



# TIBA TEXAS INDEPENDENT BAR ASSOCIATION

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## TIBA's Case of the Week

### Court of Criminal Appeals

**Case Name:** [Ex parte: Richard Bryan Kussmaul; Edward Long; James Wayne Pitts Jr; and Michael Dewayne Shelton](#)

- **NATURE OF CASES:** Post-Conviction *Habeas Corpus*
- **COUNTY:** McLennan
- **CCA. CASE No.** WR-28,586-09 ([Kussmaul](#)); WR-28,772-02 ([Long](#)); WR-35,508-03 ([Pitts](#)); WR-84,754-01 ([Shelton](#)) **DATE OF OPINION:** June 6, 2018
- **DISPOSITION:** *Habeas* Relief Granted
- **OPINION:** [Judge Newell](#) **VOTE:** 9-0
- **TRIAL COURT:** 54th D/C
- **LAWYERS:** [Tiffany Dowling](#) ([Kussmaul](#)); [William Christian](#) ([Long](#)); [Ryan Myers](#) ([Pitts](#)); & [Scott Brister](#) ([Shelton](#)) (Defense); [Sterling Harmon](#) (State)

⚖ **563.01 Post-Conviction Habeas Corpus / Sufficiency of Claims for Relief / New Scientific Evidence:** Applicants Long, Pitts, and Shelton testified against Applicant Kussmaul at his capital murder trial. Long, Pitts, and Shelton pled guilty to sexual assault and all testified at trial that they and Kussmaul had gang raped a female victim (“Murphy”), and that Kussmaul had shot both the woman and the man (“Neighbors”) who was with her. Post-conviction DNA test results exclude all four men as contributors to the semen collected from the crime scene, but reveal the genetic profiles of two unidentified men. Long, Pitts, and Shelton recanted their inculpatory statements to the police and their testimony at Kussmaul’s trial. All four claim they are both entitled to relief under Article 11.073, C.Cr.P., and actually innocent.

**Holding:** The credibility of the three men has been at issue since the very beginning, but the fact-finders (both Kussmaul’s jury and, until 2014, Judge Allen, who presided over Kussmaul’s trial

and accepted and sentenced Long, Pitts, and Shelton on their pleas) were willing to overlook all the discrepancies. \*\*\* Closing arguments at Kussmaul's trial focused on whether or not Long, Pitts, and Shelton were to be believed. The prosecutor acknowledged that the State's case against Kussmaul turned on jurors believing them. The prosecutor pointed to a sort of doctrine of chances, saying that "it goes beyond common sense to think that three people would get up, admit their crime which they were not connected with, which they do not do." The jury apparently agreed. The jury rejected Kussmaul's theory that Long, Pitts, and Shelton testified against him to save their own skins—that they cared nothing about the truth and were not telling it. Jurors did not hear any inculpatory DNA evidence. \*\*\* The jurors never heard the claims of direct coercion Applicants later made. But the claims that they were bullied and coerced were rebutted at the habeas hearing by the testimony of the lead investigator himself, the lead prosecutor, and the sole testifying defense attorney. \*\*\* We have held "that the term 'actual innocence' shall apply, in Texas state cases, only in circumstances in which an accused did not, in fact, commit the charged offense or any of the lesser-included offenses." \*\*\* We here add to that "or any greater offense." In this case, the three Applicants who pleaded guilty were initially subject to being charged with the greater offense of capital murder, and the fourth was tried for capital murder. The DNA evidence in this case undermines the State's sexual-assault and murder-in-the-course-of-aggravated-sexual-assault theories underlying these cases. But there is still the double murder to consider. If Applicants committed the double murders -- as principals or as parties -- but not the sexual assault, none are actually innocent. The issue here is whether Applicants have shown by clear and convincing evidence that they did not perpetrate the crimes committed against Murphy and Neighbors, not just whether the crimes perpetrated included rape. On this record they have not.

[\(John G. Jasuta\)](#) The only evidence that Kossmaul shot the two people is from the three who recanted. They recanted all of their testimony. What would a jury find about the murder without those three people testifying? This opinion is absolutely ridiculous. Too bad Kossmaul doesn't have a cousin on the Court. He might have received justice.

[\(David A. Schulman\)](#) It is indeed sad that the fate of all four individuals are tied together. Long, Pitts, and Shelton each admitted their guilt in the sexual assault in testimony which now appears to have been perjurious. The only evidence tying Kossmaul to the offenses was the now recanted testimony of Long, Pitts, and Sheldon. Kossmaul admitted nothing. Invoking the "sort of doctrine of chances" utilized by the trial prosecutors, I would ask what are the odds that any of this is true. The fact that the Court resolves Kossmaul's case by (in essence) making him prove the negative, demonstrates to me that the Court sees itself as being charged with protecting the State's coffers. Long, Pitts, and Sheldon made their own beds. Kossmaul didn't.