NO. 17-50559

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JARED MORRISON (APPELLANT)

V.

LORIE DAVIS (APPELLEE)

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

MIDLAND/ODESSA DIVISION

BRIEF IN SUPPORT OF APPLICATION FOR CERTIFICATE OF APPEALABILITY

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CERTIFICATE OF INTERESTED PERSONS
(5th Cir. R. 28.2.1)

JARED MORRISON (APPELLANT)

V.

LORIE DAVIS (APPELLEE)

The undersigned pro se Appellant certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in arder that the Judges of this Court may evaluate possible disqualification or recusal.

There are no nongovernmental parties that have an interest in this case. All parties are government officials, and, therefore, according to 28.2.1 do not need to be listed here.

Jared Morrison

ORAL ARGUMENT STATEMENT
(FRAP R. 34(a)(1); 5th Cir R. 28.2.3)

Morrison requests oral arguments in the event that this Court grants this appeal. Morrison asserts oral arguments should be had because of the extent and complexity of the issues raised. Morrison requests that counsel be appointed in the event that this Court elects to schedule oral arguments.

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QUESTIONS PRESENTED FOR REVIEW
(FRAP 28(a)(5); 5th Cir. R. 28.3(f))

1) Whether grounds 2,3,4,5,6,7, and 12 soley undermine or challenge substantive issues relating to the original order of deferred adjudication probation as required in **Caldwell v. Dreke 429 F.3d 521, 530 n.24 (5th Cir. 2004)**, and **Tharp v. Thaler 628 F.3d 719 (5th Cir 2010)**, in order to trigger the 1-year limitation period to start on June 5, 2004 and expire on June 5, 2005.

Because these issues raised cause a present and future First Amendment violation to Morrison and others' freedom of intimate association and right to copulate with the 18-25 year age group as explained in Grounds 2,3,and 6, or since grounds 2,5,7,and 12 were challenged in the 2011 revocation hearing, or were the cause of such constitutional violations that Morrison challenged in the 2011 revocation hearing that resulted in him getting sentenced to 16 years of prison instead of seven years, are those grounds not subject to the holdings in **Caldwell** and **Tharp**? (See **Frey v. Stephens 616 F.App'x 704 (5th Cir 2015)**; Brief in Support of COA pp.12-19) (AEDPA 1-year limitation default)

2) Whether jurists of reason would find the District Court's assessment debatable or wrong when it denied Morrison's **McQuiggin v. Perkins 133 S.Ct 1924 (2013)** actual innocence claim by stating that Morrison did not present any new evidence since the new evidence he presented was not one of the three listed examples in **Schlup v. Delo 513 U.S. 298, 324 (1995)** i.e. exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence. (See Brief in Support of COA pp.20-25). (AEDPA 1-year limitation default).

3) Whether reasonable jurists would find the District Court's assessment debatable or wrong in regards to the trial court suspending Morrison's right to file a pre-conviction writ of habeas corpus pro se while having court appointed counsel, whom admitted to the court he would not help Morrison properly file it, nor file it for him since any 11.07 writs were out of his scope of appointment. Morrison shows that the trial court left him, a person restrained of his liberty, with absolutely no way to inquire through writ of habeas corpus, into the lawfullness of such restraint, and removal thereof if unlawful, suspending his right to writ of habeas corpus. (See Brief in Support of COA pp.25-31). (Ground 8)

4) Whether jurists of reason would find the District Court's assessment debatable or wrong in regards to the trial court denying Morrison his right to effective counsel by it not appointing Morrison, an indigent defendant facing 20 years prison, an attorney to help him file a pre-conviction writ of habeas corpus before he was convicted and sentenced to prison.

Does Morrison have the Right to effective counsel to counsel him on habeas corpus constitutional issues and to properly file the constitutional issues before being convicted and sent to prison? (See Brief in Support of COA pp.25-31). (Ground 8)

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5) Whether jurists of reason would find the state habeas court's and the District Court's assessment debatable or wrong when they failed to address the evidence Morrison presented to them (i.e. Exhibits "A"-"S", and the Motion to Disqualify the Affidavit of David Rogers), that proved counsel's unsupported by the record affidavit as untrue.

Can these courts simply ignore the important evidence Morrison presented and rely solely on counsel's unsupported by the record affidavit to deny relief? (See Brief in Support of COA pp.31-34 where Morrison proved it is an unreasonable determination of the evidence presented when the courts ignored such evidence. (Ground 1)

6) Whether jurists of reason would find the state habeas court's assessment debatable or wrong when it did not address any of the prongs from **Strickland v Washington 104 S.Ct 2052 (1984)** or **Lafler v. Cooper 132 S.Ct 2072 (2012)** when addressing Morrison's ineffective assistance of counsel claims, but instead denied relief by only relying on counsel's unsupported by the record affidavit.

Was the State court's assessment "contrary to" **Strickland** and **Cooper** for purposes of § 2254(d)(1)? (See Brief in Support of COA pp.34-35, and 38-39). (Grounds 1,11,12, and 13).

7) Whether jurists of reason would find the District Court's assessment debatable or wrong when it denied Morrison relief on his IAC claims by not addressing the "contrary to" prong of § 2254(d)(1), or the **Lafler v. Cooper** standards that Morrison raised, which proved the state habeas court's decision to deny relief was "contrary to" **Strickland** and **Cooper**. (See Brief in Support of COA pp.34-35, and 38-39). (Grounds 1,11, and 13).

8) Whether jurists of reason would find it dabatable that Morrison should be sentenced to nine more years of prison for challenging 2004 plea counsel's advice to plead guilty, at a revocation hearing in 2011, after Morrison discovered new evidence that was withheld from him at trial in 2004 that showed counsel's advice was contrary to the literal plain language and legislative intent of the law as mandated in Texas Penal Code 22.011, 6.02, 2.01, and 8.02.

Should the ambiguity be resolved in Morrison's favor, and the Rule of Lenity apply by Morrison's sentence being corrected to seven years or by him getting his conviction overturned? (See Brief in Support of COA pp.35-38). (Grounds 1,2,5,7,8,11,12,and 13)

9) Whether jurists of reason would find it debatable that the language of past statutes like Texas Penal Code 21.11 or 21.09, which have no mens rea requirement can dictate that a more currently codified statute like 22.011 is strict liability, in spite of the fact the more current 22.011 has a mens rea requirement. (See Brief in Support of COA pp.31,39-41). (Grounds 1,2,5,7,8,11,12, and 13)

10) Whether jurists of reason would find it debatable that the District Court's decision was wrong in denying relief to Morrison, when he proved trial and appellate counsel were ineffective and he was prejudiced when counsel failed to investigate and do the due diligence required to discover the easily obtainable constitutional issues that Morrison has now raised, when it is clear from the plain language of the law that 22.011 cannot be a strict liability offense. (See Brief in Support of COA pp.41-43). (Grounds 2,3,4,5,6,7,12,13, and 14).

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11) Whether jurists of reason would find the District Court's assessment debatable or wrong by being "contrary to" **Strickland v. Washington** (2254(d)(1) when the Magistrate Judge removed the "reasonable probability" part of the prejudice standard in Morrison's IAC claims. (See Brief in Support of COA pp.43-44). (Grounds 11, and 13)

12) Whether jurists of reason would find the District Court's assessment debatable or wrong in regards to Morrison being allowed an equitable tolling gateway past the alleged AEDPA 1-year limitation default. (See Brief in Support of COA pp.44-45). (AEDPA 1-year limitation default)

13) Whether jurists of reason would find it debatable that the District Court or other federal courts would have had jurisdiction to hear grounds 2,3,4,5,6,7, and 12 in a § 2254 petition by Morrison from June 5, 2004 to June 5, 2005, well before Morrison was convicted, sentenced, or held in a jail or prison.

If the federal courts would not have had jurisdiction to hear the time barred claims during that time period, is it constitutionally permissible to prevent Morrison the first opportunity to raise his claims in a federal writ of habeas corpus § 2254 after he is convicted, sentenced , and sent to prison? (See Brief in Support of COA pp.45-46; Reply to Respondent's Answer (**"Reply"**) Doc 17 at pp.370-371, 377-378, and 397; Objections to the Report from the Magistrate Judge (**"Objections"**) Doc 27 pp.558-565, and 572-574).[1] (AEDPA 1-year limitation default).

14) Whether jurists of reason would find it debatable if Morrison could have exhausted his state court remedies pursuant to § 2254(b)(1)(A) to allow him to file a § 2254 petition from June 5, 2004 to June 5, 2005 while being on deferred adjudication probation without having a conviction or sentence and unable to do post-conviciton collateral review pursuant to § 2254(d)(2) or having any legal means to do a direct appeal under TX. Rules of App. P. 25.2.

Without being able to exaust state court remedies, is it constitutitonally permissible to time bar Morrison's claims in his first opportunity to raise his claims in the federal courts? (See Brief in Support of COA pp.44-45; Objection pp.560-561, 564-565, and 572-573). (AEDPA 1-year limitation default)

15) Whether jurists of reason would find the District Court's assessment debatable or wrong in regards to Morrison satisfying § 2244(d)(1)(B) and § 2244(d)(1)(D) to extend the deadline under § 2244(d)(1)(A) to when the unconstitutional state created impediments were removed, or the date on which the factual predicate of his claims could have been discovered through the exercise of due diligence. (See Brief in Support of COA p.45; Objections pp.568-572; and Reply pp.375-376, 384-389, and 391-403). (AEDPA 1-year limitation default)

16) Whether jurists of reason would find it debatable that the Supreme Court's holdings in **Trevino v. Thaler 133 S.Ct 1911 (2013)** and **Martinez v. Ryan 132 S.Ct at 1309 (2012)** should apply to ground 12's IAC claim and allow it to pass the alleged 1-year limitation default since it was impossible for Morrison to raise this ground from June 5, 2004 to June 5, 2005 since he could not raise IAC claims on appeal, nor could he do one in a postconviction collateral review without having a conviction at that time. Also when he had the first opportunity to raise ground 12 in 2011 he was deprived of counsel to help him properly

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1. All page numbers that are being cited to that are in the record will be cited to the federal habeas record page numbers located at the lower right corner of each page of that record. I.e. 17-50559.**"1-1585"**

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raise the Ground 12 IAC claim as explained in grounds 8 and 13. (See Brief in Support of COA p.28; Reply pp.379, 401-403; and Objections p.607). (Ground 12, 1-year Limitation default)

Morrison contends that reasonable jurists could conclude that each of these issues also are adequate to deserve encouragement to proceed further.

STATEMENT OF THE CASE
(FRAP 28(a)(6); 5th Cir. R. 28.3(g))

On May 6, 2004 Morrison and his brother Jason pleaded guilty to Texas Penal Code 22.011 from charges that arose from an incident that occurred in June 2003 where the Morrisons engaged in consensual-in-fact sexual conduct with a 15 year old female who presented herself to them as an adult. Because they reasonably believed the female was an adult, they did not think they could be convicted of 22.011, so up until May 6, 2004 (the date of their pre-trial hearing), they desired to have a jury trial. But on the Morning of May 6, 2004, Morrison's Attorney Ian Cantacuzene and Jason's Attorney Tom Morgan coerced them to plead guilty by telling them and their mother that their mistake of her age would not matter in court because ignorance of the law is no defense, and if they went to jury trial, the jury would have to go by the letter of the law and they would be found guilty of sexually assaulting a child. After much reluctance to pleading guilty, and wanting to put the issue in front of a jury, the two attorneys told them if they went to jury trial they WOULD BE FOUND GUILTY, and because of the nature of the offense they would go to prison for 15 to 20 years as sex offenders and get beat up and raped everyday. The Morrison's mother became very emotional and begged her sons to plead guilty so they would not have to go to prison and be beat up and raped. The Morrisons ended up signing the plea bargain for nine years of deferred adjudication probation (**"deferred probation"**). In order for them to accept the plea, they had to waive their right to appeal the deferred probation order pursuant to Tx. Rules of App. P. Rule 25.2. Morrison attempted to get permission from the trial judge to appeal because he did not believe it was right

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that he could be found guilty of statutory rape and have to register as a sex offender when the female in his case came to his house with alcohol and looking for a place to party, presented herself as an adult, and initiated the sexual acts. Cantacuzene, Morrison's attorney, however, would not allow him to get permission from the judge to appeal. (See Reply pp. 372-374; and Reporter's Record 1 of 1 at pp. 9, 14).[1] The Morrisons were placed on probation for nine years.

Six years later, the State filed a Motion to Revoke Probation and Morrison was arrested in May 2010. Tom Morgan, Jason's 2004 attorney, was appointed to represent Morrison for the revocation of probation. Morriosn was offerred a seven year prison term for a plea of true to the violations of the conditions of probation. Morrison told Morgan that he would sign the plea bargain immediately if they offered 4 years. In late Februrary 2011, while waiting on Morgan to get back to him about the 4 year plea bargain, Morrison discovered the legal basis for the current § 2254 Petition, which in its infancy was simply that he could not be guilty of 22.011 because the plain language and legislative intent of 22.011 in conjunction with 6.01, 2.01, and 8.02 Penal Code did not allow 22.011 to be Strict liability, as he was led to believe by Morgan, Cantacuzene, the State, and the Court in 2004. Also at that time in 2011, he read **Johnson v. State 967 S.W.2d 848, 858 (Tex. Crim App. 1998)** which supported his logic since Johnson was acquitted of 22.021, a statute with the exact same mens rea requirement as 22.011, and where Johnson also reasonably believed the minor in his case was legally able to consent. Almost immediately after discovering this new evidence that was withhel from him at the pretrial hearing in 2004, Morrison rejected the seven year plea, petitioned the trial court to withdraw his involuntary guilty plea from 2004, and to afford him a new jury trial because of ineffective assistance of counsel, so he could be aquitted of the 2004 22.011 charge before he was convicted of it. Since his attorney, Morgan, was a conflict of interest because of his representation

1. After Morrison received the federal record from the District Court on 9/8/17, he realized Reporter's Record 1 of 1 from the 5/6/2004 pretrial hearing was not part of the record. He sent his only copy with the original Application for COA, which is lost, therefore, he will have his family send it later.

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of Jason in 2004 and him being responsible for misleading the Morrisons, Morrison not knowing any better, petitioned the trial judge in a pro se letter to explain his situation and to ask for a new trial and new counsel. (See Exhibit "D" pp.47-51). Because of the conflict of interest, Morgan withdrew from representing Morrison, and David Rogers was appointed as counsel. (See RR2 pp.857-861).

On April 28, 2011, the trial court ultimately denied Morrison's requests claiming that his pro se pleadings could not be construed as a writ of habeas corpus because he cannot file pro se pleadings while having counsel, despite the fact when he filed the writ, counsel was a conflict of interest and his new counsel would not help him file one properly. Morrison's deferred probation order was then revoked and he was convicted of 22.011 and sentenced to 16 years prison.

David Rogers filed for appeal. Appeal was affirmed on May 30, 2013. The Texas Court of Criminal Appeals ("**TCCA**") refused Morrison's P.D.R. on October 23, 2013. On December 19, 2014 Morrison challenged his conviction and prison sentence in his State writ of habeas corpus (11.07) pursuant to the same claims he now presents in this § 2254 Petition. On April 29, 2015, the TCCA denied the 11.07 without written order based on the trial court's findings. Morrison filed the instant § 2254 Petition on May 8, 2015. In the 2254 Petition, Morrison asserts that he is being unconstitutionally imprisoned by the State of Texas for the following reasons:

Ground 1: Revocation counsel, David Rogers ("**Rogers**") failed to properly inform Morrison of the applicable laws that affected his decision to reject a plea offer of seven years prison, resulting in Morrison being sentenced to 16 years, as opposed to seven years had Rogers not been deficient. (Sixth and Fourteenth Amendments).

Ground 2: Texas Courts have violated Article 3 § 1 and the Fourteenth Amendment by viclating Article 2 § 1, Article 1 §§ 19, and 28 of the Texas Constitution in regards to how they have deemed 22.011(a)(2) as a strict liability offense despite the plain language of the prescribed culpable mental state ("**CMS**") in conjunction with

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Texas Penal Code section 6.02, 2.01, 8.02, and Government Code §§ 312.002, 311.002, 311.021, and 311.022. This separation of powers violation has denied Morrison his right to due process under the Fifth and Fourteenth Amendments.

Ground 3: 22.011 violates the Equal Protection Clause by subjecting unmarried adults who engage in the prohibited acts with a 14 to 16 year old minor to 20 years prison and a lifetime of sex offender registration, while allowing the same exact conduct to be legal to adults who choose to marry the 14 to 16 year old minor. The disparity of treatment does not wholly relate to the objectives of the statute and is underinclusive. Since the right to choose to marry or not to marry, the right to copulate, and freedom of intimate association are all fundamental rights protected by the First Amendment and infringed upon by 22.011, the equal protection claims are subject to the strict scrutiny analysis.

Ground 4: 22.011 violates the Equal Protection Clause as-applied to Morrison's situation and is underinclusive because Morrison was sentenced to 16 years prison for engaging in the prohibited acts, while MOrrison's 18 year old cousin who brought the minor to Morrison and his co-defendant, Jason Morrison's house, with alcohol, and told the Morrisons she was 21 years old, and partook in the same prohibited acts, but was not charged with the crime since he was within three years of age of the minor. The disparity of treatment does not wholly relate to the objectives of the statute, or defense the statute offers under 22.011(e)(2), since Morrison's cousin's actions and involvement in the offense were the same as the Morrisons. In the particular situation, his age of 18 did not mitigate any of the evil as perceived by the State in order for him not to be charged with the offense, while the Morrisons were charged and imprisoned for doing the same conduct to the same minor at the same time.

Ground 5: The Strict liability interpretation of 22.011 has rendered 22.011 unconstitutional because it treats violators of 22.011 differently from violators

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of all other felonies, obsenity laws, and common laws by subjecting people to a felony statute that imposes a severe sentence of incarceration, while not requiring the presumption of a mens rea to the facts that make the statute a crime.

22.011 is the only felony statute that has a prescribed CMS and does not dispense with any mental elements, yet is nevertheless, considered by the Texas courts, and prosecutors as being a strict liability crime, in spite of Supreme Court, and Fifth Circuit holdings of proper statutory construction that say otherwise.

Morrison's equal protection of the law rights have been violated because all other felonies, obsenity laws, and common laws that do have a prescribed CMS which does not dispense with any mental element do have the presumption of a mens rea to be proved beyond a reasonable doubt and are not strict liability, essentially denying Morrison the protection of Texas Penal Code Section 6.02, 2.01, and federal law as determined by the Supreme Court, which have held that statutes written like 22.011 cannot be strict liability crimes.

Ground 6: 22.011 is unconstitutional because the strict liability interpretation causes 22.011 to violate the Overbreadth Doctrine. 22.011 being strict liability in regards to the defendant's mens rea of the minority of the complainant has and will continue to put an unconstitutional chill or burden on Morrison and others' First Amendment right to copulate, and freedom of intimate association with the 18 to 25 year age group in fear they might be duped into a sexual relationship with a 14 to 16 year old potential sex partner who portrayed themselves as an adult, looked like an adult, or had identification saying they were an adult. Because a lot of 14 to 16 year old minors can look like adults from 18 to 25 years, in order to protect themselves from being charged with a 22.011 violation, and since 22.011 has been deemed strict liability, Morrison and every other person 20 years or older in this State who knows of the strict liability effects must only exercise their First Amendment right to copulate and freedom of intimate association with adults

older than 25 years, (who could not possibly be a 14 to 16 year minor) causing them to steer far wide of the unlawful zone, in order to be absolutely sure they will not be ensnared by a precocious 14 to 16 year old minor who claimed to be an adult, and be sent to prison for making a mistake in judgment of someone's age, with no defense.

Ground 7: The strict liability interpretation of 22.011 has caused 22.011 to become unconstitutionally vague and ambiguous. Since 22.011 on its face, does not have any strict liability indicators, Morrison and other people of ordinary intelligence have not been properly notified of the forbidden "strict liability" conduct. The Strict liability interpretation has not established determinate guidelines for law enforcement and can and has impermissably deligated basic policy matters to policemen, judges, and juries on a subjective basis and has and will continue to cause arbitrary and discriminatory applications by causeing selective enforcement of 22.011.

Ground 8: The trial court abused its discretion when it suspended Morrison's right to writ of habeas corpus by disallowing him to properly file a pre-conviciton writ of habeas corpus, or to hear the pro se pre-conviction writ of habeas corpus he did file, since at the time he filed the pleading he had counsel, whom would not help Morriosn with his habeas issues, leaving Morrison with no viable means in filing a writ of habeas corpus before he was convicted and sentenced to prison.

The trial court also abused its discretion by not appointing Morrison counsel to effectively counsel him about his credible habeas corpus issues and to help him properly file the complaint before he was convicted and sent to prison, resulting in Morrison being sentenced to 16 years in prison.

Ground 9 and 10: ABANDONED.

Ground 11: Morrison's appellate counsel, Rogers, was ineffective by not raising on appeal the trial court's error in overruling Morrison's Motion for Continuance and suspending his right to habeas corpus as discussed in Ground 8. Had counsel

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properly appealed these issues, then there is a reasonable probability the court of appeals would have remanded to the trial court to allow Morrison his right to file writ of habeas corpus in the trial court, and Morrison would have filed the issues he raises now in grounds 2, 5, 12, and 14, and other grounds, where there is a reasonable probability he would have received relief.

Ground 12: Morrison was denied the effective assistance of counsel when his trial counsel in 2004, Ian Cantacuzene, failed to investigate, object, and preserve for further review, and failed to appeal Morrison's easily discoverable habeas corpus issues that he now addresses.

Ground 13: Morrison was denied the effective assistance of counsel when his 2011 revocation counsel, Rogers, failed to investigate, object, and preserve for further review, and failed to appeal Morrison's easily discoverable habeas corpus issues that he now addresses.

Ground 14: Morrison's rights under the First, Fifth, Sixth, Fourteenth Amendments, and Article 3 § 1 of the United States Constitution were violated by the trial court and court of Appeals' separation of powers violation proved in Ground 2, and violation of equal protection of laws as proved in Ground 5. Morrison is, therefore, actually innocent of the 22.011 charge as the Legislature intended, because if it was not for the separation of powers or the equal protection of law violations, no reasonable juror would have been able to find him guilty, beyond a reasonable doubt, of all the elements of 22.011 as the plain language and legislative intent in the statute demand.

The ineffective assistance of counsel claims in Grounds 12 and 13 also contribute to this actual innocence claim.

DISTRICT COURT'S DETERMINATION

The District Court time barred Grounds 2,3,4,5,6,7, and 12 via 2244(d)(1). The District Court denied relief on the merits in Grounds 1,8,11,13,and 14.

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STANDARD OF REVIEW FOR OBTAINING COA

An Appeal may not be taken to the Court of Appeals from a final order in a habeas proceeding "unless a Circuit Justice or Judge issues a [COA]". 28 U.S.C. § 2253(c)(1). A COA will be granted only if the petitioner makes "a substantial showing of the denial of a constitutional right". 28 U.S.C. 2253(c)(2); **Slack v. McDaniel 529 U.S. 473, 489, 120 S.Ct 1559, 1603 (2000)**. Where a District court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straitforward: The petitioner must demonstrate that reasonable jurists would find the District Court's assessment of the constitutional claims debatable or wrong. **Slack v. McDaniel at 484**.

When the District Court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and jurists of reason would find it debatable whether the district court was correct in its procedural ruling. **I.d.** Or that "jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." **I.d; Miller-El v. Cockrell 123 S.Ct 1029, 1034 (2003)**. "[A] claim can be debatable even though every jurist of reason might agree after the COA has been granted and the case has received full consideration, that the petitioner will not prevail." **Miller-El at 1040.**

ARGUMENT

(FRAP 28(a)(8); 5th Cir R. 28.3(i))

For Morrison's Application for COA to be granted, he presents to the Judges of this Honorable Court of Appeals this Brief in Support of the Application for COA by satisfying the COA standards by demonstrating that:

1) The grounds ruled on the merits; Grounds 1,8,11,13, and 14 demonstrate that he has been denied a constitutional right and reasonable jurists would find the District Court's assessment of the five constitutional claims debatable or

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wrong, or that these issues are adequate to deserve encouragement to proceed further:

2) The grounds that the District Court time barred by the AEDPA's 1-year limitation period; Grounds 2,3,4,5,6,7, and 12, Morrison will demonstrate that jurists of reason would find it debatable that the petition states a valid claim of the denial of a constitutional right, and those jurists of reason would also find it debatable whether the District Court's assessment regarding the 1-year limitation default was correct. Or that the issues that Morrison presented that proves the 1-year limitation should not apply to his situation are adequate to deserve encouragement to proceed further.

GROUNDS 2,3,4,5,6,7, and 12 BARRED FROM REVIEW BY 1-YEAR LIMITATION PERIOD

On June 14, 2017 the District Judge adopted the Report and Recommendations of the U.S. Magistrate Judge (**"Report"**) (see Doc 19 at pp.440-474). In the Order Adopting the Report, the District Judge claims to "[have] undertaken a de novo review of the entire case file." (See Doc 28 at p.608), but yet he did not write an opinion nor address any of the meritable objections that Morrison filed on April 14, 2017 in his Objections to the Report (**"Objections"**) (see Doc 27 at pp.557-605), which invoked a denovo review in this case. Since the District Judge did not right an opinion and only adopted the Report, Morrison will refer to the Report (Doc 19 at pp.440-474) in this brief to show the Magistrate Judge's assessment of Morrison's claims are debatable or wrong, or deserve encouragement to proceed further, so this Court may issue a COA.

Question Presented #1:

The Magistrate Judge relied on the Fifth Circuit's holdings in **Tharp v. Thaler 628 F.3d 719 (5th Cir. 2010)** to timebar Morrison's grounds 2,3,4,5,6,7, and 12 by saying, **"each of these claims attempt to undermine Morrison's original guilty plea** that led to the trial court's order of deferred adjudication." (See Report at pp.447-451).

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The Magistrate Judge is essentially saying that Morrison cannot get relief on those grounds since they all attempt to undermine Morrison's May 6, 2004 plea of guilty, which was according to **Tharp**, the point that (30 days later on June 5, 2004 when time for taking direct appeal expired) triggered the AEDPA 1-year limitation period for Morrison to file for § 2254 relief in the federal courts.

This argument was first articulated by the Respondant's attorney. (See Respondent's Answer to § 2254 (**"Answer"**) at Doc 11 pp.323-328). Morrison raised extensive, compelling objections to the 1-year limitation default in his Reply. See Reply at Doc 17 pp. 370-404,, in which the majority of the objections he lodged that showed **Tharp** was distinguishable from his case, and the 1-year limitation period default should not apply, were not addressed by the Magistrate Judge, leaving Morrison's question of law that proved his constitutional issues should not be time barred as unanswered. Morrison again raised those objections in his Objections to the Magistrate Judge's Report (see Doc 27[1] pp.558-574), which again went unaddressed in the District Judge's Order Adopting the Report. (See Order Adopting Report at Doc 28 pp.608-611). Morrison will now raise those issues to this Court to satisfy the requirements for a COA to Issue.

Morrison will show that his grounds the Magistrate Judge said undermined the deferred adjudication order in 2004, in all reality, have nothing to do with the 2004 guilty plea, and the ones that can arguably be construed to undermine that order also were involved in the 2011 revocation hearing and caused Morrison to be sentenced to 16 years prison as opposed to 7 years, therefore they should not be time barred. Morrison will also make a substantial showing on how each ground that was time barred stated a valid claim of the denial of a constitutional right:

Valid claim of Denial of Constitutional Right:

The Texas Courts' separation of powers violation explained in Ground 2 is the

1. Morrison also presented a handwritten version of his Objections in Doc 26. Those objections do not need to be read since they are essentially the same objections as in Doc 27, which are the typed version.

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essence of Ground 5's equal protection of laws violation; Ground 6's Overbreadth Doctrine violation; Ground 7's Due Process and Vagueness Doctrine violation. The equal protection grounds stated in grounds 3 and 4 are not caused by the separation of powers violation and will be discussed afterwards. Ground 12 is an IAC claim stating that Morrison's 2004 trial counsel failed to investigate and to raise these meritable claims in 2004.

Simply put, Morrison has proved in Ground 2 that the Texas courts made and suspended the law, by going against the legislative intent when they negated the 'intentionally or knowingly" CMS that is required in the 22.011 statute, and when they arbitrarily suspended Texas Penal Code 6.02, 2.01, and 8.02 from applying to 22.011(a)(2). The results of the Texas courts' encroachment on the Legislature's duties violated Due Process, by leaving Morrison and others without a viable defense when the accused reasonably believed they were doing an innocent constitutionally protected act, but unwittingly commited a statutory rape offense with a precocious 14 to 16 year old minor who represented herself as an adult to have sex with. The separation of powers violation has also, as explained in Ground 5, denied people within Texas' jurisdiction, the equal protection of the laws that the Legislature created in 6.02, 2.01, and 8.02 Penal Code, along with the clear mens rea requirement in 22.011, which were created to protect all persons in Texas from being convicted of a crime and sent to prison when they did not "intentionally or knowingly" commit the crime, unless clearly dispensed with as done in statutes like 49.11, 20A02(b)(1), 43.05(a)(2), and 25.06 Penal Code.

Grounds 2 and 5 arguably undermine or attack the 2004 guilty plea, but since they are the cause of the other constitutional violations and can be liberally construed as also challenging the 2011 revocation hearing in their infancy stages, they should also be ruled on the merits. See **Frey v. Stephens 616 F.App'x 704 (5th Cir. 2014)**. Also see Objections at pp.565-567. Ground 2 is attacking the Texas courts' unlawful strict liability interpretation of 22.011, not the guilty plea.

Ground 6 proves that Morrison and others who know about the Texas courts' strict liability interpretation can no longer exercise in their First amendment rights of freedom of intimate assotiation or right to copulate with anyone in the 18 to 25 year age group. Because the 18 to 25 year age group is a lot of times indistinguishable from the protected age group of 14 to 16 years, 22.011 being strict liability with no defense, causes Morrison and others to be fearful and to steer far wide of the unlawful zone and forces them to only exercise this right with people over 25 years, putting a chill on their First Amendment protected right of intimate association, dating, and copulating with the 18 to 25 year age group. The potential 18 to 25 year old partner's rights are also infringed upon as explained in Morrison's Brief in Support of the § 2254 Petition ("**Brief**") at Doc 5 pp.251-254. That is a present and future constitutional violation to not only Morrison's rights, but to others' rights as well, and has nothing to do with undermining Morrison's original guilty plea, and therefore, should not be affected by the holdings in **Tharp v. Thaler supra.**

Ground 7's Void for Vagueness/Rule of Lenity claim proves that since 22.011's plain language demands that an intentionally or knowingly mens rea must be proved, and that mens rea can be, has been, and will continue to be interpreted by people of ordinary intelligence to applying to whether the accused knew the complainant was a child, Morrison and others have not been given fair notice of the courts' strict liability interpretation. The vagueness violation has also caused selective enforcement of 22.011 as shown in **Johnson v. State 967 S.W.2d 848, 858 (Tex. Crim. App. 1998)**. The harm from this vagueness is four fold:

1) Had the courts properly interpreted 22.011 as the plain language demands, and how the Supreme Court's statutory construction holdings have explained, then Morrison would have gone to a jury trial in 2004 and been aquitted since there was proof he reasonably believed the minor in his case was 21 years old, and the prosecutor would not have been able to prove he **intentionally** or **knowingly** caused the penetration of the sexual organ **of a child** by any means. Or;

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2) Had the Legislature properly notified the masses that 22.011 was strict liability by dispensing with the mental element of the 14 to 16 year old minority status, as required by 6.02(b) and Supreme Court precident, as shown in the Brief, then Morrison would have been properly notified about the fact that he could go to prison for unwittingly having sex with a 14 to 16 year old minor, even if one represented herself to be an adult, causing him to be more vigilant in whom he had sex with by going through an elaborate method of checking birth records, i.d's, or refraining from having sex with anyone under 25 years like he will have to continue to do. Either way, had the courts in Texas not created a strict liability statute, when it is clear that the language of the statute does not permit it to be strict liability, Morrison would not be sitting in prison right now hoping this Court of Appeals will grant a COA and allow him the relief he is due that was caused by the vagueness the strict liability interpretation caused. Because of the ambiguity and vagueness, the Rule of Lenity should be invoked for these scenerios and Morrison should be acquitted.

3) The vagueness of 22.011 also presented itself in the April 28, 2011 revocation hearing, when based on the plain language of 22.011, Morrison attempted to raise his grounds 2,5,12, and 14 issues to the trial court in hopes of getting a new jury trial and an acquittal before his conviction. (See Exhibit "C", "D", and "E" at pp.44-62). Morrison rejected a seven year plea bargain because he thought by the plain language of 22.011, that he would be acquitted, but his arguments went unaddressed. The trial court found his probation violations to be true and sentenced him to 16 years prison instead of seven. Had the Texas courts interpreted 22.011 as the plain language demands, there is a reasonable probability that Morrison would have been given an evidentiary hearing on the matter, then allowed a new jury trial, where he would likely been acqitted, or appealed the trial court's denial and given relief on appeal.

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4) Had the Legislature dispensed with the mens rea requirement from modifying "of a child", as required by 6.02(b), Morrison would have been properly notified that 22.011 was strict liability and he would have accepted the seven year plea bargain, and he would not have been influenced by the **Johnson v. State 967 S.W.2d 848 at 858** case to reject the seven year plea bargain based off the plain language of 22.011, 6.02, 2.01, and 8.02. This is a prime example of why our Constitution and the Supreme Court do not allow for criminal statutes to be vague and ambiguous, or to allow subjective interpretations of statutes through other means before a plain language reading has been done. Since Morrison was not properly notified about 22.011 being a strict liability offense and that caused him to be sentenced to prison for 16 years as opposed to seven years in 2011, and it caused him to waive his right to jury trial and appeal in 2004, the Rule of Lenity should be invoked in Morrison's favor and he should be acquitted or at the least have his sentence corrected to seven years prison.

This ground does not soley attack the 2004 deferred probation order, it also attacks the 2011 revocation hearing and should not be subject to the holdings in **Tharp v. Thaler**. Because the separation of powers and equal protection violations in Grounds 2 and 5 caused these constitutional violations, those two grounds should also not be subject to **Tharp v. Thaler.**

Ground 3 presents a valid constitutional claim by proving that 22.011 violates the Equal Protection Clause by treating similarily situated adults who have sexual relations with the 14 to 16 year age group differently:

1) Adults who choose to marry the 14 to 16 year age group are allowed to have sex with the protected age group without repercussion. And

2) Adults who choose not to marry, but have sexual relations with the 14 to 16 year age group are subject to 20 years prison and must register as a sex offender for life.

Because the government cannot show this classification promotes a compelling

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interest or is precisely tailored to further a compelling governmental interest, it violates the Equal Protection Clause of the Fourteenth Amendemnt. This ground does not attack nor undermine the 2004 deferred probation order, it is a past, present and future constitutional violation and cannot be subject to **Tharp v Thaler.**

Ground 4 proves Morrison was treated differently in violation of the Equal Protection Clause when Morrison was imprisoned for 16 years for having sex with a 15 year old minor that his cousin, White, brought over, told Morrison she was an adult, did the same conduct, and compelled the offense to happen, but White was not charged with the crime or sent to prison for it. Morrison contends that since ground 4 is only an as-applied to his situation claim, as opposed to a facial claim, that it can be construed as only undermining the original plea of guilt, but he hopes this Court will allow it to pass the time bar for the other reasons stated in this motion.

Morrison has made a substantial showing that these constitutional violations are not just subjective constitutional claims, but are real past, present, and future constitutional violations supported by Fifth Circuit and Supreme Court holdings, and not only affect him, but the millions of others that are subjected to 22.011. (See Brief at pp.145-306).

Ground 12 proves trial counsel in 2004 was ineffective for not investigating Morrison's case and discovering the above constitutional issues and raising them to the trial court or court of appeals. Had counsel properly investigated Morrison's case and identified the questionable strict liability interpretation as being unconstitutional, and the constitutional affects it had on Morrison's rights, then there is a reasonable probability the outcome of the trial or appeal would have turned out differently. With a little bit of due diligence, counsel could have discovered these easily obtainable constitutional questions that Morrison raises now, that would have had merit, especially since there were so many Supreme

Court holdings available in 2004 that proved the constitutional claims do have merit.

This ground attacks the 2004 original guilty plea, but since it was raised in 2011 and ultimately caused Morrison to be sentenced to 16 years instead of seven years, it should be ruled on the merits and not subject to **Tharp v. Thaler**. See logic in this Court's holdings in **Frey v. Stephens 616 F.App'x 704**; Objections pp.556-567. Also see **King v. United States 595 F.3d 844 (8th Cir. 2010)** for jurists of reason who would agree that trial counsel was deficient for his errors and Morrison was prejudiced because counsel's performance cost Morrison the opportunity to present his meritorious arguments at trial or on direct appeal.

Morrison contends that Ground 12 should have also been ruled on the merits in light of **Trevino v. Thaler 133 S.Ct 1911 (2011)**. (See Reply at pp.379, 401-403; and Objections at p.601).

Morrison has satisfied the first requirement as stated in 2253(c)(2) for this Court to grant COA for the seven constitutional violation grounds that were time barred. He has also shown that jurists of reason would at least debate that those seven grounds do not soley attack or challenge substantive issues relating to the original order of deferred adjudication probation as determined in **Caldwell v. Dretke 429 F.3d 521, 530 n.24 (5th Cir. 2005)** and **Tharp v. Thaler Supra**, and therefore, should not be timebarred. Morrison asserts that since the Magistrate Judge did not address this issue that these issues are adequate to deserve encouragement to proceed further. (See Reply at pp.378-380; and Objections at pp.565-567, 573-574). Morrison will now show that jurists of reason would find it debatable whether the District Court's ruling that time barred these seven grounds were wrong in regards to the exception to the time bar through Morrison's **McQuiggin v. Perkins 133 S.Ct 1924 (2013)** actual innocence claim:

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Question Presented #2

Morrison will prove that jurists of reason would find it debatable whether he presented a valid actual innocence claim to overcome the alleged 1-year limitation period default, pursuant to the holdings of **Mcquiggins v. Perkns supra**, that allow a gateway through which Morrison may pass if there is a credible showing of actual innocence. The Supreme Court said in **Perkins** that tenable actual innocence gateway pleas are rare, and the petitioner does not meet the threshold requirements unless he persuades the district court that in light of the new evidence, no juror acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Morrison has been claiming his innocence of the 22.011 charge since he went to pre-trial on May 6, 2004, and was told by his counsel, counsel's paralegal, his brother's counsel, the District Attorney, and the Court, that him believing the complainant was an adult would make no difference in court and he would be convicted and go to prison if he went to jury trial. For seven years Morrison believed that advice told to him by those legal professionals was true. However, in late Februrary 2011, Morrison discovered new evidence that was withheld from him at trial that proved he was actually innocent of the 22.011 charge. That new evidence was taken from the plain language of 22.011 in conjunction with 6.02, 2.01, and 8.02, which said that his reasonable belief that the complainant was an adult did in fact matter since the statute requires that for someone to commit the offense of 22.011 they must **intentionally or knowingly** cause the penetration of the sexual organ **of a child** by any means. (Emphasis added to show that the Legislature meant for the CMS to modify "of a child"). From reading that statute, along with 6.02, 2.01, and 8.02, and the **Johnson v. State** case in 2011, Morrison discovered that what he was told in 2004 by his attorney, Cantacuzene, and his brother's attorney Morgan (who was Morrison's court appointed attorney at that time), was not true. Since discovering the new evidence and realizing Morgan was a conflict

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cf interest, Morrison almost immediately rejected a seven year plea offer for a plea of true to the probation violations (which he knew he was guilty of), and he filed a pro se pleading with the trial court asking for a new trial and new counsel based on the new evidence he found in the law library, which proved his innocence, (See Exhibits "C" and "D" at pp.44-51). Morrison was given new counsel but the actual innocence and IAC claim raised in the pleading were not ruled on because he filed the pleading pro se while having counsel, (See RR3 p.9 lines 5-14 at p.867). He was then sentenced to 16 years prison. Morrison attempted to have Rogers, his appellate counsel, raise the new evidence of actual innocence on appeal, but Rogers did not respond, nor raise the issue. (See Exhibits "L", and "M" at pp.82-95). The actual innocence claim was again raised in Morrison's state writ of habeas corpus, 11.07, in Ground 14, and presented to the trial court and TCCA. After the State denied his 11.07, Morrison raised the actual innocence claim in his 2254 to the District Court in Ground 14, which explained the new evidence he found in 2011 was the plain language of the law, supported by Supreme Court precident, proved he is actually innocent of 22.011 since he did not commit every element of the crime as the Legislature prescribed in the statute, and that new evidence was withheld from him at trial.

On pages 12-13 of the Report (see pp.451-452), the Magistrate Judge erroneously says that Morrison did not present any new evidence of actual innocence because Morrison, "failed to present any **exculpatory scientific evidence, trustworthy eye witness accounts, or critical physical evidence.** Morrison did not produce any such evidence of innocence to the state habeas court, and he did not produce such evidence to this court. Therefore Morrison has not presented an actual innocence claim under the standard in **McQuiggins 133 S.Ct at 1935.**" (Emphasis added to show the three types of evidence the Magistrate Judge said Morrison had to file). Morrison objected to the Magistrate Judge's erroneous view that the above three types of new evidence were the only three ways new evidence could be

presented for an actual innocence claim. (See Objections at pp.574-575; Reply at pp.394-396). Morrison proved that other reasonable jurists, including Judge Junell (the District Judge ruling on Morrison's § 2254 Petition) would disagree with the Magistrate Judge's assessment regarding exculpatory scientific evidence, trustworthy eye witness accounts, or critical physical evidence being the only three examples of new evidence that could be presented in an actual innocence claim. In proving that Judge Junell could disagree or debate that issue so the District Judge would at least grant a COA on the issue, Morrison cited to Young v. Stephens 2014 U.S. Dist. Lexis 16007 at page 166, to show that the District Judge, Judge Junell, had ruled that those three examples are not an all inclusive list because:

> "The petitioner must support his allegations with new reliable evidence that was not presented at trial and must show that it is more likely than not that no reasonable jurist would have convicted him in light of the new evidence. Such 'new reliable evidence' may include **by way of example**, 'exculpatory scientific evidence, credible declarations of guilt by another, trustworthy eye witness accounts, and certain physical evidence.'" Quoting **McGowen v. Thaler 675 F.3d at 499-500 (5th Cir. 2012)**.

Those three examples of new evidence the Magistrate Judge listed, are just that; examples that may be included as ways to raise an actual innocence claim. Even though Morrison cited to **Young v. Stephens**, a case written by Judge Junell that shows the Magistrate Judge's assessment of this issue as debatable or wrong, Judge Junell denied this claim and adopted the Magistrate Judge's erroneous determination of Morrison's actual innocence claim and denied a COA. How does the above cited to quote not make the Magistate Judge's assessment about Morrison's actual innocence claim dabatable or wrong?

The supreme Court in House v. Bell 126 S.Ct 2064, 2077 (2005), while discussing the above three examples of newly discovered evidence said: "The habeas court's analysis is not limited to such evidence. There is no dispute in this case that House presented some new reliable evidence."

House brought new evidence of a putative confession, suggesting that Mr.

Muncey, not House, committed the murder. **House at 125 S.Ct 2075.** New evidence of a putative confession was not listed in the three examples in **Schlup v. Delo 513 U.S. at 324**, but reasonable jurists from the Supreme Court allowed it to be used as new evidence in an actual innocence claim, suggesting that it is at least debatable among jurists of reason that the Magistrate Judge's assessment was wrong when he denied Morrison's actual innocence claim by saying:

> "Although Morrison claims he has discovered 'new evidence', he has failed to present any exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." (See Report atp.452).

Other reasonable jurists from the Third Circuit Court of Appeals could also find the Magistrate Judge's assessment in denying this claim as debatable or wrong. See **Munchinski v. Wilson 694 F.3d 308, 337-338 (3rd Cir. 2012)**, where that Court of Appeals said the three catagories listed in **Schlup v. Delo** are not an exhaustive list of evidence that can be reliable.

Also compare to **Bousley v. United States 118 S.Ct 1604 (1998)**, where Bousley, like Morrison,claimed that his plea of guilty was not knowing, not intelligent, nor was it voluntary since he was misinformed as to the true nature of the crime charged. Five years later when the Supreme Court defined the term "use" regarding 18 U.S.C. § 924(c)(1) in **Bailey v. United States 116 S.Ct 501, 506 (1995)**, Bousley used the proper definition of the term "use" as new evidence to support his actual innocence claim to bypass a procedural default. The Supreme Court ultimately remanded the case to allow Bousley a chance to show he was actually innocent by demonstrating that he did not "use" a firearm as the term is defined in **Bailey. Bousley** is another example of new evidence that was used that was outside of the three examples listed in **Schlup v. Delo**, and since the new evidence, like in Morrison's case is predicated on the proper understanding of the language of a statute, it shows Morrison's new evidence is reliable and should be allowed, especially since he has shown that a proper statutory analysis as modeled by the Supreme Court and Fifth Circuit of the 22.011 statute would render Morrison

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innocent.

Morrison has shown that jurists of reason would agree that the three examples of types of new evidence listed in **Schlup v. Delo** are just that, examples that may be included as ways to raise an actual innocence claim, and that the District Court's assessment is wrong. The new evidence Morrison discovered in 2011 (i.e., The plain language of 22.011, 2.01, 6.02, and 8.02 which called into question the incorrect and unreasonable strict liability interpretation of 22.011, and shows the Texas courts unconstitutionally withheld from the statute, the Legislature's given mens rea requirement(s) as shown inGround 2 and 5, is evidence supported by federal law as determined by the Supreme Court that was withheld from him at the time of the May 6, 2004 pre-trial hearing, and because he was unaware of this evidence he involuntarily plead guilty. Had this new evidence been known to Morrison at the time of trial, he would not have plead guilty then went to a jury trial where no juror acting reasonable would have voted to find him guilty beyond a reasonable doubt, and he would have been acquitted.

Morrison has proven that the state trial court and trial counsel applied an unrealistic and rigid strict liability interpretation to 22.011, without determining that the Legislature's required intentionally or knowingly mental element that were prescribed into the offense in 1983, in conjunction with 6.02, and 2.01, modified "of a child". Had that determination been made, there is a reasonable probability that Morrison would have received an acquittal of the 22,011 charge because the evidence he had at the time of trial proved he reasonably thought the complainant in his case was an adult, therefore, proving he is actually innocent of 22.011 since he did not intentionally or knowingly have sex with a child. (See Objections at pp. 574-578 where Morrison proved to the District Court that he made a credible showing of actual innocence and that the newly discovered evidence should not automatically be discounted based on it not being one of the three listed examples in **Schlup v. Delo.**

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Morrison has proven in citing to Young v. Stephens, House v. Bell, McGowen v. Thaler, Minchinski v. Wilson, and Bousley v. United States that reasonable jurist disagree with the Magistrate Judge's assessment regarding Morrison not presenting new evidence for his actual innocence claim. Since these reasonable jurist would agree or it is debatable that morrison has presented a proper actual innocence/miscarriage of justice exception to the 1-year limitation period, this issue should suffice for COA to issue in regards to Grounds 2,3,4,5,6,7, and 12 being barred by the AEDPA 1-year limitation period. However, out of an abundance of caution, and if the space limitations permit, Morrison will briefly argue his other arguments that went unaddressed by the District Court regarding the time barred claims after he argues that the District Court's assessment of the claims that were ruled on the merits, i.e., Grounds 1,8,11, and 13, meet the requirements for a COA to issue. If the Court determines that this actual innocence issue is sufficient to grant COA on the time bar issue, then pages 44-46, and questions presented #'s 12-16 are superfluous.

GROUNDS RULED ON THE MERITS (GROUNDS 8, 1, 13, 11)

QUESTIONS PRESENTED # 3, AND 4.

Ground 8: The trial court suspended Morrison's right to writ of habeas corpus under Article 1 § 9 Clause 2 of the Constitution of the United States when it would not allow him to file a pre-conviction writ of habeas corpus pro se while having court appointed counsel, whom would not help Morrison properly file the writ, even after multiple requests for help by Morrison. See RR3 p. 5-9 at 866-867 where the court would not hear Morrison's writ of habeas corpus issues, nor allow him a continuance so he could properly file his pre-conviction writ since the court would not construe his pro se writ as a writ of habeas corpus since he filed

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it pro se while having counsel, despite the fact counsel admitted that Morrison discussed his issues with him, but he would not help him with any habeas issues since he was not appointed to do any 11.07 writs and it was out of his scope of appointment.

Morrison was also denied effective counsel when the trial court would not appoint effective counsel to help Morrison with his pre-conviction writ of habeas corpus. Morrison was essentialyy put in a catch-22 with no viable means in exercising in his right to writ of habeas corpus to call into question his unlawful imprisonment before he was convicted, sentenced, and sent off to prison.

The Magistrate Judge on pages 14-20 of his Report (see pp 453-459) discusses Morrison's Ground 8. Morrison objects to this Report at pages 27-37 of his Objections (see pp. 583-593), and proved everything the Magistrate Judge said to deny Morrison's Ground 8 was in error. Any reasonable jurist who reads Morrison's Objections to the Magistrate Judge's assessment of Ground 8, would find the Magistrate Judge's reasons for denying relief debatable or wrong, or that these issues are adequate to deserve encouragement to proceed further. Due to space limitations for this application, Morrison will not reargue his objections to the Report in full, therefore, he will succiently show that reasonable jurist would disagree with the Report to deny relief.

The Magistrate Judge on one hand says that the distinction between whether Morrison filed a pre-conviction or post-conviction writ of habeas corpus is not meaningful to this discussion (see p. 456), but on the other hand, on pages 457-459, he first admits that if Morrison's letter if properly filed would have been a pre-conviction writ (see p. 457), then he goes back to resorting to the letter as a post-conviction writ, so he could deny relief in Morrison's IAC claim by saying Morrison has no constitutional right to counsel in post-conviction writs. (See pp. 458-459).

Morrison has proven in his objections that reasonable jurists would disagree

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whether the distinction is meaningful in the context of Morrison receiving effective counsel to properly counsel him and help him file his pre-conviction habeas corpus issues before he was convicted and sent to prison. The reasonable Jurists of the Supreme Court have held that there is a huge difference between post-conviction and pre-conviction defendants when it pertains to their right to effective counsel. See Scott v. Illinois, 99 S.Ct. 1158 (1979) where they held that:

> "The Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of prison unless the State has afforded him the right to assistance of counsel in his defense." At 99 S.Ct. 1162.

Also in Lassiter v. Dept. of Soc.Ser. of Durham City, 101 S.Ct. 2153, 2159 (1981) they held:

> "An indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."

In Argersinger v. Hamlin, 92 S.Ct. 2006 (1972), the Supreme Court established that counsel must be provided before any indigent may be sent to prison, even where the crime is petty or the prison term brief.

At Morrison's revocation hearing, he was an indigent defendant facing 20 years in prison and the record is very clear in showing he was denied effective counsel to help him properly file his pre-conviction habeas corpus issues. (See RR pp. 5-9 at pp. 866-867). Had Morrison been given counsel who properly filed a pre-conviction writ, because of all the Supreme Court precident that was available at that time that showed Morrison's claims as meritorious, as shown in Grounds 2 - 7, and 12, and 14, there is a reasonable probability Morrison would have received relief from the trial court or the court of appeals. Since the trial court did not appoint counsel and Rogers said he would not help Morrison with the writ since it was out of his scope of appointment, and this was during "a critical stage of the criminal proceedings against him", or whenever his "substantial rights [were] affected," (See Mempa v. Rhay, 389 U.S. 128, 134 (1967)) he was denied actual effective counsel, which demands automatic relief. See Strickland v. Washington,

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104 S.Ct. 2052 (1984) and, Powell v. Alabama, 53 S.Ct. 55 (1932); U.S. v. Taylor, 933 F.2d 307 (5th Cir. 1991); compare to King v. U.S., 595 F.3d 844 (8th Cir. 2010).

Morrison has shown that reasonable jurists would find it debatable that Morrison, an indigent defendant, facing the deprivation of his liberty was actually and constructively denied the effective assistance of counsel to help him properly file his writ of habeas corpus issues before he was convicted and sentenced to prison at the April 28, 2011 revocation hearing, when revocation counsel, Rogers, admitted to on record that he would not help Morrison with the writ since it was out of his scope of counsel and he was not assigned to help Morrison with any writ issues (RR 3 p. 6 lines 2-5, and p. 9 lines 10-14), resulting in the trial court suspending Morrison,s right to writ of habeas corpus.

Had the trial court appointed counsel to help Morrison properly file the writ, or had Rogers helped Morrison like Morrison asked for in his letter to the court Exhibit "D" at pp. 47-51, and the letter to Rogers in Exhibit "E" at pp. 52-62, and in the meetings with Rogers, there is a reasonable probability that the trial court would not have suspended his right to file a pre-conviction writ of habeas corpus. Therefore it is also debatable among jurists of reason that the distinction between whether Morrison's pro se pleadings to the court was a pre-conviction or post-conviction writ is meaninglful to the Magistrate Judge's discussion. Morrison has proved it is meaningful since he had the constitutional right to counsel to help him file the pre-conviction writ at the revocation hearing.

Because this important Sixth Amendment issue has not been confronted in a deferred adjudication revocation proceeding it is adequate to deserve encouragement to proceed further.

On page 17 of the report (see p. 456), the Magistrate Judge, like the trial court's reasoning for suspending Morrison's right to writ of habeas corpus, said Morrison incorrectly filed his letter (Exhibit "D" at pp. 47-51) as an application for a pre-conviction writ of habeas corpus by filing it pro se instead of through his counsel.

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Morrison could not afford to retain counsel to file his pre-conviction writ for him, he was disallowed by the court to file one pro se since he was appointed counsel, and his appointed counsel said he would not do one for him, nor help him file one as admitted to in the record twice. (See RR 3 p. 6 lines 2-5 and p. 9 lines 10-14 at pp. 866, and 867), Plus, when Morrison filed the pre-conviction writ, on March 5, 2011, he was represented by Tom Morgan, who was a conflict of interest since he was one of the attorneys that the writ was implicating as one that provided the incorrect information to Morrison and his brother in the 2004 plea bargain hearing. (See RR 2 pp. 4-6 at p. 860) Morrison could not logically have Morgan file his pre-conviction writ that implicated Morgan as being one of the attorneys responsible for the IAC claim that the writ encompassed. Therefore, under the trial court's no right to hybrid counsel reason that suspended Morrison's right to writ of habeas corpus, how is a regular citizen suppose to exercise in their right to habeas corpus, if he cannot do one pro se while having counsel, but at the same time, counsel would not help him with it because he was not assigned to do it, or counsel was a conflict of interest? The no right to hybrid counsel rule by the Texas Courts cannot and does not supercede the United States Constitution. The Suspension Clause of the Constitution does not give us a right to habeas corpus through counsel, nor does it say if we have counsel we cannot file a habeas corpus pro se. The Suspension Clause gives us the right regardless. The reasonable jurists of the Supreme Court agree in case like Boumediene v. Bush, 128 S.Ct. 2229 (2008), where they made it clear that:

> "Every person restrained of his liberty is entitled to an inquiry into the lawfulness of such restraint, and to a removal thereof if unlawful; and such inquiry or removal ought not be denied or delayed, except when, on account of public danger the Congress shall suspend the privilege of writ of Habeas Corpus." At 128 S.Ct. 2446-47. Quoting a resolution passed by the New York Ratifying Convention on July 26, 1788, that made it clear its understanding that Suspension Clause not only protects against arbitrary suspensions of the writ, but also it guarantees an affirmative right to judicial inquiry into the causes of detention.

Morrison attempted to inquire about the lawfulness of his restraint since he

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did not commit all elements of the crime as stated by the Legislature, but the trial court would not allow him to inquire about his unlawful detention resulting in him being sentenced to 16 years of prison.

The Supreme Court went on to say discussing the Suspension Clause:

> "In our system the Suspension Clause is designed to protect against these cyclical abuses. The clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the judiciary will have a time tested device, the writ, to maintain the 'delicate balance of governance' that is itself the surest safeguard of liberty." Also see Hamdi v. Rumsfield, 124 S.Ct. 2633 (2004). (Emphasis added).

In I.N.S. v. St. Cyr, 121 S.Ct. 2271. 2279-80 (2001). it is clear that:

> "A construction of the Amendments at issue that would entirely preclude review of a pure question of law by any court would give rise to substantial constitutional questions. Article I, 9 cl. 2. of the Constitution provides: 'The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.' Becuase of that clause, some 'judicial intervention in deportation case' is unquestionably required by the Constitution." (Citation omitted). (Emphasis added). At 2279.
> "Moreover, the issuance of the writ was not limited to challenges to the jurisdiction of the custodian, but encompassed detentions based on errors of law, including the erroneous application or interpretation of statutes." at 2280.

Morrison's pre-conviction writ was predicated on the erroneous application and interprietation of 2241.011. He is also not an enemy combatant nor a foriegner as the defendants in the cases above where the Supreme Court ruled in their favor in regards to their right to writ of habeas corpus being suspended. morrison is a citizen of this Great Country who fought in the Navy for this right, therefore, if enemy combatants and foriegners can have the right to writ of habeas corpus, then surely so can he.

Since Morrison has shown that he was denied by the trial court his constitutional right to writ of habeas corpus, and jurists of reason would find the District Court's assessment that said Morrison cannot file a pre-conviction writ while having counsel, and the trial court did not deny him the right to file a pre-conviction writ debatable or wrong, or that this issue is adequate to deserve

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encouragement to proceed further, a COA should issue regarding this Ground. (See pages 583-589 of Objections for other issues not listed here regarding Ground 8).

Question Presented # 9:

The Magistrate Judge said that Morrison's letter is not a proper application for writ of habeas corpus since it did not contain specific facts that, if proven to be true, might entitle him to relief. The Magistrate Judge determined this by basing the court's strict liability interpretation of 22.011 from Johnson v. State, 967 S.W.2d at 849-50. (See Report at pp. 456-457). Morrison will explain further on pages 39-41 while discussing Ground 13, that the Johnson v. State case is an indecency with a child case, which is statute 21.11, and does not contain the requirement of a mens rea as does 22.011. Therefore reasonable jurists would debate while comparing the language of 22.011 and 21.11 whether Morrison's pre-conviction writ, which was based on the plain language of 22.011 having a required mens rea that must be proved, and not 21.11 which has no mens rea in it, and therefore, contains specific facts that if proven would entitle him to relief. Or this issue is adequate to deserve encouragement to proceed further since 21.11 is completely distinguishable from 22.011.

GROUND 1: REVOCATION OF PROBATION COUNSEL IN 2011/2254(d)(1) and (2)

Question Presented # 5:

In Ground 1 Morrison has proven with the evidence presented to the state habeas court and district court that revocation counsel, David Rogers, was ineffective for not properly counseling Morrison about the laws that affected his decision to reject a plea offer of seven years prison, resulting in him being sentenced to 16 years prison instead. (See Brief at pp. 155-173; Motion to Disqualify the Affidavit of David Rogers at pp. 96-109; and Exhibits "A" - "M" at pp. 41-95, Exhibits "N" - "S" at pp. 110-136 in federal Habeas Record and Brief at pp. 41-136 in vol.1

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of State Habeas Court Record; Motion to Disqualify Affidavit of David Rogers at pp. 493-506 and Exhibits "N"-"S" at pp. 507-535 in vol.2 of State Habeas Court Record; Exhibits "A"-"M" at pp. 137-191 in vol. 1 of State Habeas Court Record).[1] Morrison presented this evidence to the state court after he received Rogers' affidavit (See pp, 1311-1315 of Federal Habeas Record), which was Rogers' post hoc rationalizations that Rogers created to cover up his derelection of duty that the Sixth Amendment guaranteed to Morrison. A reading of this evidence proves the statements in Rogers' affidavit were untrue.

The state court, the Respondent, the Magistrate Judge, nor has the District Judge addressed or acknowledged, in any way, the evidence that Morrison presented, which has proven the state habeas court's unreasonable determination of the facts in light of that evidence presented when Morrison filed that evidence in his 11.07 proceedings to prove Rogers did not actually do the things he claimed in his affidavit. Since the State court relied solely on the affidavit by David Rogers to deny Morrison's Ground 1 (See State Habeas Court Record Vol.2 pp. 341-354, 357-365 at pp. 1383-1386, 1399-1407), had Exhibits "D"-"S", and the Motion to Disqualify the Affidavit of David Rogers, which is clear and convincing evidence that the state court's findings regarding Rogers' affidavit was erroneous) been properly addressed, there is a reasonable probability Morrison would have received relief on his Ground 1 and had his sentence corrected to seven years prison. The state court did not address this evidence, therefore Morrison presented that same evidence to the District Court to satisfy § 2254(d)(1)(2). (See Brief at pp. 168-171 and Appendix "1" at pp. 40-142).

Areading of the letters Morrison wrote to his brother and Rogers in 2011, along with the other Exhibits, shows that it is clear that during the time Rogers was Morrison's trial counsel from March 18, 2011 to April 28, 2011; and from the time

1. Upon receiving the Federal Habeas Record, Morrison noticed that several of the pages in the Exhibits did not copy very well because when he filed them he used different colors to highlight the relevant part of the Exhibit, which in the copy darkened out the relevant part. It might have copied fine during electronic copy on a computer screen, but if not Morrison asks this Court to read the Exhibits in the State Habeas Record at pages indicated above since they copied a little better in that record.

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Rogers was his appellate counsel from April 28, 2011 to May 30, 2013, that during that entire time Morrison's rationale and knowledge of the law that affected his decision to reject the seven year plea offer remained the same; i.e., that he was still expecting a new jury trial, evidentiary hearing, or relief on appeal, proving that Rogers did not properly counsel Morrison as Rogers claims in his affidavit. And had Rogers properly counseled him, Morrison would have accepted the seven year plea bargain and been sentenced to seven years instead of 16. Unfortunately for Morrison, it is clear that the District Court chose also to ignore this clear and convincing evidence and denied relief based solely on the unsupported by the record affidavit of David Rogers.

> "Contested facts may not be decided on affidavit alone, unless the record supports it." Jordan v. Estelle, 594 F.2d 144 (5th Cir. 1979).

This shows that the reasonable jurists at the Fifth Circuit would debate whether the state habeas court, and the Magistrate Judge were correct in their decisions to rely solely on the unsupported by the record affidavit of David Rogers to deny Morrison's Ground 1.

> "A state court's decision that rests upon a determination of facts that lies against the clear weight of the evidence is by definition, a decision 'so inadequately supported by the record' as to be arbitrary and therefore objectively unreasonable." Ward v. Steres, 334 F.3d 696, 704 (7th Cir. 2003).

The District Court, like the state habeas court, completely ignored the important evidence that Morrison presented, but says:

> "Having independently reviewed the entirety of the evidence from Morrison's trial, direct appeal, and state habeas corpus proceedings, the undersigned recommends that none of Morrison's claims regarding the performance of his attorneys satisfy either prong of the Strickland test." See Report at 460-461).

Reasonable jurists would also find the state court and District Court's decision to deny Morrison's Ground 1 IAC without addressing the evidence he presented as debatable or wrong. See Guidry v. Dretke, 397 F.3d 327 (5th Cir. 2005):

> "The state trial court's omission, without explanation, of findings on evidence crucial to Guidry's habeas claim, where the witnesses are apparently credible, brought into question, whether, under subpart (D)(2)[of § 2254], its decision was based on an unreasonable determination of the facts in light

of the evidence presented in the state court proceedings.")

Also see Taylor v. Maddox, 366 F.3d 992, 1000-01 (9th Cir. 2004) where the Ninth Circuit explained that although state courts are not required to address every "jot and tittle" of proof suggested to them, nor need they make detailed findings "a judge must acknowledge significant portions of the record, particularily where they are inconsistent with the Judge's findings." The "failure to consider key aspects of the record is a defect in the fact-finding process, " and if omitted evidence was "very significant", the state court's factual determination will be deemed unreasonable and not entitled to deference. Also see Miller-El v. Cockrell, 537 U.S. 322, 346-347. (2003).

Question Presented # 6, 7, and 8:

Regarding § 2254(d)(1) the Magistrate Judge said:

> "Furthermore, under AEDPA review, in order to obtain federal habeas relief on an ineffective assistance claim rejected on the merits by a state court, the petitioner must do more than convince the Federal Court the State Court applied Strickland to the facts of his case in an objectively unreasonable manner. (Citation omitted). (See Report at pp. 461).

The Magistrate Judge went on to say that the state court's decision to deny Morrison's IAC claims on the merits was not an unreasonable application of the Strickland standard or an unreasonable determination of the facts in light of the evidence presented. Then he recommended that Morrison should not be entitled to relief on his IAC claims. (See Report at pp. 461; p. 469 for Ground 13; and pp. 471-472 for Ground 11. Notice the "contrary to" prong of § 2254(d)(1) was never mentioned)

Morrison did not raise the "unreasonable application" prong of 2254(d)(1) in any of his IAC claims since the state habeas court did not follow the Strickland v. Washington or Lafler v. Cooper standards of IAC that were required in the review of Morrison's IAC claim in Ground 1, or the Strickland standards that were required in Grounds 11, 12, and 13. The Magistrate Judge also never even mentioned the Lafler v. Cooper standards to resolve Groung 1, which reasonable jurists could

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agree are ~~new~~ THE standards that are now required in an IAC claim when the defendant rejects a plea offer and goes to trial. (See Lafler v. Cooper, 132 S.Ct. 1376 at 1390 (2012)). Brief at 159). In Ground 1, Morrison used the federal law as determined by the Supreme Court in Cooper to prove he was denied effective counsel by Rogers in 2011, and the deficient performance caused Morrison to be sentenced to 16 years prison instead of seven. The state habeas court based its determination to deny relief only from counsel's unsupported by the record affidavits (which Morrison showed actually contradicts the record), without giving any consideration to Strickland's deficient performance or prejudice standards, or the other standards that are required in Cooper, which apply to Ground 1, resulting in the state habeas court's decision being "contrary to" federal law as determined bty the Supreme Court in Strickland and Cooper. Specifically, the state habeas court found that Morrison's Ground 1 claim was without merit because Morrison was apprised by both his plea counsel and revocation counsel of Texas law that his knowledge concerning whether the female victim was a minor at the time of the sexual conduct was not relevant TO HIS CRIMINAL CONVICTION. (See REPORT AT P. 464 AND TRIAL COURTS FINDINGS AT vol.2 of State Habeas Court Record pp. 351-353). The state habeas court went on to discuss what the courts have said regarding 22.011 being strict liability and mistake of fact defense not applying to sexual offenses against children, which is contrary to the letter of the law and IS what Morrison was challenging. (See Report p. 463, and II SHCR p. 353).

Morrison has already shown revocation counsel's statements in his affidavit were proved untrue by the evidence that was presented but ignored by both the state and District Court. So what is said about revocation counsel apprising Morrison about the Texas law is not true. (See Exhibits "N"-"S" at Vol.2 SHCR pp. 507-535; Exhibits "A"-"M" at Vol. 1 SHCR pp. 137-191; and Motion to Disqualify Affidavit of David Rogers at Vol. 2 SHCR pp.493-506).

Regarding Morrison's 2004 plea counsel, Cantacuzene, what Morrison was challenging

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in 2011 is what Cantacuzene erroneously told him in 2004, about it not mattering if he thought the victim in his case was an adult, he would still go to prison. Morrison challenged what Cantacuzene told him because what made Morrison reject a jury trial and plead guilty in 2004 was contrary to the plain language of the law. Morrison found that out in 2011 when he discovered that the literal language of 22.011 cannot make 22,011 strict liability, therefore he rejected a seven year plea bargain so he could get a new jury trial and be acquitted before he had a conviction and sentence to prison. (See RR 3 pp. 5-8 at pp. 866 where Morrison's attorney tells the court Morrison's imtentions for the writ were to file it before his conviction so the writ would be made returnable in that court as opposed to the TCCA had he been convicted), also see Exhibit "E" at pp. 52-53 where Morrison explained to Rogers that he wanted to file the writ so it would be returned to Midland County and not the TCCA, since he was not yet convicted).

The State is essentially saying that since Morrison rejected the seven year plea and was sentenced to 16 years based on his rationale from the language of 22.011, that it does not matter since Cantacuzene informed him of the strict liability nature of 22.011 in 2004, seven years earlier, therefore, Morrison knew 22.011 was strict liability and deserves no relief even though what was told to him by Cantacuzene in 2004 was completely contrary to the law as proscribed by the law makers. The Magistrate Judge agreed when he said:

> "Throughout the record, it is abundantly clear that multiple persons, including revocation counsel advised Morrison that Texas law does not require the state to prove that he knew the victim was a minor. In numerous filings with the court, Morrison devotes countless pages of argument to his point that he is innocent because he was unaware that he was engaging in sexual relations with a minor. It is not evident from the record that had Morrison been advised that his knowledge of the victim's minority was irrelevant to his offense, he would have accepted accountability and accepted the plea of seven years. (See Report at pp. 465-466).

Regarding that statement, Morrison stated several times in his Brief that had he been properly counseled by Rogers in 2011 about the laws that affected his

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decision to reject the seven year plea, he would have accepted the plea and still challenged the issues he now challenges, but he would have seven years instead of 16 years. Therefore, reasonable jurists would debate that the record is clear in demonstrating whether the Magistrate Judge's assessment regarding this issue is correct, and that morrison would have accepted the seven year plea had he been properly counseled by Rogers in 2004. (See Brief at pp. 164, and 165; Objections at pp. 595; and Report at p. 466).

Morrison has never denied the fact that plea counsel, Cantacuzene, informed him that 22,011 was strict liability. He did so by telling Morrison that ignorance of the law is no defense, and if he went to trial, the jury would have to go by the letter of the law, and it would not matter that he did not know the complainant was a minor, he would still be convicted and go to prison. Morrison found out seven years later that was not true and what Cantacuzene told him was contrary to the plain language of 22.011, 6.02, 2.01, amd 8.02. Morrison contends that it is unfair and unconstitutional for the state court and the district Court to deny him relief of at least getting his 16 year prison sentence corrected to seven years by saying Morrison's claims of IAC in Ground 1 are without merit since he was apprised by counsel that his knowledge concerning whether the female victim was a minor was not relevant to his conviction, in light of what the plain literal language of 22,011 demands. Any jurists of reason that reads 22.011 in conjunction with 6.02, 2.01, and 8.02 would find it debatable, or simply agree that a person of ordinary intelligence, in the same situation as Morrison, should not be punished to nine more years of prison, merely for wanting to challenge what counsel from 2004 told him, which according to the literal language of the law was not true. Therefore, what plea counsel in 2004 told Morrison should have no bearing on his decision to reject the plea of seven years in 2011, since what counsel told Morrison was being challenged by Morrison in a separate IAC claim i.e., Ground 12. Saying an accused must believe everything

counsel tells him, even though it is contrary to the law, is not the standard for resolving an IAC claim. If it was, every time a prisoner challenged their counsel's advise, that claim would be rejected. Therefore, reasonable jurists would determine the Magistrate Judge's decision to reject Morrison's IAC claim in Ground 1 as debatable or wrong since it is contrary to **Strickland** and **Cooper**. Or this issue is adequate to deserve encouragement to proceed further.

In order to use the unreasonable application prong of § 2254(d)(1), a state court must identify the correct governing legal principles from the Supreme Court's decisions but unreasonably apply the principle to the facts of petitioner's case. Brown v. Payton, 544 U.S. 137, 141 (2002)... But what happens when the state court failed to "identify", much less, even mention **Strickland, Cooper,** or any of its prongs? That happened in Morrison's State Writ of Habeas Corpus-11.07, therefore, Morrison did not raise the "unreasonable application" prong of § 2254(d)(1). Instead Morrison proved by the state habeas court only relying on counsel's affidavit, which stated disputed facts that were not in the record (which Morrison has shown in the Motion to Disqualify the Affidavit of David Rogers and Exhibits "D" - "S" actually contradict the Record), that the state court's decision to deny relief was "contrary to" **Strickland** and **Cooper.**

Since the state habeas court failed to identify and apply the **Strickland** and **Cooper** standards, Morrison should have received a true **de novo** review, as opposed to the deference standard of review in accordance with Rompilla v. Beard, 125 S.Ct. 2546, 2567 (2005); Porter v. McCollum, 130 S.Ct. 447, 452 (2009); Wiggins v. Smith, 539 U.S. 510, 534 (2003), regarding his§ 2254(d)(1) "contrary to" argument, which was left unaddressed by the Magistrate Judge and the District Judge, See also Williams v. Taylor, 529 U.S. 362, 397-98, 412 (2000), where a state court's decision was "contrary to" clearly established law because it mischaracterized the appropriate rule for evaluating defendant's Sixth Amendment claim. This shows reasonable jurists would find the District Court's assessment of Morrison's IAC

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claims debatable or wrong, since the District Court used the Unreasonable application prong of 2254(d)(1) (See Report at p 461) and ignored Morrison's "contrary to" prong (See Brief at pp. 297-302. 295, 171-172; Reply at pp. 422-423; and Objections at pp. 590-591) which proved the state habeas court's decision to reject Morrison's IAC claims were contrary to **Strickland** and **Cooper** since the state never mentioned or used those standards and denied relief only by relying on counsel's unsupported by the record affidavit.

Since Morrison has made a substantial showing that he was denied a constitutional right and has shown it is debatable among jurists of reason whether the state habeas court's decision to deny relief was objectively unreasonable by being contrary to **Strickland** and **Cooper,** and the District Court ignored Morrison's "contrary to" prong and the evidence he presented that refuted the Affidavit of David Rogers, or since this issue deserves encouragement to proceed further, a COA should be granted for Ground 1's IAC claim. (See Objections at pp. 590-595).

GROUND 13: REVOCATION COUNSEL IN 2011 FAILURE TO INVESTIGATE AND OBJECT

Question Presented # 9, and 10:

In Ground 13 Morrison has proven that revocation counsel, Rogers, was ineffective for not properly investigating and objecting to the questionable strict liability interpretation of 22.011, which was predicated on pre-22.011 law, like 22.011's predecessor 21.09 (Rape of a Child) or other statutes like 21.11 (Indencency with a Child). See **Johnson v. State, 967 S.W.2d 848 (Tx.Crim.App. 1998),** and **Vasquez v. State, 622 S.W.2d 864 (Tx.Crim.App. 1981).** 21.11 and 21.09 do not have a mens rea requirement prescribed in the statute that can modify "of a child", making the mens rea an element of the offense and the accused must have had the intent or knowledge that they were having sex with a child in order to commit the offense, as 22.011 has.

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The Magistrate Judge Recommennded in his Report that relief be denied to Morrison on his claims since the Johnson v. State, 967 S.W.2d848, 849-59, (an Indecency with a Child case) did not require the State to prove that the defendant knew that the victim was under the age 17. (See Report at pp. 456-458, 467). Morrison is not challenging the Indecency with a Child statute as being strict liability. He was not charged with that crime, Morrison is not challenging the constitutionality of 22.11, 21.09. or any other statute but 22.011. Therefore, what the Magistrate Judge says in his Report abourt 21.11 saying what the law is regarding 21.011 is in error. The two statutes are completely distinguishable. However, a reading of the Johnson v. State at 858 case will show that reasonable jurists would have acquitted Morrison on his 22,011. charge, since he reasonably believed the minor in his case was an adult. Through Morrison's same logic regarding the plain language of the statute, Johnson was acquitted of his 22.021 charge, which 22.021 has the exact same mens rea requirement as 22.011.

Therefore, expecting also to be acquitted, Morrison used that case as support for his logic and rejected the 7 year plea offer. Since Morrison was only charged with 22.011 and not 21.11, reasonable jurists would agree that he would also be acquitted from the same logic the Johnson jury had. The fact of the matter is that 22.011 has an intentionally of knowingly mens rea requirement that by the correct rules of grammer and syntax, and statutory construction rules from Supreme Court cases like: Flores-Figueroa v. United States, 173 L.Ed 2d 853 (2009); United States v. Williams, 170 L.Ed 2d 650 (2008); United States v. X-Citement Video, 115 S.Ct. 464 (1994); Staples v. United States, 114 S.Ct. 1973 (1994); and Liaparota v. United States, 105 S.Ct. 2084 (1985), can be, has been, and will continue to be interpreted to modify the only element in the statute that makes it a crime; "of a child". Despite what the Magistrate Judge says about what Texas law is regarding 22.011 being strict liability, based from other statutes like 21.11 which have no mens rea requirement; 21.11 is not 22.011 which plainly requires a mens rea.

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Therefore, any reasonable jurists comparing the language of 22.011 and 21.11 would find the District Court's assessment regarding 21.11 (a statute without a mens rea requirement) making 22,011 (a statute with a mens rea requirement) a strict liability offense as debatable or wrong, or this issue is adequate to deserve encouragement to proceed further. (See Objections at pp. 595-597).

Question Presented # 10:

Morrison asserts that the following issues are debatable among jurists of reason or are adequate to deserve encouragement to proceed further:

1) Article 1 § 28 of the Texas Constitution mandates that "no power of suspending laws in this State shall be exercised except by the Legislature."
2) The Fourteenth Amendment gives everyone in Texas the guarantee that Texas ~~will~~ shall not deny any person within its jurisdiction the equal protection of the laws.
3) No where in Texas Penal Code, Code of Crminal Procedure, or in any other text has the Legislature said that the intentionally or knowingly mens rea requirement they prescribed into 22.011 does not modify "of a child", or that 6.02, 2.01. and 8.02 do not apply to 22.011. The Legislature has never suspended those laws to the people accused of violating 22.011, including Morrison.
4) The Texas Courts have said that: "The law is clear, sexual assault of a child under Section 22.011 Penal Code is a strict liability offense and the actor's knowledge that the child was under the age of 17 is not an element of the offense, and the statute does not require the State to allege or prove that the actor knew the child was under the age of 17." (Suspending 6.02, 2.01, and the mens rea requirement in 22.011); "The defense of mistake of fact under Section 8.02 Penal Code that the actor formed a reasonable but mistaken belief that the child was 17 years of age or older at the time of the offense does not apply to sexual offenses against children." (Suspending 8.02). (See State Habeas Court Record at Vol.2 p. 353. ; Brief at pp. 175-177, 186-188; Byrne v. State, 358 S.W.3d 745 (2011); Scott v. State, 36 S.W.3d 240 (2001); Jackson v. State,

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889 S.W.2d 615(1994).

5) Morrison is guaranteed by the Sixth Amendment the effective assistance of counsel to make sure his constitutional rights are protected and that he would receive a fair trial. Therefore, it was counsel's duty, at the May 6, 2004 pre-trial hearing, the April 28, 2011 revocation hearing, and in direct appeal to look out for Morrison's constitutional rights and investigate any possible constitutional issues, and not to merely rely on what other lawyers have said regarding the strict liability status of 22.011. (See Reply at pp. 394-399, 423-431).

6) Any person of ordinary intelligence, Morrison's counselors included, can read the 22.011 statute, along with 6.02, and 2.01 as saying that in order for a person to commit the 22.011 offense, a person must intentionally or knowingly have sexual intercourse with a child, and if the person did not know they were having sex with a child because their intentions were to have sex with a person they believed was an adult, they did not commit the offense, since they did not commit all the elements of the offense.

7) Counsel, Cantacuzene and Rogers, were both ineffective for allowing the Texas courts to violate Morrison's constitutional rights and by not objecting to the unconstitutional strict liability interpretation by the Texas courts, which violated the Separation of Powers Doctrine and also violated Morrison's right to the equal protection of the laws, and to Due Process. They were also deficient for not appealing these issues on direct appeal.

8) Had counsel raised these issues in 2004, 2011, or on direct appeal, there is a reasonable probability, as Morrison had proved with Supreme Court precident in Grounds 2, and 5, that the outcome of the trial or appeal would have turned out differently and Morrison would have been acquitted, or at least been sentenced to a less severe sentence than 16 years prison.

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Ground 11 (Appellate Counsel):

Since appellate counsel David Rogers, was the same attorney who represented Morrison during the revocation hearing and was aware of Morrison's constitutonal issues as stated in Ground 13, reasonable jurists would find it debatable that he should have raised Morrison's constitutional issues on appeal as stated in Grounds 2,3,4,5,6,7,8,11, and 14, then there is a reasonable probability the outcome of Morrison's direct appeal would have been different as stated in: Brief at pp. 294-296; Reply at 431; and Objections at pp. 601-603. Also see **King v. Unites States, 595 F.3d 844 (8th Cir. 2010)** for jurists of reason who would find this issue debatable.

Question Presented # 11:

On page 29 of the Report (See p. 468), the Magistrate Judge's decision in saying "Morrison's emphasis that the trial court or appellate court would have agreed with his argument that he is innocent is ~~sufficient~~ insufficient to show prejudice. Morrison has offered nothing more than speculation that the court or appellate court would have made a different decision concerning the revocation of his [probation] had revocation counsel investigated the issues." (Emphasis added). Morrison never said the trial court or appellate court **would have** made a different decision. That kind of certainty is not the standard for the prejudice prong in **Strickland.** All Morrison is required to show is that had counsel not been deficient then there is a **resonable probability,** that the outcome of the proceedings would have turned out different. In Ground 13 Morrison showed that reasonable jurists would agree that had rogers properly investigated and objected to the issues Morrison now raises, there is a reasonable probability the outcome of the revocation hearing would have been different and Morrison could have been acquitted or sentenced to less than 16 years prison. Or he could have received relief on direct appeal if the trial court denied relief. (See Objections pp. 599-601).

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Question Presented # 12:

Equitable Tolling-

Morrison first raised the equitable tolling gateway past the 1-year limitation default in his Reply at pp. 372-378. and 384-404, then again in his Objections at pp. 578-583. A look to those pages along with Exhibits "A" - "S" and the Statement of Facts show the extraordinary circumstances that prevented Morrison from raising his claims prior to and after the alleged time bar, until he was able to raise them in his state writ of habeas corpus. It is clear by reading Morrison's pleadings that he has been pursuing his rights diligently since he found out about the extraordinary circumstances that prevented him from timely filing. Morrison has shown the District Court's assessment regarding his equitable tolling arguments are wrong, debatable among jurists of reason, or are adequate to deserve encouragement to proceed further. (See Objections at pp 578-583; Reply at pp. 372-378, and 384-404). Also see **United States v. Patterson, 211 F3d 927, 930-31 (5th Cir. 2000); Holland v. Florida, 177 LEd. 2d 130 (2010).** It is a fact that Morrison received nine more years of prison for diligently pursuing his right, when he rejected a seven year plea bargain, thinking the trial court would hear his issues and give him relief, but it did not as explained in Ground 8. That in itself should suffice to show the diligence required to allow Morrison relief through equitable tolling so his Grounds can be ruled on their merits.

Question Presented # 13, 14:

Jurisdictional Question-

The federal courts did not have jurisdiction for Morrison to file a § 2254 Petition between June 5th, 2004, and June 5, 2005 without him having a conviction and sentence, or being held in a jail or prison, while he was on deferred probation.

Morrison proved that jurists of reason would find the District Court's assessment that time barred his claims by starting the 1-year limitation period at June 5, 2004

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was debatable or wrong, or these issues deserve encouragement to proceed further, since the federal courts lacked jurisdiction to hear a §2254 Petition between June 5, 2004 and June 5, 2005; before Morrison was convicted, sentenced, of held in a jail or prison. (See Reply at pp. 370-371), 377-378, 380-391, and 397; Objections at pp. 558-565, and 572-574). The Magistrate Judge nor did the District Judge address any of Morrison formidable jurisdictional questions of law. Therefore, Morrison asserts that his jurisdictional questions of law are adequate to deserve encouragement to proceed further, and in the interest of justice this Court of Appeals should grant this application for a COA, so it can answer those important questions of law that were left unanswered.

Question Presented # 15:

2244(d)(1)(B), and (D)-

Morrison has proved in his Objections at pp. 568-572 and Reply at pp. 375-376, 384-389, and 391-403 that even if he could be time barred by §. 2244(d)(1)(A), that it is debatable among jurists of reason whether he satified § 2244(d)(1)(B), and (D) to extend the deadline date to when the unconstitutional state created impediments were removed, or the date on which the factual predicate of his claims could have been discovered through the exercise of due diligence. Morrisom was then prevented from filing those issues because direct appeal was pending. Then the time was tolled when he filed his 11.07 on December 19, 2014. See Starenes v. Andrews, 524 F.3d 612 (5th Cir. 2008) for another case that shows the debatability from reasonable jurists that show Morrison's argument to bypass the timebar should prevail. A reading of the above cited issues proves jurists of reason would find it debatable whether the district court's ruling regarding 2244(d)(1)(B), (D) are wrong, or the issues presented in his Reply and Objections that prove the 1-year limitations period should start at the January 20, 2015 trigger date via § 2244(d)(1)(B), and (D), minus tolling for state 11.07 are adequate to deserve encouragement to proceed further.

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Question Presented #16:

Ground 12 IAC Claim/Trevino v. Thaler, 133 S.Ct. 1911 (2011); Martinez v. Ryan, 132 S.Ct. (2012)-

Morrison asserts that the same locic in Trevino v. Thaeler and Matrinez v. Ryan should be applied to his Ground 12 IAC claim against trial counsel Ian Cantacuzene, since it was impossible for Morrison to raise this IAC claim during direct appeal, or the alleged limitation period of June 5, 2004 - June 5, 2005. Morrison could not file any IAC claims on direct appeal during that time since he plead guilty and was given Deferred probation pursuant to TRAP 25.2. Also in Texas IAC claims are not heard on direct appeal. When Morrison was first able to raise the IAC claim of Ground 12 in 2011, he was also deprived of effective counsel as explained in Grounds 8 and 13. It is debatable among jurists of reason that Ground 12 should have been ruled on, without being time barred, through the holdings in Trevino and Martinez. Also see Young v. Stephens, 2014 U.S. LEXIS 16007 at 129 ; Reply at pp. 379, 401-403; Objections at p. 601.

CONCLUSION
(FRAP 28(a)(9); 5th Cir. R. 28.3(j))

For the foregoing reasons, this Court should issue a Certificate of Appealability on the issues as stated in this Application for COA and its Brief in Support, and review the issues on their merits in an appeal.

10/13/17
Jared Morrison #1747148

CERTIFICATE OF SERVICE
(FRAP 25(a)(2)(C); 5th Cir. R. 28.3(1))

I, Jared Morrison, hereby certify that a true and correct copy of this APPLICATION FOR CERTIFICATE OF APPEALABILITY and BRIEF IN SUPPORT OF THE APPLICATION FOR CERTIFICATE OF APPEALABITLITY are being given to the proper prison officials in the prison mailroom to be mailed pre-paid priority mail to Morrison's mother, Jana Morrison so she can make copies and then mail one copy to the Assistant Attorney General, Craig Cosper, and Two copies and the original to the United States Court

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of appeals for the Fifth Circuit. It will be mailed on September 27, 2017 to the following addresses. Tracking No. 9114 9014 9645 6468 59. Then shortly afterward it will be mailed to the following addresses:

Fifth Circuit Court of Appeals
Clerk of Court
600 S. Maestri Place
New Orleans, La 70130 . . . . . Original and two copies.

Craig Cosper
Assistant Attorney General
P.O.BOX 12548
Austin, TX 78711-2548. . . . . Copy

Originally signed and mailed on 9/27/17
see next page for current certificate of service
10/16/17
Jared Morrison 1747148 9/27/17

CERTIFICATE OF COMPLIANCE
(FRAP 32(g)(1), 28(a)(10); 5th Cir. R. 32.3, 28.3(m))

This document complies with the type-volume limitation of Fed. Rules of App. P. 32(a)(7)(8). (i.e., 1300 Lines of Text).

This brief used a monospaced typeface and contains 1296 lines of text.

NOTE: Morrison counted lines that were not full lines with other lines that were not complete to make up a full line.

10/16/17
Jared Morrison 1747148 9/27/17

PRISONER'S UNSWORN DECLARATION

I, Jared Morrison, declare under penalty of perjury that the foregoing is true and correct.

Executed on September 19, 2017.
originally Executed on 9/19/17

10/16/17
Jared Morrison 1747148
Huntsville Unit
815 12th Street
Huntsville, TX 77348

CERTIFICATE OF SERVICE

I Jared Morrison, hereby certify that a true and correct copy of this: APPLICATION FOR CERTIFICATE OF APPEALABILITY and BRIEF IN SUPPORT OF THE APPLICATION FOR CERTIFICATE OF APPEALABILITY are being given to the proper prison officials in the prison mailroom to be mailed pre-paid priority mail to the Fifth Circuit Court of Appeals, and First Class Mail to the Respondent's attorney at the following addresses on October 16, 2017 with tracking number 9114 9014 9645 0924 6468 97 :

Fifth Circuit Court of Appeals
Clerk of Court
600 S. Maestri Place
New Orleans, LA 70130.....Original and two copies

Craig Cosper
Assistant Attorney General
P.O. Box 12548
Austin, TX 78711-2548.....Copy

10/16/17
Jared Morrison 1747148

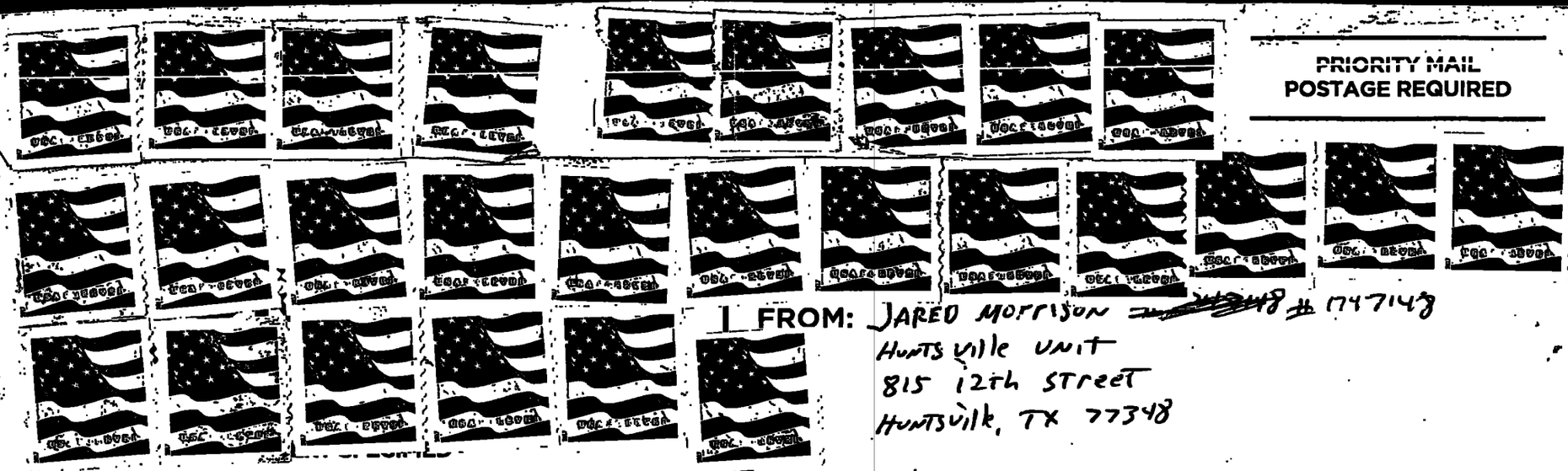
DECLARATION OF INMATE FILING

I am an inmate confined in an institution. Today, October 16, 2017, I am depositing the APPLICATION FOR CERTIFICATE OF APPEALABILITY and BRIEF IN SUPPORT OF THE APPLICATION FOR CERTIFICATE OF APPEALABILITY in this case in the Huntsville Unit's internal mail system. Priority postage is being pre-paid by me. Tracking number is: 9114 9014 9645 0924 6468 97 .

I declare under penalty of perjury that the foregoing is true and correct (see U.S.C. § 1746; 18 U.S.C. 1621).

Executed on October 16, 2017

10/16/17
Jared Morrison 1747148



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