



# TIBA TEXAS INDEPENDENT BAR ASSOCIATION

Post Office Box 783  
Austin, Texas 78767  
Tel. 512-354-7823  
Fax: 512-532-6282



Web Site: [www.texindbar.org](http://www.texindbar.org)

⌘ Vol. 14, No. 43, November 6, 2006

**Case Name:** *Ex parte Curtis Eugene Brown*

- OFFENSE: Post-Conviction Habeas Corpus
- COUNTY: Refugio
- CCA. CASE No. AP-75,377
- DATE OF OPINION: November 1, 2006
- DISPOSITION: Relief Denied
- OPINION: [Cochran, J.](#) VOTE: 8-1-0
- TRIAL COURT: 24th D/C; Hon. Stephen Williams
- LAWYERS: Albert Pena (Defense); Michael Sheppard (State)

**Ed Note:** (Background Facts) CB told her mother that Applicant, CB's great uncle, sexually molested her. CB used hand motions to show what Applicant did to her. CB's aunt was present when CB described what Applicant did. CB's mother testified before the grand jury that she believed CB because no child would make up something like that. CB's mother also testified that Applicant had molested her when she was a child. Applicant pleaded guilty to aggravated sexual assault of a child and was placed on deferred adjudication probation. Three years later, Applicant was adjudicated guilty and sentenced to 12 years in prison. Just in time to file a motion for new trial, CB, her mother, and her aunt filed affidavits -- CB recanted, and her mother and aunt stated CB lied. At the hearing on the motion, the parties agreed to allow the trial judge to interview CB in chambers. After the interview, the trial judge stated, "I do not believe the recantation of the child," and denied the motion for new trial.

⌘ **562.01 Post-Conviction Habeas Corpus / Cognizability / Newly Discovered Evidence:** Two years after conviction, Applicant filed an application for writ of habeas corpus, making the same claim of innocence as he had in his motion for new trial and attaching the same affidavits. The CCA remanded for a live evidentiary hearing. At the hearing, CB's mother testified that CB lied about the sexual assault, that CB was mad at Applicant because he moved her from the couch to the floor while she was sleeping. CB's mother further testified that she lied to the grand jury about being molested by Applicant. CB, who was now in the ninth grade, testified that she did not remember telling her mother that Applicant had molested her and did not know why she would make up such a "vicious story." Applicant testified that on the night of the "incident," he had a few beers and went to his mother's house to spend the night. Applicant noticed CB sleeping on the love seat and four or five other children sleeping on pallets on the floor. Applicant picked CB up, put her on the floor, and went to sleep on the love seat. Applicant testified that he pleaded guilty because he had a nephew who had been sent to prison in a similar case, and "my dad told me that if I didn't have a decent lawyer, it was probably going to happen to me too." The habeas court recommended that the CCA grant relief.

**Holding:** Applicant does not explain why his claim, or the evidence in support of his claim developed at the live evidentiary hearing, "is different in quality from the evidence presented at

the hearing on the motion for new trial . . .," [and] "we are unable to find any substantively new and compelling evidence in the habeas record that was not considered by the judge when he denied Applicant's motion for new trial." Further, the habeas court provides no explanation on the credibility of the witnesses and points to nothing in the record that "unquestionably" demonstrates Applicant's innocence. The court's conclusion of "actual innocence" does not logically flow from the record evidence: CB's mother had testified both that CB was truthful and a liar who accused Applicant of sexual abuse because he moved her from the love seat to the floor; a deputy who interviewed CB after her outcry found her account credible, but the court never mentioned the deputy's testimony or why it should be rejected; CB's mother testified she lied before the grand jury, so why should her testimony at the habeas hearing be credited? Because the habeas record does not show that Applicant's evidence is either newly discovered or that it unquestionably establishes his innocence. We deny relief.

**Concurring / Dissenting Opinions:** Judge Keasler concurred without note.