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- APPELLANT'S NAME: **Ex parte Joe Rene Elizondo**
- OFFENSE: Aggravated Sexual Assault of Child
- COURT OF APPEALS: Beaumont 1985
- CITATION: 697 S.W.2d 65 (Pet. Ref'd)
- RESULT: Conviction Affirmed
- COUNTY: Jefferson
- CRIM. APPEALS NO. 72235
- DATE OF OPINION: December 18, 1996
- JUDGE: Meyers, J.
- DISPOSITION: Relief Granted - New Trial Ordered

CASE NOTE: In *State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 397 (Tex.Cr.App. 1994), the Court of Criminal Appeals "accepted the proposition that the 'execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and announced that [it] would begin to entertain post-conviction applications for the writ of habeas corpus alleging actual innocence as an independent ground for relief." In this case, a majority of the Court holds that "if applicant can prove by clear and convincing evidence to this Court, in the exercise of its habeas corpus jurisdiction, that a jury would acquit him based on his newly discovered evidence, he is entitled to relief."

NEWLY DISCOVERED EVIDENCE / ACTUAL INNOCENCE: Applicant's conviction for aggravated sexual assault, the validity of which is challenged in this post-conviction proceeding, was based solely upon the testimony of his step-son Robert, one of the alleged victims in that case. This inculpatory testimony was given in court both by the victim himself and by the hearsay report of his step-mother and of a police officer who was dispatched to investigate the complaint made by his step-mother. A sexually explicit picture drawn by Robert at school and a sexually suggestive note written by him to one of his female classmates were also received in evidence because it was the seizure of these items by the child's teacher during class that precipitated the subsequent interrogation of Robert by his father and the police, leading eventually to the criminal prosecution of applicant for aggravated sexual assault. However, neither the drawing nor the note actually intimated that the child had been sexually abused or assaulted, either by applicant or by any other person. No other incriminating evidence was offered or received at trial. Since 1990, the two sons, now grown men, have maintained that their testimony was perjured. Both now claim that their natural father relentlessly manipulated and threatened them into making such allegations against Applicant in order to retaliate against their natural mother, his ex-wife, for marrying applicant years before. After a hearing in which Robert testified, the trial ("*habeas*") court concluded that he "had testified falsely at trial."

HOLDING: The record supports a finding that the recantation in this case is more credible than the trial testimony was. Robert's recantation not only voids his trial testimony which implicated Applicant, but constitutes affirmative evidence of his innocence ("We are convinced by clear and convincing evidence that no rational jury would convict him in light of the new evidence."). Thus, Applicant is entitled to relief, and a new trial is ordered.

NOTES: Judges McCormick, White, Mansfield and Keller dissented without note or opinion. Judge Baird filed a concurring opinion.

COMMENT: This case sounds like one of those travesities you see on "Nightline," "Dateline" or one of those evening tabloid shows. The scary part is that this man has been in prison for thirteen years. Also, although the McCormick Four dissented, the fact that they did so without note or comment (as compared with what they had to say in the *Mowbray* case, see next summary, it is obvious that their dissent is more cosmetic rather than substantive.