WRIT NO. 222074-C

EX PARTE	**)**	
MICHAEL PRINZ ARENA	**)**	**169th DISTRICT COURT**
	)	**BELL COUNTY, TEXAS**
	)	
Applicant	**)**	
	)	

MEMORANDUM OF LAW OF APPLICANT IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

F. CLINTON BRODEN
Broden & Mickelsen
2707 Hibernia
Dallas, Texas 75204
214-720-9552
214-720-9594 (fax)

LOCAL COUNSEL: **JAMES H. KREIMEYER, JR.**
112 North Main St.
Belton, Texas 76513-0727
254-939-9393
254-939-2870 (fax)

Attorneys for Applicant
Michael Prinz Arena

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other

[*W*]*e fail in our primary duty of protecting the innocent and punishing the guilty if we intentionally slam the courthouse doors against one who is, in fact, innocent of wrongdoing....*[*I*]*f the criminal justice system-even when its procedures were fairly followed-reaches a patently inaccurate result which has caused an innocent person to be wrongly imprisoned for a crime he did not commit, the judicial system has an obligation to set things straight. Our criminal justice system makes two promises to its citizens: a fundamentally fair trial and an accurate result. If either of those promises are not met, the criminal justice system itself falls into disrepute and will eventually be disregarded.*

Ex Parte Thomspon, 153 S.W.3d 416,421 (Tex. Crim. App. 2005) (Cochran, J., concurring)

I. JURISDICTION OF THE DISTRICT COURT

As noted below, this case was originally filed and adjudicated in County Court No. 1 of Bell County sitting as a juvenile court. Nevertheless, Michael Prinz Arena has chosen to file this Application for Writ of Habeas Corpus (the "Application") in the District Court and requests that the Application be decided by one of the district courts sitting in Bell County.

Because this is a juvenile case, a writ of habeas corpus is not proper under Article 11.07 of the Texas Code of Criminal Procedure because Article 11.07 does not apply to juvenile dispositions. *Ex Parte Valle*, 104 S.W.3d 888, 890 (Tex. Crim. App. 2003). Instead, authority to grant an application for a writ of habeas corpus is pursuant to Tex. Const. art. V § 8. *Id*. Moreover, Tex. Fam. Code § 56.01(o) specifically provided that the Juvenile Justice Codes does "not limit a child's right to obtain a writ of habeas corpus."

Tex. Fam. Code § 51.06(b) provides that an application for a writ of habeas corpus is to be brought in the county in which the court that entered the judgment of commitment is located. Nevertheless, it does not specify to which court in the county the application should be made. *See Texas Criminal Practice Guide* at § 115.04[2]. In general, there is no grant of jurisdiction to the county courts which preclude a district court from exercising its plenary power over issuance of writs of habeas corpus. *See State v. Onion*, 741 S.W.2d 433, 434 (Tex. Crim. App. 1987) (misdemeanor case); *Ex parte Williams*, 786 S.W.2d 781, 782 (Tex. Ct. App.--Houston [1st] 1990) (same). Consequently, all commentators that have considered the issue have determined that, in addition to the juvenile court, the district court also has jurisdiction over applications for juvenile habeas corpus. *See Texas Criminal Practice Guide* at § 115.04[2]; Comment, *State Habeas Corpus for Juvenile Delinquents in Texas*, 12 Houst. L. Rev. 1126, 1134-36 (1975) ("[I]t appears to be well settled that a juvenile delinquent in Texas may file an application for habeas corpus either in a juvenile court or in a district court vested with civil jurisdiction, and that an appeal from these courts may be taken to the court of appeals and the supreme court.").[1]

[1]*See also, Lockamay v. State*, 488 S.W.2d 954 (Tex. App.--Austin 1972) (Juvenile petition for writs of habeas corpus filed in the district court).

II. BACKGROUND

A. STATEMENT OF THE CASE

Michael Arena, born on December 17, 1982, was charged in the Juvenile Court of Bell County, Texas with engaging in delinquent conduct and the grand jury approved a Determinate Sentencing Petition. Specifically, it was alleged in Count 1 that, on or about May 1, 1997, he sexually assaulted Stephanie Arena by causing her mouth to contact his sexual organ; it was alleged in Count 2 that, on or about May 1, 1997, he sexually assaulted Stephanie Arena by causing her sexual organ to contact his sexual organ; and it was alleged in Count 3 that, on or about May 1, 1997, he sexually assaulted Austin Arena by causing Austin's anus to contact his sexual organ.[2]

An adjudication trial was held in October 1999 before the Honorable Edward S. Johnson in County Court No. 1 of Bell County sitting as a juvenile court. The transcripts of the adjudication hearing and dispositional hearing are attached hereto as Attachments B-D. Judge Johnson directed a verdict on Count 3 and the jury found that the evidence established the allegations in Counts 1 and 2.

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[2]Michael's brother, John Arena, was charged separately with sexually assaulting Stephanie and Austin and pleaded guilty to sexually assaulting Stephanie. Recently, however, John passed a polygraph exam when he answered "no" to the questions of whether he ever sexually assaulted Stephanie and whether Stephanie's mouth ever came in contact with his penis. The polygrapher was hired by the State of Texas in connection with John's parole. *See* Report from Peter J. Heller and Associates dated Sept. 23, 2005 (attached hereto as Attachment A)

Adjudication Trial ("Adjud. Tr.") at III:153, 190-91. The jury ultimately found that Michael should be committed to the Texas Youth Commission for twenty years. *Id*. at IV:63.[3]

The finding of delinquency was affirmed on appeal by the Third Court of Appeals on November 20, 2000. *In re M.P.A.*, 2000 Tex. App. LEXIS 8027 (Tex. Ct. App.--Austin Nov. 30, 2000). The issues on appeal related to the trial court's refusal to allow Stephanie to be questioned regarding the ongoing divorce and custody battle involving her parents and an issue of whether statements made by Stephanie to a nurse were admissible under Tex. R. Evid. 803(4).

On November 1, 2000, Michael next filed a Bill of Review and subsequently filed three amended Bills of Review.[4] The transcript from the Bill of Review hearing is attached hereto as Attachments E-J. On August 1, 2001, Judge Johnson found that Michael had made a "prima facie" showing of a meritorious defense in order to be entitled to a full hearing on his Bill of Review. *See* BR at III:29. Nevertheless, Judge Johnson ultimately noted that Stephanie's

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[3]Pursuant to a transfer hearing held on September 10, 2003, Michael was later transferred to the Texas Department of Criminal Justice.

[4]The First Amended Bill of Review and the Second Amended Bill of Review also contained an Application for Writ of Habeas Corpus, however; Michael's counsel, without consulting Michael or his parents, ultimately elected to proceed only on the Bill of Review. *See* Bill of Review Hearing ("BR") at I:11.

"recantation of her prior testimony, standing alone and if now believed, constituted 'intrinsic fraud' only" and, therefore, he held that Michael was *not* entitled to relief on a Bill of Review. *See* Amended Findings of Fact and Conclusions of Law (January 11, 2002).

The denial on the Bill of Review was upheld by the Third Court of Appeals on December 19, 2002. *In re M.P.A.*, 2002 Tex. App. LEXIS 8952 (Tex. Ct. App.--Austin Dec. 19, 2002). The Court agreed with the trial court that, assuming that it was established that Stephanie lied at the original adjudication trial, that was "intrinsic fraud" and not "extrinsic fraud" and, therefore, Michael was not entitled to relief on a Bill of Review. Significantly, the Court of Appeals *never* considered the strength of the new evidence claims alleged in the Bill of Review given its finding of no "extrinsic fraud." A Petition for Review was ultimately denied by the Texas Supreme Court on June 5, 2003.

On October 15, 2002 and while the appeal of the Bill of Review was pending before the Third Court of Appeals, Michael filed a Petition for Writ of Habeas Corpus. He also filed a First Amended Petition for Writ of Habeas Corpus on February 11, 2003. On March 17, 2003, Judge Johnson entered an order dismissing the Petition for Writ of Habeas Corpus because, given that the Petition for Review on the Bill of Review was pending in the Texas Supreme Court, his Court was without jurisdiction to consider it.

B. EVIDENCE SUPPORTING THE FINDING OF DELINQUENCY AND DISPOSITION

1. Delinquency

The evidence presented at the original October 1999 adjudication trial to support a finding that Michael Arena sexually assaulted Stephanie Arena was minimal at best. First, Stephanie (then age 9) testified that "more than once" Michael "made his private parts touch [her] private parts" and that Michael "made [her] put [her] mouth on his private parts" at her "grandma's house, at [her] house and his house." *See* Adjud. Tr. at II:48, 55-60. Stephanie alleged that it happened in 1997 prior to her moving to Florida. *Id*. at II:60. The following exchange that took place during Stephanie's direct examination is illustrative of her testimony:

> Q. Stephanie, did Michael ever make you do anything to his private parts?
>
> A. Yeah.
>
> Q. Is that a yes?
>
> A. Yeah, uh, huh. Yeah.
>
> Q. Did he make you put your mouth on his private parts?
>
> A. Uh, huh. I think so.
>
> Q. You think so?
>
> A. Yeah, I can't remember.

Q. You think that happened. Where do you think that happened? Whose house? Do you remember?

A. No.

Q. You don't.

A. Huh, uh.

Q. Did he ever make his private parts touch your private parts, Stephanie?

A. I think -- (Moved head up and down.)

Q. You nodded your head and you said, "I think so." You're going to have to tell me yes or no.

A. Yes.

Q. Where did that happen? Do you remember?

A. Huh, uh. No.

Q. No. Did it happen at one of those three places you mentioned?

A. Yeah.

Q. When no grown-ups were there?

A. Yeah.

Q. Now, getting back to when I asked you if he ever made you put your mouth on his private parts, you shook your head, you nodded and then you said, "I think so." You're going to have to tell them, is that yes or no?

A. Yes.

Q. Where did that happen, do you remember?

A. No.

Id. at II:58-59.

Alice Linder, a Sexual Assault Nurse Examiner for Scott & White Hospital, testified that, during a forensic examination of Stephanie, Stephanie told her that Michael had put his "privates in my butt." *See* Adjud. Tr. at II:81, 85, 88-89; III:119. Notably, Nurse Linder did not incorporate these statements into the contemporaneous medical records from the examination but only included them in an addendum prepared six days later. *Id*. at II:85-86.

Finally, Dr. Pamela Green, a physician at Scott & White, testified that she "review[ed] medical records on Stephanie" from Nurse Linder's examination. *See* Adjud. Tr. at III:121, 130. The rectal exam "was normal." *Id*. at III:135. She testified that the vaginal exam indicated that Stephanie had a "scant" "Posterior Rim Hymen." *Id*. at III:135, 137. Dr. Green testified that this fact "was suspicious, a suspicious finding for possible vaginal penetration." *Id*. at III:137, 139.

2. Disposition

Dr. Fred Willoughby testified at the dispositional hearing over objection from the defense as "an expert in the field of sexual offender assessment and

treatment." *See* Adjud. Tr. at IV:14-16.

During voir dire and outside the presence of the jury, Dr. Willoughby testified that he performed an "Abel Assessment" on Michael. *Id*. at IV:7. He also testified that the Abel Assessment involves an objective part where the person taking the tests "sits in a room by him or herself and looks at a number of different slides of different ages and different genders, male and female, and it really measures ones response time, how one looks at the various slides in comparison to other slides. *Id*. at IV:9. *Id*. Finally, Dr. Willoughby testified that the Abel Assessment is "**accepted in the scientific community** as a test that's able to predict those people who have an interest in...particular types of sexes and age groups." *Id*. at IV:10 (emphasis added). He stated that the use of the Abel Assessment was supported by "a number of articles out by Gene Abel and his colleagues" as well as the fact that "researchers at Brigham Young University have established the reliability of the instrument and the classification accuracy of the instrument." *Id*.

Before the jury, Dr. Willoughby testified as follows with regard to the Abel Assessment:

> On the objective part, with the slides, there was evidence of significant sexual interest in eight to ten year-old females and two to four and eight to ten year-old males. There was also interest, as you might expect, in adolescent females and adult females, too. But there was significant interest in young females and young males.

See Adjud. Tr. at IV:29. Dr. Willoughby testified that, based upon these "findings" on the Abel Assessment, he would qualify Michael as "a pedophile" with a "high risk to reoffend." *Id*. at IV:30, 32.

The state hammered Dr. Willoughby's testimony home during its final argument to the jury. It first told the jury:

> And you've heard the psychologist tell you he is a pedophile. He is at a high risk to reoffend.

See Adjud. Tr. at IV:60. It continued:

> You know he's been classified as a pedophile by an expert. You now know that he is interested in children, interested in children, in fact, in the same age group as little Stephanie Arena. Think about her and think about that.

Id. at IV:61.

C. BILL OF REVIEW HEARING

A hearing on Michael's Bill of Review was held in July and October of 2001. While it is completely unclear why Michael's former attorney, Ross Lavin, used this vehicle to present evidence to the Court, the evidence presented should have left little doubt as to Michael's innocence.[5]

First and foremost was the testimony from Stephanie. Judge Johnson, *sua*

[5]It appears bizarre that Lavin would file a Bill of Review since such an attack would require him to prove "extrinsic fraud" on the part of the state. There was no evidence whatsoever that the state engaged in any misconduct and, indeed, it appears the state *also* was a victim of LaVonna Arena's manipulations and Dr. Willoughby's perjury.

sponte, strongly and repeatedly admonished Stephanie about the possibility of being prosecuted for perjuring herself at the adjudication hearing when she was nine years old. *See* BR at I:61-65, 79-92. He also took steps to ensure that Stephanie had independent counsel to advise her before testifying and, when he became dissatisfied with that independent counsel, he appointed additional independent counsel to advise her. *Id.* at I:65-79. Despite all of this, Stephanie testified that, in fact, Michael had *never* sexually assaulted her and that her previous testimony was a result of her mother, LaVonna Arena, telling her to accuse Michael of sexual assault. *Id*. at I:99-100.[6]

Second, Michael offered the testimony of Dr. Stuart Coles and Arlene Stoddard. Dr. Coles is a physician with Scott & White and did a physical exam of Stephanie on August 30, 2000. *See* BR II:19-20. During the exam, Stephanie "denied that she'd been inappropriately touched by anyone...." *Id*. at II:22. More importantly, in his report, Dr. Coles noted that Stephanie's "hymenal structure appears normal." *See* Plaintiff's Exhibit 3 in BR (attached hereto as Attachment L).[7] Similarly, Arlene Stoddard, a licensed therapist who also worked at the

[6]Prior to the Bill of Review hearing, Austin also recanted any allegations of sexual assault that he had made. *See* at BR I:35. *See also* Affidavit [sic.] of Austin Arena (attached hereto as Attachment K).

[7]Although not introduced at the Bill of Review hearing, Dr. Coles' examination was confirmed in an independent examination conducted by Dr. Susan P. Nickel of Scott & White. *See* Outpatient Notes dated Sept. 15, 2000 (attached hereto as Attachment M).

Children's Advocacy Center, counseled Stephanie in November of 2000. *See* BR II:27-29. During the counseling sessions, Stephanie told her "that her mother influenced her in what she said about the abuse." *Id*. at II:40. *See also* Letter from Arlene N. Stoddard dated July 13, 2001 (attached hereto as Attachment N).

Third, Michael offered the testimony of Lorenzo Cyrs who worked with Michael when he was incarcerated in the Texas Youth Commission. *See* BR III:69-70. Mr. Cyrs testified that, despite the fact that Michael had performed well in all other areas expected of him, he consistently refused to admit to assaulting Stephanie. *Id*. at III:73-74.

Then the defense painted the big picture. LaVonna, Stephanie's mother, had previously been in a relationship with Danny Profit that produced a daughter, Vanessa Profit. During the initial custody fight between LaVonna and Mr. Profit, it was established that somebody, now known to be LaVonna, accused Mr. Profit of sexually and/or physically abusing Vanessa and that accusation was later dismissed by the State of California as unsubstantiated. *See* BR II:58-59.

In May of 1997, LaVonna was seeking a divorce from Stephanie and Austin's father, Stephan Arena.[8] During that time, she told several friends/acquaintances in Bell County that she would do anything she needed to do

[8]The divorce action was filed in Bell County on January 28, 1997 but was dismissed on May 7, 1998 for want of prosecution after LaVonna fled Texas. *See* Plaintiff's Exhibit 17 in BR (attached hereto as Attachment O).

in connection with the divorce to get custody of the children. *See* BR IV:20 ("[S]he stated no matter what [her husband] wasn't going to get the kids and she would do whatever she had to do in order for him not to get them."); *Id*. at V:14-15 ("She told me specifically that she, one way or another, that she would have custody of her children and that the Arenas would pay for the way they had treated her; those were her exact words.").

True to plan, on May 16, 1997, the day following LaVonna's theft of $670.91 from her employer, she absconded with her children to the State of Florida. *See* Attachment O. She fled with Stephanie and Austin despite an April 3, 1997 court order that prohibited her from removing the children from Bell County. *Id*.

On September 2, 1997, at about the time Stephan tracked his family to Florida, LaVonna reported to child protective services in Florida that Michael had sodomized Austin and Stephanie during the second week of May 1997. *See* BR III:83; Plaintiff's Exhibit 18 to BR (attached hereto as Attachment P) . While in Florida, the children were seen for thirteen sessions, between June 24, 1997 and October 20, 1997, by a counselor from Catholic Charities named Adair Pickard. *See* Plaintiff's Exhibit 6 to BR (attached hereto as Attachment Q). LaVonna, having changed the children's first names to "Ashley" and "Dexter," informed the counselor that the children had been sexually abused. *Id*. Nevertheless, the

counselor reported that the children "denied abuse and no definitive indicators [of abuse] were noted." *Id*.

Eventually, in November 1997, LaVonna fled to the State of Iowa and, when Stephan again located his family, she instituted divorce proceedings in that state in October 1998. *See* Attachment O. It appears that from November 1997 to November 1998, LaVonna had not arranged for any counseling for Stephanie or Austin as a result of the alleged sexual abuse and she first made sexual abuse claims in Iowa during a custody evaluation conducted in September 1998 only *after* Stephan had located the children in Iowa. *Id*. Interestingly, when Stephanie was questioned by an Iowa social worker about the alleged sexual abuse, the interview had to be halted because "Stephanie became very anxious and said that she couldn't continue because she need to talk to her mother about what to say." *Id.*[9]

In August of 2000, Stephan sought custody of Stephanie (he had previously been awarded custody of Austin) from the Iowa courts. *See* Attachment O. LaVonna, true to form, then turned around and made a report to the Texas

[9]LaVonna's modus operandi was true to form. During her disputes with Danny Profit over Vanessa, LaVonna kidnapped Vanessa on five occasions. Once, after she physically assaulted Mr. Profit, she was charged with spousal assault on the elderly. Likewise, during the pendency of a 1993 divorce proceeding with Stephan (the couple later reconciled) she fled Texas for California with Stephanie and Austin and made allegations of physical assault against Stephan. In that case, Stephan had to hire a detective to find the children. *See* Attachment O.

Department of Regulatory Services ("TDRS") that her ex husband, John Arena and Michael were molesting Stephanie and Austin while they were visiting their father in Texas. *See* BR III:85-87. *See also*, Plaintiff's Exhibit 10 to BR (attached hereto as Attachments R). She also made a report to Harker Heights Police that her ex-husband had physically *and* sexually abused the children in the past. *See* Plaintiff's Exhibit 8 to BR (attached hereto as Attachment S.) Not surprisingly, given that John and Michael were incarcerated at the time LaVonna was alleging that they again sexually assaulted the children, LaVonna's allegations were "ruled out." *See* BR III:87. *See also*, Attachment R.[10]

D. NEW EVIDENCE REGARDING DR. FRED WILLOUGHBY

In 2002, well after the Bill of Review hearing, the Texas State Board of Examiners of Psychologists brought a complaint against Dr. Willoughby related to his performance in this case. *See* Complaint No. 02-574-3660 (attached hereto as Attachment U). The complaint charged, *inter. alia*.:

> The Abel Assessment is designed to assess sexual interest; in this case, sexual interest in children. At the time the Abel Assessment was administered to the juvenile patient, the scientific literature had not

[10]The Iowa court eventually awarded Stephan custody of Stephanie. It is interesting to note that the only record of LaVonna ever testifying before a judge who could weigh her credibility is during an October 2, 2000 hearing to determine who would be awarded custody of Stephanie. The hearing was held before Iowa Judge Patrick Madden. One of Judge Madden's orders in that case reflects a determination that LaVonna "was not credible" in *multiple* instances in her testimony before that Court. *See* Plaintiff's Exhibit 5 to BR (relevant portion attached hereto as Attachment T).

> established the instrument's accuracy in predicting sexual interest in adolescents. **The scientific literature at the time called the instrument a "nonvalidated instrument" for adolescent subjects.** Rebuttals to the article critical of the assessment were not published prior to the instrument being administered on this particular patient.
>
> **Further, it is alleged that Respondent falsely testified in October 1999 that the above-referenced article critical of the Abel Assessment's use with adolescents actually supported his work. At the time of the Respondent's testimony, the instrument had not been independently validated by scientific literature outside of the originator of the test (Dr. Abel). In addition, it is alleged that Respondent misrepresented in his testimony the accuracy rates for the assessment. Therefore, Respondent was unable to scientifically substantiate the findings in his psychosexual evaluation and in this testimony.**
>
> Finally, Respondent erred in making a diagnosis of "pedophilia" for the patient, in that the testing instrument is not designed to produce a DSM-IV diagnosis.

Id. at 2 (emphasis added). The complaint was supported by a detailed report from Dr. Richard L. Long who concluded that Dr. Willoughby's performance in this case was "a significant departure from the standards of our profession." *See* Report of Richard L. Long, Psy.D. (attached hereto as Attachment V) at 12.

On or about August 14, 2003, as a result of the complaint brought against him by the Texas State Board of Examiners of Psychologists related to his performance in this case, Dr. Willoughby signed an order agreeing that he **"misstated in his court testimony the research that had been conducted with respect to the Abel Assessment.**" *See* Agreed Order (attached hereto as

Attachment W) at 1 (emphasis added). As part of the agreed order, Dr. Willoughby accepted disciplinary sanctions to be imposed by the Texas State Board of Examiners of Psychologists. *Id*. at 2-3.

E. DEPOSITION OF LAVONNA ARENA

On December 12, 2006, a deposition was taken of LaVonna Arena and is attached hereto as Attachment X ("LaVonna Deposition"). Not surprisingly, LaVonna Arena denies putting Stephanie and Austin up to making false allegations. Nevertheless, the deposition is important in several respects. First, LaVonna admits that, during the custody fight between her and Danny Profit over Vanessa Profit, it was, in fact, her that accused Mr. Profit of sexually abusing Vanessa and that accusation was later dismissed by the State of California as unsubstantiated. At first, during the deposition, LaVonna stated she could not recall making the claims. *Id*. at 12. Later, she admitted making the claim and stated that she was allegedly told by Vanessa that she had been in the same bed as Mr. Profit and that she was also allegedly told by Vanessa at "a very young age" about "some odd substance." *Id*. at 13-16.

Next, LaVonna was asked about Stephanie and Austin being seen by Adair Pickard of Catholic Charities after she absconded with the children to Florida. In direct contrast to Ms. Pickard's reports in which Ms. Pickard reported that the children "denied abuse and no definitive indicators [of abuse] were noted" (*see*

Attachment Q), LaVonna swears that Ms. Pickard reported to her that the children *had* been sexually abused. *See* LaVonna Deposition at 40 ("She said to me that she actually felt that [the abuse] happened."). Moreover, even though Pickard would have been required under Florida law to report such abuse to the proper authorities, LaVonna claims that Pickard told her not to report the abuse to authorities. *See* LaVonna Deposition at 43-44.[11] Likewise, despite the fact that Pickard notes in her report that Stephanie told her that it was LaVonna who made her change her name to "Ashley" (*see* Attachment Q 6/30/97 session), LaVonna claims in her deposition that Stephanie was lying and that she (Stephanie) and Austin requested that she change their names. *See* LaVonna Deposition at 39.

Next, LaVonna claimed in her deposition that, after Stephan located them in Florida and she moved the children to Iowa in October 1997, she "immediately" arranged for the children to receive counseling in Iowa through a Lutheran organization. *See* LaVonna Deposition at 52.[12] In fact, that counseling did not begin until December 1998 -more than a year after their arrival in Iowa but only three months *after* divorce proceedings were filed in Iowa- and was

[11] Fla. Stat. Ch. 39.201 would have required Pickard to make a report of suspected child sexual abuse to authorities. Fla. Stat. Ch. 39.205 makes failure to make such a report or preventing another from making such a report a crime in Florida.

[12] LaVonna made the same claim under oath in the Iowa divorce hearing. *See* Attachment Y hereto.

limited to counseling for Stephanie. *See* Lutheran Social Services of Iowa records page 1 (attached hereto as Attachment Z).

Finally, LaVonna admitted to stealing from her employer, HEB, prior to absconding with the children to Florida in violation of a court order. *See* LaVonna Deposition at 31.

F. MEDICAL LITERATURE

As noted above, the only evidence supporting a conviction in this case other than the statements of Stephanie was the testimony of Dr. Pamela Green who testified that she "review[ed] medical records on Stephanie" from Nurse Linder's examination. *See* Adjud. Tr. at III:121, 130. Dr. Green testified that the vaginal exam indicted that Stephanie had a "scant" "Posterior Rim Hymen" and that this "was suspicious, a suspicious finding for possible vaginal penetration." *Id*. at III:135, 137, 139.

Nevertheless, this conclusion is refuted by medical literature. For example, in *Appearance of the Genitalia in Girls Selected for Non-Abused: Review of Hymenal Morphology and Nonspecific Findings* contained in the Journal of Pediatric and Adolescent Gynecology (attached hereto as Attachment aa), it is noted on page 34 that "[a]ny 'narrowing' of the hymenal rim posteriorly is difficult to measure accurately and is at best an estimate. This 'narrowing' can be normally found in over 20% of girls."

Likewise, in *Genital Anatomy in Non-Abused Preschool Girls* contained in Acta Paediatrca (attached hereto as Attachment bb), it is noted on page 1453 that, in evaluating sexual abuse of children, "all findings related to hymenal measurements were removed because of the uncertainly about their interpretation." The scholars of the article agreed "with other investigators that hymenal measurements should *never be used* as the only tool in the diagnosis of previous penetration." *Id*. at p 1460 (emphasis added).

Significantly, on pages 87 and 88 of *The Medical Evaluation of Child and Adolescent Sexual Assault Abuse* prepared by the Texas Pediatric Society Committee on Child Abuse and Neglect (relevant portion attached hereto as Attachment cc), the Committee notes that the medical literature concludes that, with the data currently available to medical practitioners, a narrow posterior rim hymen "neither support[s] nor refute" an impression of sexual abuse in a child. Likewise, it points out that "the measure of the posterior rim with such a high level of precision is fraught with the potential for error...."

G. AFFIDAVITS OF MEDICAL EXPERTS

In addition to Dr. Coles' findings that were introduced at the Bill of Review hearing in which he concluded that Stephanie's "hymenal structure appears normal" (*see* Attachment K), Dr. Stephen Ajl's Declaration is attached hereto as Attachment dd. Dr. Ajl's credentials in the area of child abuse are impeccable.

He has three decades of experience dealing with children who have been physically abused and/or sexually abused. He serves on the New York City Mayor's Task Force on Child Abuse and has served on that task force since 1995. He has also been a member of both the American Academy of Pediatrics' Subcommittee on Child Abuse and Neglect and the New York Professional Society on Abuse and Children for over a decade. As he explains in his deposition;

> I strongly disagree that a scant posterior rim hymen is evidence that a child was sexually assaulted. Scant posterior rim hymens are often seen in children who have not been sexually abuse. Moreover, a narrow hymenal rim posteriorly is very difficult to measure in the first place and can be even more difficult if done so by a person reviewing pictures from a colposcope rather than the person doing an actual examination.

H. 20/20

As this Court may be aware, this case was featured on the ABC News show 20/20 in an episode that aired on January 9, 2006. *See* Attachment ee hereto. The show contained an in-depth interview of Stephanie in which she explained that her mother manipulated her into making the false sexual abuse claims in order to avoid being prosecuted for kidnapping the children and taking them to Florida. Likewise, 20/20 asked four experts in child abuse cases, including Dr. Ajl, to review the medical evidence in the case and all four unanimously agreed that Dr. Green's conclusions of sexual abuse were not correct based upon the medical

evidence. Finally, ABC claimed that LaVonna's live-in boyfriend told 20/20 that she "wanted to tell the truth" but was afraid of going to jail.

III. "ELECTION OF REMEDIES" IS NOT APPLICABLE

As noted above, Michael Arena previously filed a Petition for Writ of Habeas Corpus that was dismissed by Judge Johnson because his Court was without jurisdiction to consider it while Michael's Petition for Review on the Bill of Review was pending in the Texas Supreme Court. In other words, Michael has *never* had a Petition for Writ of Habeas Corpus reviewed on its merits.

Nevertheless, from the file in the case it appears that Judge Johnson may have believed that, given the unilateral decision by Michael's counsel to initially proceed by way of the Bill of Review, Michael would ultimately be precluded from pursuing a Petition for Writ of Habeas Corpus under the doctrine of "election of remedies." This is clearly *not* case.

The doctrine has recently been explained as follows:

> An election of remedies is "the act of choosing between two or more inconsistent but coexistent modes of procedure and relief allowed by law on the same set of facts." The doctrine of election of remedies bars recovery when one successfully exercises an informed choice between two or more remedies, rights, or states of facts, which are so inconsistent that to allow recovery would constitute manifest injustice. Remedies are inconsistent when one of the remedies results from affirming the transaction and the other results from disaffirming the transaction. For example, in a fraud case, the plaintiff can either claim rescission for fraud and get his property back or he can sue for damages and affirm the transaction. *Id*. A party is entitled to sue and seek damages on alternative theories but is not entitled to recover on both theories; to do so is considered equivalent to a "double recovery."

Calstar Properties, L.L.C. v. City of Fort Worth, 139 S.W.3d 433 439-40 (Tex. Ct. App.--Ft. Worth 2004) (citations omitted). It should be clear that a Bill of Review is *not* inconsistent with a Petition for Writ of Habeas Corpus. While a petitioner is required to show extrinsic fraud when proceeding by way of a Bill of Review, this is no way inconsistent with a claim that he is being unlawfully restrained and thereby entitled to a Writ of Habeas Corpus. Indeed, a finding of extrinsic fraud *and* illegal restraint is not inconsistent at all.

In fact, the Fifth Court of Appeals came to this exact conclusion in a similar situation. In *Martin v. Goodstein & Starr*, 1994 Tex. App. LEXIS 3806 (Tex. Ct. App.--Dallas April 22, 1994), the trial court had granted Martin's new trial motion after she had previously filed a Bill of Review that was still pending and Goodstein & Starr argued that this violated the "elections of remedies" doctrine. *Id*. at *2. The Court disagreed:

> The doctrine of election of remedies prevents a double recovery for a single wrong. Where a plaintiff has received some benefit or his opponent has suffered some detriment, the plaintiff may not pursue an alternative remedy. The doctrine applies to remedies in the form of redress for prevailing on a cause of action.
>
> A bill of review is an equitable remedy used by a party to obtain relief from a judgment when the party is no longer able to obtain relief by direct appeal. A bill of review is not a form of double recovery or redress for prevailing on a cause of action. We hold that the doctrine of election of remedies does not apply in this case. We find no authority supporting Goodstein's contention. We hold that Martin's motion for new trial was not rendered

ineffective because she filed a bill of review.

Id. at *9-10 (citations omitted).[13]

Moreover, even if the "election of remedies" doctrine somehow applied, it would not apply to Dr. Willoughby's admission of perjury at the adjudication trial because that admission took place subsequent to any alleged "election."

[13]The application of this doctrine in this case would also "limit a child's right to obtain a writ of habeas corpus" in violation of Tex. Fam. Code § 56.01(o).

IV. DISCUSSION

This Petition is based on three separate grounds that individually or cumulatively support granting a Writ of Habeas Corpus. The first ground is new found evidence based upon Stephanie's recantation, evidence regarding LaVonna Arena, as well as medical evidence, all of which support Michael Arena's claim of actual innocence. The second ground is based upon ineffective assistance of Michael Arena's trial counsel. The third ground relates to Dr. Willoughby's admitted perjury at the dispositional phase of the original proceedings.

A. Actual Innocence

1. Introduction

Courts in Texas "entertain postconviction applications for the writ of habeas corpus alleging actual innocence as an independent ground for relief." *Ex Parte Elizondo*, 947 S.W. 3d 202, 204 (Tex. Crim. App. 1996). In such cases, an applicant must show that, in light of new evidence, no reasonable juror would have convicted him. *Id*. at 209.

Two Court of Criminal Appeals cases are instructive as to the resolution of the instant case. In *Elizondo*, the applicant had been convicted of sexual assault of his step-son, Robert. *Id*. The evidence introduced at trial included the "perfunctory" testimony of Robert and the hearsay report of Robert's step-mother who married Robert's natural father. *Id*. at 209-10. There was also evidence that

Robert was acting in sexually inappropriate ways. *Id*. at 209. Included in Robert's claims was a claim that he and his brother were made to watch sexually explicit videotapes by the applicant. *Id*. at 210. Thirteen years later, both boys (now grown men) testified that Robert's testimony was false and that he was manipulated into making the allegations against the applicant by his natural father. *Id*. Despite the fact that the natural father denied manipulating the boys and despite the fact that the Court could not "know beyond all doubt whether [the recantation] was true," habeas relief was granted. *Id*.

In *Thompson*, the applicant was convicted of sexually assaulting his five-year old daughter who was eight years old at the time of trial. *Thompson* 153 S.W.3d at 418. The daughter testified at trial along with her mother. *Id*. At the time of the habeas hearing, the daughter was twenty years old. *Id*. at 419. At the habeas hearing, she testified that the sexual abuse never happened but the mother, in connection with an ongoing custody dispute, pressured her into making the allegations against her father. *Id*. Nevertheless, the mother "vehemently denied having pressured the complainant into making the allegations." *Id*. The Court of Criminal Appeals still granted habeas relief. *Id*. at 421.

2. Stephanie's Recantation

In this case, Stephanie's recantation is even stronger than the recantation in *Elizondo* and *Thompson*. Indeed, as noted above, at the Bill of Review hearing,

Judge Johnson, *sua sponte*, strongly and repeatedly admonished Stephanie about the possibility of being prosecuted for perjuring herself at the adjudication hearing when she was nine years old. *See* BR at I:61-65, 79-92. He also took steps to ensure that Stephanie had independent counsel to advise her before testifying and, when he became dissatisfied with that independent counsel, he appointed additional independent counsel to advise her. *Id.* at I:65-79. Nevertheless, Stephanie *never* wavered, and testified that, in fact, Michael had not sexually assaulted her and that her previous testimony was a result of her mother, LaVonna, telling her to accuse Michael of sexual assault. *Id*. at I:99-100.

In addition, Stephanie went on national television and, despite the disrepute she would subject herself to by admitting to being responsible for imprisoning an innocent person, she repeatedly denied having been sexually assaulted and explained how her mother manipulated her into making the allegations.

In his findings on the Petition for Bill of Review, Judge Johnson noted that Stephanie was subject to manipulation by *both* set of parents. Judge Johnson seemed to be concerned that Stephanie made her recantations after she was placed in the custody of her father. Nevertheless, Judge Johnson's concerns can be easily answered. First, it would be unlikely that Stephanie would accuse her mother of suborning perjury while she was still in her mother's care. Second, the fact that

Judge Johnson noted manipulation by *both* parents suggests that Stephanie was, in fact, manipulated in the *first instance* into falsely accusing Michael of sexual assault. Third, Stephanie's recantation is corroborated by a great deal of other evidence and, in fact, has much, much more corroboration than the recantations which justified habeas relief in *Elizondo* and *Thompson.*

3. Corroboration of Recantation

Indeed, there is a great deal of evidence that corroborates Stephanie's recantation. First and foremost is LaVonna's *modus operandi*:

> •In connection with a custody dispute with Danny Profit over Vanessa Profit, LaVonna accused Mr. Profit of sexually abusing Vanessa. To justify the accusation, she claimed she was told by Vanessa at "a very young age" that she had been in the same bed as Mr. Profit and that Vanessa told her about "some odd substance." That accusation was later dismissed by the State of California as unsubstantiated.
>
> •The next accusation came in connection with another custody dispute after LaVonna kidnapped Stephanie and Austin, changed their names, and took them to Florida. It was only after Stephan Arena found his children in Florida that LaVonna reported to child protective services in Florida that Michael had sodomized Austin and Stephanie during the second week of May 1997. Moreover, when asked why she did not make the report earlier, she gave the absolutely ludicrous explanation that she was told by a counselor, Adair Pickard, *not* to report the abuse.
>
> •Then after LaVonna moves the children from Florida to Iowa she waited until September 1998, right after Stephan located them in Iowa, to make a report to Iowa officials.
>
> •Finally, when Stephan went back to Court to attempt to get

> custody of Stephanie in August of 2000, LaVonna turned around and made a report to the Texas Department of Regulatory Services ("TDRS") that *Stephan* had sexually abused the children in the past.

Next are LaVonna's threats. As noted above, she told one Bell County acquaintance that "no matter what [her husband] wasn't going to get the kids and she would do whatever she had to do in order for him not to get them." *See* BR IV:20. She told another that "one way or another, that she would have custody of her children and that the Arenas would pay for the way they had treated her...." *Id*. at V:14-15. Both of these acquaintances testified at the Bill of Review Hearing that neither had *any* reason to lie.

Third, are the observations of Adair Pickard, who counseled the children for four months in Florida and reported that the children "denied abuse and no definitive indicators [of abuse] were noted." *Se* Attachment Q. While it is true that this does not mean definitively that the abuse did not take place, Ms. Pickard's report certainly corroborates the recantation.

Fourth, is the fact that, when Stephanie was asked about the alleged sexual assault in Iowa, she "became very anxious and said that she couldn't continue because she needed to talk to her mother about what to say." *See* Attachment O. Again, while it is true that this does not mean definitively that the abuse did not take place, the evidence supporting the recantation continues to mount.

Fifth is Dr. Coles' physical examination of Stephanie and his conclusion that her "hymenal structure appears normal." *See* Attachment L. Moreover, Dr. Coles' examination is supported by Dr. Nickel's examination. *See* Attachment M.

Finally, the only evidence to support Stephanie's original claim was the testimony of Dr. Green. Yet even Dr. Green would only say there was "*possible* vaginal penetration." *See* Adjud. Tr. at III:135, 137, 139 (emphasis added). As explained below, however, even though Dr. Green's testimony was lukewarm, her conclusions are now belied by medical literature and several medical experts.

B. Ineffective Assistance of Counsel

Michael Arena was represented at trial by Bobby Barina. As recognized by the Eighth Court of Appeals, "a juvenile is entitled to the effective assistance of counsel, and its lack may serve as the basis for reversal of any adjudication of delinquency." *M.B v. State*, 905 S.W.2d 344, 345-46 (Tex. Ct. App.--El Paso 1995). Consequently, a juvenile may raise cognizable claims of ineffective assistance in habeas proceedings. *Id*. at 346.[14] Michael Arena's ineffective assistance of counsel claim is based upon four separate grounds that individually

[14]Michael Arena submits that the ineffective assistance claims raised herein were not sufficiently developed in the record to allow him to raise them on direct appeal. To the extent this Court might conclude that any of the ineffective assistance claims should have been raised on direct appeal and were not, Michael Arena submits that he was denied effective assistance of appellate counsel as a result of appellate counsel's failure to raise the issue(s) and therefore asserts this as an additional basis supporting habeas relief.

or cumulatively support a new trial.

1. Barina Failed to Introduce the Conclusions by Counselor for Catholic Charities

First, as noted above, a trained counselor with Catholic Charities in Florida who worked with Stephanie and Austin for thirteen sessions, between June 24, 1997 and October 20, 1997 reported that the children "denied abuse and no definitive indicators [of abuse] were noted." *See* Attachment Q. This information could have been used to impeach Stephanie's testimony at the adjudication hearing and could have given reasonable doubt to the jury whether abuse had occurred given the lack of indicators observed by the counselor.

At the Bill of Review hearing, Barina was asked about this exculpatory information from Catholic Charities and, surprisingly, he testified that he did not "remember ever seeing it." B.R. at V:30-31. Nevertheless, Barina's notes, which appear to have been taken at the time he reviewed the discovery in this case, clearly state: "Neither reported sexual abuse to Catholic Social Service counselors." *See* Notes of Bobby Barina (attached hereto as Attachment ff) at 4.

2. Barina Failed to Introduce the Fact that Stephanie Needed Her Mother to Tell Her What to Say When Making the Allegations

As also noted above, when Stephanie was videotaped by an Iowa social worker about the alleged sexual abuse on December 11, 1998, the interview had to

be halted because "Stephanie became very anxious and said that she couldn't continue because she need to talk to her mother about what to say." *See* Attachment O. This evidence would have given strong support to a defense theory that Stephanie was put up to making the allegations by LaVonna. Barina knew about the videotape as reflected in his notes. *See* Attachment ff at 5. Indeed, Barina wrote in his notes while describing the videotape: "Stephanie wanted her mother there 'because her mother helped her.'" *Id*. It is likely that a jury would find it highly relevant that Stephanie would have needed help from her mother about what to say if she was truly a victim of sexual assault.

3. Barina Failed to Refute Dr. Green's Expert Testimony

The most egregious example of Barina's ineffectiveness was his failure to challenge the testimony of Dr. Green. Again, the *only* evidence supporting a conviction in this case other than the statements of Stephanie was the testimony of Dr. Green who testified that Stephanie had a "scant" "Posterior Rim Hymen" and that this "was suspicious, a suspicious finding for possible vaginal penetration." *See* Adjud. Tr. at III:135, 137, 139. Nevertheless, as explained above, scientific literature belies Dr. Green's conclusions and renowned experts who have reviewed Dr. Green's findings strongly disagree with them. Similarly, Dr. Coles, Dr. Green's colleague at Scott & White, reports that, in fact, Stephanie's "hymenal structure appears normal" and this report is corroborated by Dr. Nickel, another

Scott & White doctor. *See* Attachments L and M. Moreover, as far back as 1995, lawyers were urged to aggressively cross-examine medical experts who claimed that a narrow posterior rim hymen was suspicious for sexual abuse. *See Cross Examination of the Medical Expert*, IPT Journal (Vol. 7 1995) at 9 (attached hereto as Attachment gg). In addition, as noted above, a renowned expert has given his opinion "that a scant posterior rim hymen is [not] evidence that a child was sexually assaulted [because] [s]cant posterior rim hymens are often seen in children who have not been sexually abused." As well as his opinion that "a narrow hymenal rim posteriorly is very difficult to measure in the first place and can be even more difficult if done so by a person reviewing pictures from a colposcope rather than the person doing an actual examination." *See* Attachment dd.

Despite the importance of Dr. Green's testimony, however, Barina did absolutely nothing to challenge the underlying conclusion that Stephanie actually had an abnormal hymenal structure let alone the conclusion that a "scant" "Posterior Rim Hymen" is "a suspicious finding for possible vaginal penetration." Likewise, it does not appear that Barina undertook to discuss Dr. Green's findings with any medical experts nor did he call an expert at the adjudication hearing to refute Dr. Green's testimony.

A case almost directly on point is *Gersten v. Senkowski,* 426 F.3d 588 (2d Cir. 2005) where a federal court reversed a state court's denial of post-conviction

relief. There, Gersten had been convicted of sexually abusing his daughter. At trial, the state's witnesses included Gersten's daughter, Gersten's ex-wife as an outcry witness and a medical expert, Dr. Bella Silecchia, who testified that her findings, based upon a physical examination of the girl, "were highly suggestive of penetrating trauma to the hymen and chronic irritation of the posterior fourchette and perihymenal tissues." *Id*. at 591-96. In his petition for habeas relief, Gersten claimed that his trial counsel was ineffective for failing to call an expert to refute Dr. Silecchia's testimony and submitted the affidavit of Dr. Jocelyn Brown who disagreed with Dr. Silecchia's testimony and concluded that "the physical evidence did not appear in any respect to be indicative of penetrating trauma to the alleged victim's vagina or anus." *Id*. at 599-600.

Gersten's trial counsel took the same approach at Gersten's trial that Barina took at Michael Arena's adjudication hearing. In connection with the post-conviction proceedings, Gersten's counsel explained:

> In preparation for the trial, I reviewed [petitioner's daughter's] medical records. Rather than calling any experts, I chose to advance the defense theories of the case through cross-examination of the People's witnesses. Based on what I learned during my pre-trial investigation of the facts of the case, I was confident that I would be able to adduce innocent explanations for the observations and/or theories of the People's experts.

Id. at 602. Nevertheless, Gersten's counsel admitted "he did not obtain, or

attempt to obtain, any information about clinical indicia of child sexual abuse, or any of the...indicia relied on by Dr. Silecchia, in offering her opinion that the examination revealed evidence of penetration of the vagina and anus were actually accepted as such by any scientific community." *Id*. at 604.

The federal court had no problem finding Gersten's trial counsel ineffective. It first noted, that "[t]he prosecution's case rested centrally on the alleged victim's testimony and its corroboration by the indirect physical evidence as interpreted by the medical expert." *Id*. at 608. It then noted:

> Here, defense counsel failed to call as a witness, or even to consult in preparation for trial and cross-examination of the prosecution's witnesses, any medical expert on child sexual abuse. Counsel essentially conceded that the physical evidence was indicative of sexual penetration without conducting any investigation to determine whether this was the case. As Dr. Brown's affidavit demonstrates, had counsel conducted such an investigation, counsel would likely have discovered that exceptionally qualified medical experts could be found who would testify that the prosecution's physical evidence was not indicative of sexual penetration and provided no corroboration whatsoever of the alleged victim's story.

Id. at 607-08. It finding Gersten's trial counsel ineffective, the federal court concluded, "in a case where the only direct evidence that any crime occurred or that, if it did, the petitioner committed it, was the testimony of the alleged victim, *for defense counsel to simply concede the medical evidence without any investigation into whether it could be challenged was performance that the state*

court could not reasonably find to be objectively reasonable." *Id*. at 608 (emphasis added).

In sum, the claim in *Gersten* is almost identical to Michael Arena's claim. In *Gersten*, as in the instant case, "[t]he prosecution's case rested centrally on the alleged victim's testimony and its corroboration by the indirect physical evidence as interpreted by the medical expert." *Id*. at 608. In *Gersten*, as in the instant case, "defense counsel failed to call as a witness, or even to consult in preparation for trial and cross-examination of the prosecution's witnesses, any medical expert on child sexual abuse." *Id*. at 607-08. In *Gersten,* as in the instant case, "had counsel conducted such an investigation, counsel would likely have discovered that exceptionally qualified medical experts could be found who would testify that the prosecution's physical evidence was not indicative of sexual penetration and provided no corroboration whatsoever of the alleged victim's story." *Id*. at 608. In the end and in light of the scientific literature, the review of Dr. Green's testimony by independent experts, and Dr. Coles' findings, Barina was no less ineffective then Gersten's counsel and this Court could not "reasonably find" Barina's performance to meet constitutional standards for effective assistance of counsel.

4. Barina Failed to Challenge Dr. Willoughby's Alleged Expert Testimony

Just as Barina failed to make any efforts to refute Dr. Green's testimony, he made no efforts whatsoever to challenge Dr. Willoughby's assertions at the dispositional phase that the Abel Assessment was "accepted in the scientific community as a test that's able to predict those people who have an interest in...particular types of sexes and age groups" or that the Abel Assessment was supported by "a number of articles out by Gene Abel and his colleagues," or that "researchers at Brigham Young University have established the reliability of the instrument and the classification accuracy of the instrument." *See* BR at IV:10. Even a minimal investigation by Barina would have revealed that the Abel Assessment was *not* "accepted in the scientific community as a test that's able to predict those people who have an interest in...particular types of sexes and age groups" and that the "scientific literature at the time called the instrument a 'nonvalidated instrument' for adolescent subjects." *See* Attachment V.

Again, *Gersten* is on point. There, Gersten's trial counsel allowed a psychologist to testify regarding "Child Sexual Abuse Accommodation Syndrome." *Gersten*, 426 F.3d at 596-97. Nevertheless, it was learned after trial that "'in point of fact, what was once known as "Child Sexual Abuse Accommodation Syndrome" is no longer accepted in the child sexual abuse research community.'" *Id*. at 600. The Court concluded that the failure of Gersten's trial counsel to "consult or call an expert on the psychology of child

sexual abuse, or to educate himself sufficiently on the scientific issues" was ineffective. *Id*. at 611. ("[I]t would appear that had counsel investigated the possibility of challenging the prosecution's psychological expert, he would have discovered that exceptionally qualified experts could be found who would challenge the scientific validity of the prosecution expert's other theories....")

Here, had Barina consulted or called an expert regarding the validity of the Abel Assessment to diagnose pedophilia in adolescents, he could have prevented the testimony from being admitted under Tex. R. Evid. 702 because the testimony was *not* based upon a theory accepted in the scientific community. Moreover, in the event the testimony was, nevertheless, admitted by the Court, he could have called a defense expert to refute Dr. Willoughby's reliance upon the assessment.

C. Perjury at Dispositional Phase

This claim must be judged in relation to the state's closing argument in the dispositional phase of this case. As noted above, the state relied almost exclusively on the testimony of Dr. Fred Willoughby in repeatedly arguing that the jury should reject Michael Arena's plea for probation and sentence him to TYC.

> And you've heard *the psychologist* tell you he is a pedophile. He is at a high risk to reoffend.

* * * *

> There's also a question of rehabilitation. How are you going to rehabilitate him? Well, you heard from the *expert testimony* that the only way you're going to be able to rehabilitate him, if he is able to be rehabilitated is to put him in a very structured setting, where he can get the intense supervision, where he can get the best care available. And that is simply TYC, folks. That's the only place for him.
>
> * * * *
>
> You know he's been *classified as a pedophile by an expert*. You now know that he is interested in children, interested in children, in fact, in the same age group as little Stephanie Arena. Think about her and think about that.

See Adjud. Tr. at IV:60-61 (emphasis added).

Nevertheless, the psychologist and "expert in the field of sexual offender assessment and treatment" (*id*. at IV:16) upon which the state so heavily relied and whose testimony was admitted by the Court over defense objection, has now admitted that his testimony at the dispositional phase was perjurious. Had Dr. Willoughby not perjured himself, there is little doubt that his testimony would not have been permitted under Tex. R. Evid. 702. Indeed, although Willoughby testified that the conclusions he shared with the jury were "accepted in the scientific community" (*id*. at IV:10), at the time of his testimony the basis for his conclusions had actually been *rejected* by the scientific community. *See* Attachment U (Complaint No. 02-574-3660). The perjury was, in fact, so serious

that it resulted in disciplinary sanctions from the Texas State Board of Examiners of Psychologists.

While Michael Arena submits that he is entitled to relief on the grounds of actual innocence and ineffective assistance of counsel, there can be no serious argument that Willoughby's admitted perjury at the dispositional phase of the original proceedings "might well have influenced the jury's appraisal" of the appropriate sentence in this case. *Cf. Ex Parte Gonzalez*, 2006 Tex. Crim. App. LEXIS (Tex. Crim. App. Oct. 18, 2006). Consequently, in the alternative, Michael Arena should be given a new punishment hearing free from the taint of Willoughby's perjury and the state's inadvertent reliance upon that perjury.

V. CONCLUSION

Michael Arena respectfully requests that the District Court grant his Petition for Writ of Habeas Corpus and order his immediate release from his unlawful incarceration. In the alternative, Michael Arena requests the District Court grant his Petition for Writ of Habeas Corpus and order a new punishment hearing to take place within 30 days of the order.

Respectfully submitted,

_____

F. Clinton Broden
Tx. Bar 24001495
2707 Hibernia
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)

LOCAL COUNSEL: JAMES H. KREIMEYER, JR.
112 North Main St.
Belton, Texas 76513-0727
254-939-9393
254-939-2870 (fax)

Attorneys for Applicant
Michael Prinz Arena

CERTIFICATE OF SERVICE

I, James H. Kreimeyer, Jr., certify that on March ___, 2007, I caused the foregoing document to be served by first class mail, postage prepaid on Bell County Attorney's Office, Bell County Courthouse, Belton, Texas 76513

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James H. Kreimeyer, Jr.