

MATT JOHNSON

Judge

McLennan County Courthouse
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Waco, Texas 76701

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54TH DISTRICT COURT

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August 19, 2016

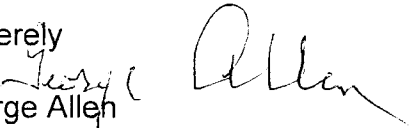
Judge George Allen
Presiding

In Cause Nos. 1993-773-C2I Richard Bryan Kussmaul
1993-497-C2B James Edward Long
1993-510-C2A Michael Dewayne Shelton
1993-511-C2C James Wayne Pitts

Dear Attorneys:

Enclosed please find a filed marked copy of the Order entered in the above styled cases

Sincerely


George Allen
Presiding Judge

CC: McLennan County District Attorney
Abelino Reyna; Michael Jarrett; Gabe Price; Sterling Harmon

For Bryan Kussmaul:

Tiffany J Dowling; David Sheppard

For James Long:

John J "Mike" McKetta III; William G Christian

For Michael Shelton:

Scott Brister; David P Whittlesey

For James Pitts:

Marcy Kurtz; Kelley Clark; Ryan Myers

FILED
AUG 19 AM 10:44
JESSICA BAKER
CLERK
DISTRICT CLERK
MCLENNAN CO. TX
DEPUTY

No. 1993-773-C 21

Ex parte

RICHARD BRYAN KUSSMAUL

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IN THE DISTRICT COURT OF

MCLENNAN COUNTY

54TH JUDICIAL DISTRICT

FILED
2016 AUG 19 AM 10:41
JUDICIAL DISTRICT CLERK
MCLENNAN CO. TX.
DEPUTY

FINDINGS OF FACT AND RECOMMENDATIONS

Having received an Application for Writ of Habeas Corpus, filed pursuant to Articles 11.07 and 11.073, Texas Code of Criminal Procedure, by Richard Bryan Kussmaul (hereinafter "Kussmaul"), the Court enters the following Findings of Fact and Recommendations:

1. In Cause No. 1993-773-C, Kussmaul pled not guilty and was convicted of Capital Murder by a jury. He was sentenced to life and is currently incarcerated in the Institutional Division of the Texas Department of Criminal Justice.

2. Mr. Kussmaul is "confined" for purposes of Section 3(c) of Article 11.07 of the Texas Code of Criminal Procedure.

3. After considering the record of Kussmaul's case, the evidence introduced in his jury trial, the pleadings, evidence, and prior Findings of Fact and Conclusions of Law entered at the Chapter 64 hearing for Kussmaul and James Wayne Pitts, Jr. in Cause No. 1993-511-C, Michael Dewayne Shelton — in cause No. 1993-511-C, and James Edward Long in Cause No. 1993-497-C, — all of which are made a part of the record in this matter, the Court finds

there are controverted, previously unresolved facts material to the legality of Kussmaul's confinement.

4. The Findings of Fact and Conclusions of Law entered by the Court on October 2, 2014 pursuant to Article 64.04 of the Texas Code of Criminal Procedure are incorporated in full into these Findings of Fact and Recommendations and are attached hereto. In making these Findings of Fact and Recommendations, the Court further relies on its personal knowledge of the jury trial of Kussmaul.

5.. This application for *writ of habeas corpus* is the latest of a series of seven prior applications for *writ of habeas corpus* filed by Kussmaul, the latest of which was dismissed on March 25, 2009 (Tex. Ct. Crim. App. #WR-22,586-07).

6. The Court finds that although the application filed by Kussmaul is a subsequent application under Section 4 of Article 11.07 of the Texas Code of Criminal Procedure, the current claims and issues have not and could not have been presented previously in any of Kussmaul's previous applications because the legal basis and factual basis for the claims being brought by Kussmaul were unavailable at the time of Kussmaul's previous applications.

7. The DNA results obtained in the recently concluded Chapter 64 proceeding in Kussmaul's case were not ascertainable through the exercise of reasonable diligence by Kussmaul on or before the date on which any previous application was filed because the DNA testing method used to obtain the DNA results in the Chapter 64 proceeding did not exist on the date on which the

original application was filed. Further Kussmaul did not have a way to test evidence in the possession of the State until 2001 with the addition of Chapter 64 to the Texas Code of Criminal Procedure.

8. Kussmaul could not have sought relief under Section 11.073 of the Texas Code of Criminal Procedure on the date that he filed the previous applications because Article 11.073 did not take effect until 2013.


9. Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, the Court finds that the new evidence in this case constitutes clear and convincing evidence that no reasonable juror would have found Kussmaul guilty beyond a reasonable doubt had the new evidence been available at trial. Kussmaul is actually innocent of Capital Murder, the crime for which he has been convicted. Accordingly, the Court recommends that *habeas* relief be granted.

10. The Court further finds that relevant scientific evidence, specifically the evidence developed pursuant to DNA testing ordered by this Court under Article 64.01 of the Texas Code of Criminal Procedure, is currently available and was not available at the time of Kussmaul's trial because the evidence was not ascertainable through the exercise of reasonable diligence by Kussmaul before his trial. The scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of Kussmaul's current application. Had the evidence been presented at trial on the preponderance of the evidence Kussmaul would not have been convicted. The Court finds that the field of scientific knowledge and the scientific method relating to the

evidence developed pursuant to the Chapter 64 proceedings in Kussmaul's case have changed since Kussmaul's previous applications were filed.

11. The Court hereby orders the Clerk of the Court to immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, all motions filed, transcripts of all hearings, including the Chapter 64 DNA hearings, any affidavits, and the record in Cause No. 1993-773-C, including the transcripts of the jury trial of Kussmaul, and any other official records utilized by this Court in resolving issues of fact.

Signed this 19th day of August, 2016


Hon. George H. Allen
Judge Presiding

Ex parte
JAMES EDWARD LONG

§ IN THE DISTRICT COURT OF
§
§ MCLENNAN COUNTY
§
§ 54TH JUDICIAL DISTRICT

FILED
2016 AUG 19 AM 10:42
DISTRICT CLERK
MCLENNAN COUNTY
DEPUTY

FINDINGS OF FACT AND RECOMMENDATIONS

Having received an Application for Writ of Habeas Corpus filed pursuant to Articles 11.07 and 11.073 of the Texas Code of Criminal Procedure by James Edward Long, the Court enters the following Findings of Fact and Recommendations:

1. In Cause No. 1993-497-C, Mr. Long pleaded guilty and was convicted of the felony offense of sexual assault.
2. Mr. Long is "confined" for purposes of Section 3(c) of Article 11.07 of the Texas Code of Criminal Procedure.
3. After considering the record of Mr. Long's case, the jury trial of Richard Bryan Kussmaul in Cause No. 1993-773-C, the pleadings, evidence, and prior Findings of Fact and Conclusions of Law entered at the Chapter 64 hearing for Michael Dewayne Shelton in Cause No. 1993-510-C, Mr. Kussmaul in Cause No. 1993-773-C, James Wayne Pitts, Jr. in Cause No. 1993-511-C, and Mr. Long in Cause No. 1993-497-C, all of which are made a part of the record in this matter, the Court finds there are controverted, previously unresolved facts material to the legality of Mr. Long's confinement.

4. The Findings of Fact and Conclusions of Law entered by the Court on October 2, 2014 pursuant to Article 64.04 of the Texas Code of Criminal Procedure, are incorporated in full into these Finding of Fact and Recommendations as if set forth herein. In making these Findings of Fact and Recommendations, the Court further relies on its personal knowledge of Mr. Long's case, including his guilty plea, and the jury trial of Mr. Kussmaul.

5. This application for writ of habeas corpus is the second application filed by Mr. Long. On April 27, 1995, Mr. Long filed an original application for writ of habeas corpus, docketed as Application No. 28,772-01. The Texas Court of Criminal Appeals denied the original application on January 17, 1996.

6. The Court finds that although the application filed by Mr. Long is a subsequent application under Section 4 of Article 11.07 of the Texas Code of Criminal Procedure, the current claims and issues have not and could not have been presented previously in Mr. Long's previous application because the legal basis and factual basis for the claims being brought by Mr. Long were unavailable at the time of Mr. Long's previous application.

7. The DNA results obtained in the recently concluded Chapter 64 proceeding in Mr. Long's case were not ascertainable through the exercise of reasonable diligence by Mr. Long on or before the date on which the previous application was filed because the DNA testing method used to obtain the DNA results in the Chapter 64 proceeding did not exist on the date on which the original application was filed. Further, Mr. Long did not have a way to test evidence in the

possession of the State until 2001 with the addition of Chapter 64 to the Texas Code of Criminal Procedure. Further, the Court of Criminal Appeals first recognized “actual innocence” as a ground for relief from a non-capital conviction in 1996, after the original application was filed. *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996). The Court in *Elizondo* overruled prior decisions that had previously barred such claims, making this claim unavailable at the time of the original application.

8. Mr. Long could not have sought relief under Section 11.073 of the Texas Code of Criminal Procedure on the date that he filed the previous applications because Article 11.073 did not take effect until 2013.

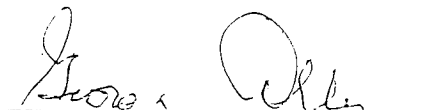
9. Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, the Court finds that the new evidence in this case constitutes clear and convincing evidence that no reasonable juror would have found Mr. Long guilty beyond a reasonable doubt had the new evidence been available at trial. Mr. Long is actually innocent of sexual assault, the crime for which he has been convicted. Accordingly, the Court recommends that habeas relief be granted.

10. The Court further finds that relevant scientific evidence, specifically the evidence developed pursuant to DNA testing ordered by this Court under Article 64.01 of the Texas Code of Criminal Procedure, is currently available and was not available at the time of Mr. Long’s plea because the evidence was not ascertainable through the exercise of reasonable diligence by Mr. Long before his plea. The scientific evidence would be admissible under the Texas Rules of

Evidence at a trial held on the date of Mr. Long's current application. Had the evidence been presented at trial, on the preponderance of the evidence Mr. Long would not have been convicted. The Court finds that the field of scientific knowledge and the scientific method relating to the evidence developed pursuant to the Chapter 64 proceedings in Mr. Long's case have changed since Mr. Long's plea was filed.

11. The Court hereby orders the Clerk of the Court to immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, all motions filed, transcripts of all hearings, any affidavits, and the record in Cause No. 1993-497-C, the record in Cause No. 1993-773-C, including the transcript of the jury trial of Mr. Kussmaul, and any other official records utilized by this Court in resolving issues of fact.

Signed this 17 day of August, 2016.


Hon. George H. Allen,
Judge Presiding

No. 1993-510-C24

Ex parte

MICHAEL DEWAYNE SHELTON

§ IN THE DISTRICT COURT OF
§
§ MCLENNAN COUNTY
§
§ 54TH JUDICIAL DISTRICT

FILED
2016 AUG 19 AM 10:43
JULIA M. BELL
DISTRICT CLERK
MCLENNAN CO. TX.
DEPUTY

FINDINGS OF FACT AND RECOMMENDATIONS

Having received an Application for Writ of Habeas Corpus, filed pursuant to Articles 11.07 and 11.073 of the Texas Code of Criminal Procedure by Michael Dewayne Shelton, the Court enters the following Findings of Fact and Recommendations:

1. In Cause No. 1993-510-C, Mr. Shelton pleaded guilty and was convicted of the felony offense of sexual assault.
2. Mr. Shelton is "confined" for purposes of Section 3(c) of Article 11.07 of the Texas Code of Criminal Procedure.
3. After considering the record of Mr. Shelton's case, the jury trial of Richard Bryan Kussmaul in Cause No. 1993-773-C, the pleadings, evidence, and prior Findings of Fact and Conclusions of Law entered at the Chapter 64 hearing for Mr. Shelton in Cause No. 1993-510-C, Mr. Kussmaul in Cause No. 1993-773-C, James Wayne Pitts, Jr. in Cause No. 1993-511-C, and James Edward Long in Cause No. 1993-497-C, all of which are made a part of the record in this matter, the Court finds there are controverted, previously unresolved facts material to the legality of Mr. Shelton's confinement.

4. The Findings of Fact and Conclusions of Law entered by the Court on October 2, 2014 pursuant to Article 64.04 of the Texas Code of Criminal Procedure, are incorporated in full into these Finding of Fact and Recommendations as if set forth herein. In making these Findings of Fact and Recommendations, the Court further relies on its personal knowledge of Mr. Shelton's case, including his guilty plea, and the jury trial of Mr. Kussmaul.

5. As Mr. Shelton has not filed a previous application for habeas, the requirements for subsequent applications in Article 11.07, section 4 do not apply.

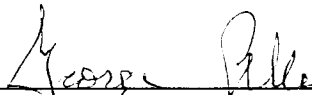
6. Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, the Court finds that the new evidence in this case constitutes clear and convincing evidence that no reasonable juror would have found Mr. Shelton guilty beyond a reasonable doubt had the new evidence been available at trial. Mr. Shelton is actually innocent of sexual assault, the crime for which he has been convicted. Accordingly, the Court recommends that habeas relief be granted.

7. The Court further finds that relevant scientific evidence, specifically the evidence developed pursuant to DNA testing ordered by this Court under Article 64.01 of the Texas Code of Criminal Procedure, is currently available and was not available at the time of Mr. Shelton's plea because the evidence was not ascertainable through the exercise of reasonable diligence by Mr. Shelton before his plea. The scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of Mr. Shelton's current application. Had the evidence been presented at trial, on the preponderance of the evidence Mr. Shelton

would not have been convicted. The Court finds that the field of scientific knowledge and the scientific method relating to the evidence developed pursuant to the Chapter 64 proceedings in Mr. Shelton's case have changed since Mr. Pitt's plea was filed.

8. The Court hereby orders the Clerk of the Court to immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, all motions filed, transcripts of all hearings, any affidavits, and the record in Cause No. 1993-510-C, the record in Cause No. 1993-773-C, including the transcript of the jury trial of Mr. Kussmaul, and any other official records utilized by this Court in resolving issues of fact.

Signed this 19th day of August, 2016.



Hon/George H. Allen,
Judge Presiding

No. 1993-511-C2C

Ex parte

JAMES WAYNE PITTS, JR.

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IN THE DISTRICT COURT OF

MCLENNAN COUNTY

54TH JUDICIAL DISTRICT

FILED
2016 AUG 19 AM 10:44
JULIE E. [unclear]
DISTRICT CLERK
MCLENNAN CO. TX.
DEPUTY

FINDINGS OF FACT AND RECOMMENDATIONS

Having received an Application for Writ of Habeas Corpus filed pursuant to Articles 11.07 and 11.073 of the Texas Code of Criminal Procedure by James Wayne Pitts, Jr., the Court enters the following Findings of Fact and Recommendations:

1. In Cause No. 1993-511-C, Pitts pled guilty and was convicted of the felony offense of sexual assault.
2. Mr. Pitts is "confined" for purposes of Section 3(c) of Article 11.07 of the Texas Code of Criminal Procedure.
3. After considering the record of Mr. Pitts's case, the jury trial of Richard Bryan Kussmaul in Cause No. 1993-773-C, the pleadings, evidence, and prior Findings of Fact and Conclusions of Law entered at the Chapter 64 hearing for Mr. Pitts in Cause No. 1993-511-C, Mr. Kussmaul in Cause No. 1993-773-C, Michael Dewayne Shelton in Cause No. 1993-510-C, and James Edward Long in Cause No. 1993-497-C, all of which are made a part of the record in this matter, the Court finds there are controverted, previously unresolved facts material to the legality of Mr. Pitts's confinement.

4. The Findings of Fact and Conclusions of Law entered by the Court on October 2, 2014 pursuant to Article 64.04 of the Texas Code of Criminal Procedure are incorporated in full into these Finding of Fact and Recommendations as if set forth herein. In making these Findings of Fact and Recommendations, the Court further relies on its personal knowledge of Mr. Pitts's case, including his guilty plea, and the jury trial of Mr. Kussmaul.

5. This application for writ of habeas corpus is the third application filed by Pitts. On October 6, 1997, Pitts filed an original application for writ of habeas corpus, docketed as Application No. 35,508-01. The Texas Court of Criminal Appeals denied the original application on November 5, 1997. On July 11, 2003, Pitts filed a second application, docketed as Application No. 35,508-02, which the Texas Court of Criminal Appeals dismissed pursuant to Section 4 of Article 11.07 of the Texas Code of Criminal Procedure on September 3, 2003.

6. The Court finds that although the application filed by Mr. Pitts is a subsequent application under Section 4 of Article 11.07 of the Texas Code of Criminal Procedure, the current claims and issues have not and could not have been presented previously in either of Mr. Pitts's previous applications because the legal basis and factual basis for the claims being brought by Mr. Pitts were unavailable at the time of Mr. Pitts's previous applications.

7. The DNA results obtained in the recently concluded Chapter 64 proceeding in Mr. Pitts's case were not ascertainable through the exercise of reasonable diligence by Mr. Pitts on or before the date on which either previous

application was filed because the DNA testing method used to obtain the DNA results in the Chapter 64 proceeding did not exist on the date on which the original application was filed. Further, Mr. Pitts did not have a way to test evidence in the possession of the State until 2001 with the addition of Chapter 64 to the Texas Code of Criminal Procedure.

8. Mr. Pitts could not have sought relief under Section 11.073 of the Texas Code of Criminal Procedure on the date that he filed the previous applications because Article 11.073 did not take effect until 2013.

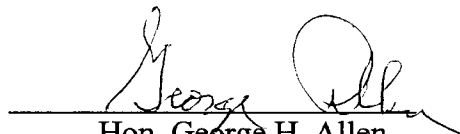
9. Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, the Court finds that the new evidence in this case constitutes clear and convincing evidence that no reasonable juror would have found Mr. Pitts guilty beyond a reasonable doubt had the new evidence been available at trial. Mr. Pitts is actually innocent of sexual assault, the crime for which he has been convicted. Accordingly, the Court recommends that habeas relief be granted.

10. The Court further finds that relevant scientific evidence, specifically the evidence developed pursuant to DNA testing ordered by this Court under Article 64.01 of the Texas Code of Criminal Procedure, is currently available and was not available at the time of Mr. Pitts's plea because the evidence was not ascertainable through the exercise of reasonable diligence by Mr. Pitts before his plea. The scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of Mr. Pitts's current application. Had the evidence been presented at trial, on the preponderance of the evidence Mr. Pitts would not have

been convicted. The Court finds that the field of scientific knowledge and the scientific method relating to the evidence developed pursuant to the Chapter 64 proceedings in Mr. Pitts's case have changed since Mr. Pitt's previous applications were filed.

11. The Court hereby orders the Clerk of the Court to immediately transmit to the Court of Criminal Appeals, under one cover, the application, any answers filed, all motions filed, transcripts of all hearings, any affidavits, and the record in Cause No. 1993-511-C, the record in Cause No. 1993-773-C, including the transcript of the jury trial of Mr. Kussmaul, and any other official records utilized by this Court in resolving issues of fact.

Signed this 19th day of August, 2016.



Hon. George H. Allen,
Judge Presiding