct.

JUSTICE PHIL JOHNSON: So we do have findings made by the trial court regardless of who initially drafted them.

ATTORNEY F. CLINTON BRODEN: That is correct.

JUSTICE EVA M. GUZMAN: You're asking us, the trial court made this finding that the testimony was not credible based on the testimony of all the witnesses, the confessions or the admissions of J.A. and other evidence. So it wasn't from the trial court's perspective, just the lack of credibility of these two witnesses, but all of the other evidence, which is the same evidence you contend, supports I guess no deference to the trial court's findings.

ATTORNEY F. CLINTON BRODEN: Well, not no deference, but deference that can be overcome and in this case should be overcome, but yes--

JUSTICE EVA M. GUZMAN: The standard is almost total deference.

ATTORNEY F. CLINTON BRODEN: That's correct.

JUSTICE EVA M. GUZMAN: And if we disregard this finding then doesn't that amount to no deference to the trial court's finding on this issue?

ATTORNEY F. CLINTON BRODEN: I guess you can look at the flipside, if the Court just checks it off then it's absolute non-reviewable deference. So the Court has to look at this, look at the totality, look at the record and say did this trial court in light of the recantations, in light of the overwhelming corroboration, did it abuse its discretion in finding the recantations are not credible.

CHIEF JUSTICE WALLACE B. JEFFERSON: Justice Medina.

JUSTICE DAVID M. MEDINA: Yes, this may be the wrong analogy, but it seems to me that your argument is similar to what we have for a motion for summary judgment and when a judge--

ATTORNEY F. CLINTON BRODEN: Now you're talking to a poor criminal lawyer.

JUSTICE DAVID M. MEDINA: --well, when a judge grants a new trial in interest of justice, they can't do that anymore. They have to give an explanation of why, the same thing for motion for summary judgment has to give an explanation of why. So we don't take, the Court doesn't take whatever the trial judge does for granted anymore, even though the trial judge is there, sees the witness and makes the decision, an informed decision hopefully. So they don't have absolute discretion and it seems that's what your argument is to me.

ATTORNEY F. CLINTON BRODEN: That sounds good. I agree with you, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is now ready to hear argument from the Respondent.

MARSHAL: May it please the Court, Mr. Murphy and Mr. Gant will present argument for the Respondent. Mr. Murphy will open with the initial 11 minutes.

ORAL ARGUMENT OF JAMES V. MURPHY ON BEHALF OF THE RESPONDENT

ATTORNEY JAMES V. MURPHY: May it please the Court, opposing Counsel and audience, this is the fourth time this case has been before this Court in one form or fashion in the past 12 years. The Petitioner has continued to challenge his adjudication for committing the offense of aggravated sexual assault.

JUSTICE DEBRA H. LEHRMANN: Well, let me ask you, do you dispute that Willoughby's statements were false?

ATTORNEY JAMES V. MURPHY: Well, Your Honor, my Co-Counsel is going to discuss the issues of Dr. Willoughby and the use of the Able exam, but I would indicate, if I may speak for him for the moment, that, no, his statements were false.

JUSTICE DEBRA H. LEHRMANN: And they were wrongfully admitted.

ATTORNEY JAMES V. MURPHY: Well, I would disagree to the point that those statements were never presented to the jury. The jury did not hear those statements. Those were statements that were done in voir dire to the judge in determination of whether Dr. Willoughby's testimony was going to be admitted.

JUSTICE EVA M. GUZMAN: Didn't you argue to the jury in closing argument that the expert said, he was a pedophile and you were relying on that 65, 85?

ATTORNEY JAMES V. MURPHY: Not necessarily relying on the 65, 85 distinction, but the counsel in this case did argue to the jury that, in fact, he was a pedophile.

JUSTICE EVA M. GUZMAN: Because the expert said, so.

ATTORNEY JAMES V. MURPHY: They heard the expert say so that he was a pedophile and that he was at a high risk to reoffend. The testimony wasn't exactly that he was a pedophile, just that that expert would designate him or would describe him as a pedophile though he didn't meet the actual standard [inaudible].

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, that would be highly influential to a jury that's trying to make a determination of the future dangerousness of this Defendant, isn't that right?

ATTORNEY JAMES V. MURPHY: Well, Your Honor, and my Co-Counsel is going to discuss these issues, but I would defer to him to answer.

CHIEF JUSTICE WALLACE B. JEFFERSON: What was your argument?

ATTORNEY JAMES V. MURPHY: I'm dealing with the issues of actual innocence and the claim of ineffective assistance of counsel in this case.

JUSTICE NATHAN L. HECHT: So on actual innocence, can you help me?

ATTORNEY JAMES V. MURPHY: Sure.

JUSTICE NATHAN L. HECHT: I'm trying to understand whether the standard is what would any reasonable jury have done if they heard all we know now, which it seems to me awfully difficult to imagine a jury convicting knowing all we know now? If the victim and her father recant on the witness stand, it seems to me a jury would be sitting there thinking why did you even bring this case. But if the question is, is any of what this has been said, credible, then we have to, surely we have to give a lot of deference to the trial judge because people recant all the time.

ATTORNEY JAMES V. MURPHY: You're right, Your Honor, and I believe your second part is the correct answer. This is not, the test is not whether this testimony, this recantation, the testimony brought forth on a writ of habeas would raise a reasonable doubt. Herrera is very clear, which is the U.S. Supreme Court case that the petitioner must prove actual innocence. It is not enough that he raise a reasonable doubt, but the recantation testimony must be by clear and convincing and credible evidence that, in fact, no reasonable juror would be able to convict with that new evidence. And it is up to the trial court in a writ of habeas case to make that determination.

JUSTICE NATHAN L. HECHT: Help me here again; if this case were being retried, the trial judge would not exclude evidence of the recantation just because he didn't think it was credible.

ATTORNEY JAMES V. MURPHY: No, Your Honor.

JUSTICE NATHAN L. HECHT: So if all of this had happened before the first trial and the young lady and the father had come in and said, you know she shouldn't have said, what she said, and she doesn't think it's the truth any longer, it would be very hard for a jury to convict.

ATTORNEY JAMES V. MURPHY: I would agree. I think it would be hard for a jury to convict.

JUSTICE NATHAN L. HECHT: That prosecutor probably wouldn't even bring a case like that if he couldn't get the victim even or her father even--

ATTORNEY JAMES V. MURPHY: Well, I don't know about that. I have actually seen cases and have brought cases where I believe, where the person now says, it didn't happen, but we had prior testimony that, in fact, it had and we had other evidence that it occurred. And in this case, we didn't just have S.A.'s statements. We had the younger brother's statements as well and there was some limited medical evidence and I'll agree that it was limited at the time for what the value of it was. Though it's interesting in and primarily we need to look to the decisions of writs of habeas corpus that deal with the Court of Criminal Appeals and that's where we find the law in these cases. But I think it's interesting to note also that this case is brought under Article 5 Section 8 of the Texas Constitution. This is not a juvenile case brought under the Family Code. This is a case brought under that writ power of the district court, which is different than the normal writ cases brought under 1107 or 1107.1 of the Court of Criminal Procedure in that in those cases, the Court of Criminal Appeals sits at a court of original jurisdiction. This Court sits as an appellate court and as Justice Hecht and Justice Guzman have indicated, in that it must give deference to the findings of the trial court and give deference to those issues of credibility as determined by the trial courts as far as they apply to the findings of facts in this case. Visiting counsel has complained of the findings of fact and he's done that before, but in fact, he had an opportunity to submit alternative findings, chose not to, never did and the rules of appellate procedure are clear. He can't complain later on if he doesn't submit alternative findings or object to those findings.

JUSTICE DALE WAINWRIGHT: Now in discussing jurisdiction, if this were the Court of Criminal Appeals with original jurisdiction over habeas matters, it would be a different story. But because of our appellate jurisdiction only, we have to give a large degree of deference to the proceedings below, the findings below. Is that right?

ATTORNEY JAMES V. MURPHY: I would argue you have to give greater deference to the Court of Criminal Appeals, but the Court of Criminal Appeals has indicated clearly under Justice Cochran's concurring opinion, Ex-parte Thompson and Ex-parte Brown, the court set forth kind of a system of how this was to work. That the Petitioner brings forth evidence and with that evidence would prove actual innocence, then the district court holds a hearing on that to discover if the evidence is credible. If the evidence is credible, then the court makes findings of facts, conclusions of law and recommendations to the Court of Criminal Appeals. The Court of Criminal Appeals generally then follows those recommendations to the extent that it finds any support in the record to support those findings. This is not an absolute deference. There has to be some basis for those findings in the record and clearly there is in this case. As Justice Guzman indicated, this case followed many of the factors set forth in Keeter v. State, including and one I would point out specifically is regarding the internal conflict within this recantation itself. This recantation makes no sense when you juxtapose it next to the knowledge that the co-defendant, the Petitioner's brother, in fact, confessed to sexually assaulting Stephanie Arena on three different occasions. Three times he confessed that he actually did it. That recantation makes no sense and when she says--

JUSTICE EVA M. GUZMAN: But the recantation, well it as to this particular M.P.A., it makes sense as to him. He's maintained his innocence; in fact, has not gotten parole presumably because he will not admit that he committed this crime.

ATTORNEY JAMES V. MURPHY: But the recantation of S.A. in this case says, I was never touched by anyone.

JUSTICE EVA M. GUZMAN: Well, in custodial disputes, in custody disputes, it is not unusual to have these types of allegations arise routinely only to later be found to have been completely fabricated at the pressure, suggestion of another parent. That's not an unusual circumstance that when there's a custody dispute, they're going to complain that someone abused them. That just happens all the time.

ATTORNEY JAMES V. MURPHY: Sure and Your Honor, I would point out the fact, I mean they have placed up what I call straw figure in Lavana Arena to try and say to focus from to this custody issue, but the fact is here, jury found the Petitioner guilty and two different trial courts both sitting in the ability to judge the credibility of the witnesses, both found that the recantation was not credible. People who were in the bill of review hearing, that was the same judge who had heard the original trial testimony and he found that the recantation was not credible.

JUSTICE EVA M. GUZMAN: Of course, this goes to the ineffective assistance of counsel claim, but there was also a social worker, I believe, who found that there were a lot of questions about the credibility of the allegations way back, but that goes to being an effective claim, but --

ATTORNEY JAMES V. MURPHY: Well, I would only say it's an extent that the record is unclear and the Petitioner failed to produce sufficient record to show what those people would have said, if they were brought to court.

JUSTICE EVA M. GUZMAN: They might have if Mr. Barina had I guess explored that at the time.

ATTORNEY JAMES V. MURPHY: Well, Mr. Barina indicated he had tried to contact him, but even with that, looking at what Mr. Barina knew at the time, we cannot get past the fact that the Petitioner's brother, J.W.A.,

had already confessed. The trial counsel knew that Stephanie Arena had been sexually assaulted because he had the confessions. He had pled true to the offense just three days before trial.

JUSTICE EVA M. GUZMAN: How old was the brother, I know it's in the record, the one that confessed at the time?

ATTORNEY JAMES V. MURPHY: The one that confessed I believe was the older brother, I believe he was 16 at the time of the confession. And like I said, he had already confessed once in his own handwriting, once in signing a confession to the police and a third time in a judicial confession after all of his warnings to the judge and that's what Mr. Berina knew. Now getting back, interestingly enough Justice Cochran says, in Ex-parte Thomas regarding the writs in the Court of Criminal Appeals that this approach works remarkably well when the trial court finds the post trial recantation not credible and recommends the denial of habeas relief. This court, that being the Court of Criminal Appeals, follows the trial court's factual findings, legal conclusions and recommendations. These cases are speedily disposed of with per curiam orders and that's what we would ask this Court to do here today. I see that my time is up.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, counsel.

ORAL ARGUMENT OF JOHN T. GAUNTT, JR. ON BEHALF OF THE RESPONDENT

ATTORNEY JOHN T. GAUNTT, JR.: May it please the Court, Counsel, to start with, I need to clear up one thing that was a misstatement of the law by Counsel for Petitioner. M.P.A. is not going to be required to register for life as a sex offender as a result of this case. This was a juvenile matter, even though it was a determinant at sentence, he's only required to register for 10 years after the end of his sentence. And there was one other issue that came up that I want to make sure we're all on the same page. The false testimony of Dr. Willoughby was not used to convict anybody. That was only used in this position for the sentence.

JUSTICE EVA M. GUZMAN: I'm sorry you used it in closing argument when you said, he's been diagnosed as a pedophile by an expert. He is at high risk to reoffend. Our community simply cannot take that chance. Is that not a use of the false testimony in the punishment phase?

ATTORNEY JOHN T. GAUNTT, JR.: In the punishment phase, Your Honor, but not in the adjudication phase. And --

JUSTICE DALE WAINWRIGHT: And when, the false testimony is it the opinion that is argued as wrong or false or is it the supporting facts?

ATTORNEY JOHN T. GAUNTT, JR.: Your Honor, it would be the supporting facts and the --

JUSTICE DALE WAINWRIGHT: Which your co-counsel said, the jury never heard. But if they were heard, I guess their argument is that that testimony never should have been admitted.

ATTORNEY JOHN T. GAUNTT, JR.: That's the argument from Petitioner, Your Honor, but that may or may not have been the case. What we have in the record, the literature involved is just one of the key factors. What we have in the record is the article from Dr. Able from 1997 that was cited by the Fisher and Smith studies that said, 300 therapists in 36 states, two foreign countries and eight states' judicial systems were using this assessment. On top of that, we had Miss Parker, one of the prosecutors in the case, who talked to at least one other practitioner about it. We had both Berina and Mike White, M.P.A.'s brother's counsel on his related charges, who talked to multiple psychologists, psychiatrists.

JUSTICE DEBRA H. LEHRMANN: So are you arguing that there was no harm?

ATTORNEY JOHN T. GAUNTT, JR.: Well, we argue that they failed to meet their burden of proof on the issue of harm, Your Honor.

JUSTICE PHIL JOHNSON: And Counsel, everything you've said, about what the lawyers, who the lawyers talk to and all of that is in the record?

ATTORNEY JOHN T. GAUNTT, JR.: Yes, Your Honor. It's in the habeas records.

JUSTICE PHIL JOHNSON: Habeas record, right.

JUSTICE EVA M. GUZMAN: Does the test for the 65% accuracy rate satisfy the Robinson Standard, 65% Robinson Kelly standards?

ATTORNEY JOHN T. GAUNTT, JR.: Your Honor, that's a difficult question in part because the Able Assessment wasn't designed to compare offenders to nonoffenders. It's not a 65% accuracy rate for the whole test. One thing we have to keep in mind is that 65% or 66%, depending on how you round, was applicable to one subgroup within this Able Assessment.

JUSTICE DAVID M. MEDINA: In any standard, that's an F. In the school standards, you make 65, you get an F. You make an 85, you get a B. So you want to use this standard to incarcerate somebody for one day and you use a standard that's not even A+. That seems wrong on its face.

ATTORNEY JOHN T. GAUNTT, JR.: Your Honor, I can agree that that is not a suitable standard, but being only one subpart of the test, it's hard to on this record tell how that affected the rest of the assessment.

JUSTICE EVA M. GUZMAN: How much of that was before the trial court, what you just mentioned before my question about the other studies and the 300 other jurisdictions, etc.

ATTORNEY JOHN T. GAUNTT, JR.: The original trial court or the habeas trial court?

JUSTICE EVA M. GUZMAN: Yea the original trial court that admitted.

ATTORNEY JOHN T. GAUNTT, JR.: None of that was before the original trial court, Your Honor.

JUSTICE EVA M. GUZMAN: So how do we consider that when we're analyzing whether it should come in at all ever?

ATTORNEY JOHN T. GAUNTT, JR.: Well, that's a good question.

JUSTICE EVA M. GUZMAN: I don't know the answer.

ATTORNEY JOHN T. GAUNTT, JR.: I'm not sure that I do either, Your Honor, but that's the trial court. In the habeas court, it goes to show that this was a widely accepted tool used by the relevant scientific community at least in our geographic area when this case went to trial. And the fact that one or two studies come out shortly before trial that are critical of its use, that's not going to instantaneously undo the acceptance of the assessment.

JUSTICE DAVID M. MEDINA: That makes sense. What if the test at the time, everybody agrees it's the right standard and later on through scientific methods and technology that we develop even since that case, we learn that those aren't good standards and that that evidence wasn't good enough to use for in this case I guess a conviction or a sentencing term. What type of review would we have in that situation?

ATTORNEY JOHN T. GAUNTT, JR.: Well, Your Honor, I believe they would be entitled to believe under ha

beas review as long as they met their burden of proof, as long as they met the standard. Here, even if they jump over the first hurdle of the analysis, they can't get over the second one.

JUSTICE DAVID M. MEDINA: And the second one being?

ATTORNEY JOHN T. GAUNTT, JR.: The second hurdle is proving by preponderance that the admission of this testimony from Dr. Willoughby as it related to the false testimony affected the disposition.

JUSTICE NATHAN L. HECHT: So you do sort of focus in on the second part of it. Don't you all but can see that the evidence was inadmissible?

ATTORNEY JOHN T. GAUNTT, JR.: The tests may still have come in, Your Honor.

JUSTICE NATHAN L. HECHT: I'm sorry now?

ATTORNEY JOHN T. GAUNTT, JR.: The tests may still have come in. That's hard to say.

JUSTICE NATHAN L. HECHT: It just strikes me that this is very unreliable testimony verging on hokum to get in and say we're going to show a kid some picture and we can tell whether he's a pedophile or not, but we're not going to let a lie detector test, I can't, it's hard to imagine.

ATTORNEY JOHN T. GAUNTT, JR.: Well, in hindsight, Your Honor, I don't know of anybody using this assessment anymore.

JUSTICE NATHAN L. HECHT: Yeah.

CHIEF JUSTICE WALLACE B. JEFFERSON: So why shouldn't there be, at the very least, at a minimum, a resentencing with some, with evidence that is not invalid.

ATTORNEY JOHN T. GAUNTT, JR.: Because to do so Your Honor, would do away with the difference given to the habeas court in this instance.

CHIEF JUSTICE WALLACE B. JEFFERSON: But there's less deference given in the circumstance like this than there is in, on the recantation side, that's what Chabot said, and other Court of Criminal Appeals' cases.

ATTORNEY JOHN T. GAUNTT, JR.: Your Honor, the deference is still an abuse of discretion standard in this Court's role as in appellate court and the habeas court was tasked with the original assessment of whether when this information came in it caused harm by making the jury's disposition different. The habeas court made that assessment based on the record, entered findings where if not explicitly, it at least implicity ruled on the credibility of Mr. Barina and Miss Parker.

JUSTICE EVA M. GUZMAN: Well, its finding was that the evidence presented that indicated that the jury was not likely swayed by the testimony of Dr. Willoughby, but by the direct testimony of the minors. But on this record when you're looking at a 20-year sentence that was imposed, it's tough to say that the jury was not likely swayed by your references to him again being diagnosed as a pedophile. I mean that finding, how much deference should we really afford that. I think the evidence was from Mr. Barina, his part of it.

ATTORNEY JOHN T. GAUNTT, JR.: Part of that was from Mr. Barina, Your Honor.

JUSTICE EVA M. GUZMAN: So do you think we should still afford that almost total deference even though you relied heavily in closing to suggest that he was a danger to society, pedophile, that he should be put away and not given probation?

ATTORNEY JOHN T. GAUNTT, JR.: Well, Your Honor, the pedophile issue that Dr. Willoughby testified about that wasn't based solely on the Able Assessment. One thing that we have to remember is that by this point in time, the M.P.A.'s had already been adjudicated committing the offenses. I see my time is expired, thank you.

JUSTICE PHIL JOHNSON: Thank you, Counsel.

REBUTTAL ARGUMENT OF CLINTON BRODEN ON BEHALF OF PETITIONER

ATTORNEY F. CLINTON BRODEN: Just clearing up a few things on the Able Assessment. First of all, the 65% went directly to the likelihood to reoffend against people in S. A.'s character. So to describe this is just a brief part of the test is a gross understatement. No court except one outlier court in Louisiana has ever let the Able Assessment in as evidence in a punishment hearing. The references counsel makes to all these other situations are somebody's on parole and you're comparing progress made in a therapeutic session. Nobody, even Dr. Able says, it not admissible to declare somebody a pedophile or likely to reoffend. And as far as all these other lawyers talking to people about the test, if you look at the record, none of them say that they talked to these other psychiatrists about use in adolescents and that's the problem here, the adolescents and that's what the Brigham Young study went to. And the Court has before in tab one all the ways it was used before the jury by Dr. Able. That it was scientific reliable with an 85%, a B, passing rate.

JUSTICE NATHAN L. HECHT: If the recantation was not credible, if it was not, but a jury who heard it would have been almost perfectly unlikely to adjudicate, what is the result?

ATTORNEY F. CLINTON BRODEN: If the recantation was not credible?

JUSTICE NATHAN L. HECHT: But a jury who heard it probably wouldn't have convicted, almost certainly would not have.

ATTORNEY F. CLINTON BRODEN: If the court looking at the record and giving the deference it needs to give to the trial court decides that it wasn't, the recantations were not credible when you look at the weak trial testimony, the recantations, the corroboration, then we don't get relief on the actual innocence. But one of the things that you do is you juxtapose it against the original trial testimony. The Court has it before it in one of the bench briefs, S. A.'s trial testimony. Equivocal and drawn out by leading questions, here it is, here's what M.P.A. was convicted on. Question, did M.P.A. make you put your mouth on his private parts? Uh-huh, I think so says, this 8-year-old S. A. You think so? Yea, I can't remember. You think that happened? Where do you think that happened? Who's house? Do you remember? No. You don't? Uh-uh. That's why M.P.A. is sitting in prison for 20 years.

JUSTICE DAVID M. MEDINA: Let me ask you a stupid question. How do we reach the actual innocence issue here? You have that before us, right?

ATTORNEY F. CLINTON BRODEN: That's correct.

JUSTICE DAVID M. MEDINA: How do we actually get to that if we find that the evidence should have been admitted, the recantation is valid, you're saying we still have the jurisdiction to make that ultimate decision here?

ATTORNEY F. CLINTON BRODEN: Under the Court's appellate habeas jurisdiction under the Texas Constitution, yes, Your Honor.

JUSTICE DAVID M. MEDINA: I need to study that further.

ATTORNEY F. CLINTON BRODEN: And then when you look at that testimony and juxtapose it against all the corroboration in this case, Lavana's repeated false claims of sexual assault again ex-husbands, against Stephanie Arena, how she learned about this from the first place that A.A. drew a picture and that she lost the picture in a move and never showed it to anybody. That she first talked to somebody about it, an unknown police office in an unknown gas station from an unknown police department said, what do you do if somebody's been sexually assaulted? Takes the kids to Florida, lies about what the Florida counselor says, then takes them to Iowa, doesn't report it in Iowa until Stephen finds them and then there's this videotape where S. A. has to take a break in order to talk to her mom about what to say. Lavana's claims that she would get custody at any cost.

JUSTICE PHIL JOHNSON: Counsel, was this argument presented to the trial court that you're making right now?

ATTORNEY F. CLINTON BRODEN: The actual trial itself where he was adjudicated?

JUSTICE PHIL JOHNSON: Well, the habeas.

ATTORNEY F. CLINTON BRODEN: Yes.

JUSTICE PHIL JOHNSON: The very words of what you're using to us are what were used on the trial court and the trial court ruled against you?

ATTORNEY F. CLINTON BRODEN: That is correct, but the State to come up and say well, it's no big deal because he only has to register as a sex offender for ten years rather than life, they very well might be right. But this is an innocent man who has spent 40% of his life in prison over this testimony I just read to you. This man's innocent.

JUSTICE PAUL W. GREEN: So how many courts would this make that's heard this testimony and they would have to go the other way?

ATTORNEY F. CLINTON BRODEN: Contrary to the State's argument, only one judge, judge, the district court judge found the testimony not to be credible. It was presented to the juvenile judge in a bill of review and the court said, even assuming that S. A.'s recantations are truthful, it doesn't meet the bill of review standards.

JUSTICE PAUL W. GREEN: So is this like the fourth court, fifth court that's heard all this?

ATTORNEY F. CLINTON BRODEN: No, this is the try, the district court, well the juvenile court heard it through the bill of review, some of it, and ultimately punted because it said, well we can show fraud on the part of the State, which is the standard in the bill of review. Then it was presented to Judge Adams in the district court, which is where we get this appeal, he made his determination. Then it was upheld by the Third Court of Appeals. If the Court looks at it and I urge it to look at the entire record and it has the testimony in its bench briefs, this man is innocent. He needs to be out of prison.

CHIEF JUSTICE WALLACE B. JEFFERSON: Further questions? Thank you, Counsel. The cause is submitted. That concludes arguments for this morning and the Marshal will adjourn the Court.

MARSHAL: All rise.

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