FILED
APR 19 2017
CLERK, U.S. DISTRICT CLERK
WESTERN DISTRICT OF TEXAS
BY ________ DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
MIDLAND/ODESSA DIVISION

JARED MORRISON (PETITIONER)	§	
	§	
V	§	CIVIL ACTION NO MO-15-CV-069-RAJ
	§	
WILLIAM STEPHENS (RESPONDANT)	§	

OBJECTIONS TO THE REPORT AND RECOMMENDATIONS OF THE U.S. MAGISTRATE JUDGE

Comes now, Petitioner, Jared Morrison (**"Morrison"**), and presents to this Honorable Court these Objections to the the Report and Recommendations of the U.S. Magistrate Judge (**"Judge Counts' Report"**, or **"Report"**). Morrison received Judge Counts' rport on March 22, 2017. Upon reading Judge Counts' report, Morrison has identified several clear errors and issues that need to be objected to, so to allow a de novo review by this Court, pursuant to 28 U.S.C. § 636(b)(1).

Morrison requested for extra time to file these objections on March 23, 2017. As of April 3, 2017 Morrison did not hear back from this Court whether his request for extension of time had been granted. Also on the Morning of April 3, the Huntsville unit went on lockdown, therefore, Morrison had to handwrite his second draft of these objection to have them mail filed by April 5, 2017 (or 14 days after he received Judge Counts' Report on March 22). Morrison completed his handwritten draft then mailed them to this Court on April 4, 2017 by giving to a prison guard to put in prison mailbox on April 5, 2017. On April 6, 2017, Morrison received notice from this Court that his extension of time was granted up until April 21, 2017. On April 10, 2017 the Huntsville Unit prison came off lockdown, and Morrison has decided to type the handwritten objections and send the typed version in before the April 21 deadline, so this Court can read these objections easier as he said he may do in the event this Court granted his extension of time.

Morrison will now show the reasons he objects to Judge Counts' report to allow de novo review of his §2254 by this Honorable Senior District Judge Robert Junell:

On page 5 of Judge Counts' Report, Judge Counts failed to properly state Morrison's grounds as Morrison originally presented them in his §2254. Judge Counts used the Assistant Attorney General, Miss Vindell's,reconstruction of Morrison's grounds, that were used in the Respondant's Answer (Doc #11), despite the fact Morrison asked this Court to correctly understand his grounds for relief, and read them as

they were presented by him, instead of Miss Vindell. See Petitioner's Reply to Respondant's Answer (**"Reply"**), (Doc #17 at pp.1-14.

The reconstruction of Morrison's claims might not, on its face, look like a serious problem, but Morrison will show how the reconstruction of his grounds has caused Judge Counts to put two of Morrison's grounds in opposition with each other, when that was never Morrison's intention. See page 26 of Judge Counts' report where Morrison's ground one ineffective assistance of counsel (**"IAC"**) argument is meshed together with his ground 13 IAC argument, putting the two in opposition with each other. Morrison will show how Judge Counts inadvertantly errored in doing so, and the prejudice of the error at page 42-43 of these objections, when he objects to the other portions of Judge Counts' Report regarding Morrison's IAC claim against revocation caounsel David Rogers (**"Rogers"**). Morrison believes that had his IAC claims against Rogers been properly stated, the error would not have occured.

By using the reconstructed grounds, Judge Counts also in discussing Morrison's Ground 8, on pages 14-19 of his Report, he erroneously focused on the trial court's abuse of discretion regarding the trial court's failure to grant the continuance of the revocation hearing, when the focus and actual constitutional violation was that the trial Judge suspended Morrison's right to Writ of Habeas Corpus. Morrison will further argue this at Pages 27-28 infra.

Morrison respectfully requests that when this Court does its de novo review, that it understands Morrison's grounds as he has presented them, not as Miss Vindell and Judge Counts have presented them. (See Pages 1-4 of Reply). Morrison objects to the reconstruction of his grounds because he could be prejudiced by the way Miss Vindell restated them if they continue to be written like that during a Certificate of Appealability or Writ of Certiorari, if Morrison has to continue past the District Court.

On page 7 of Judge Counts' Report, Morrison would respectfully request that this Court take judicial notice of the fact that Judge Counts, when stating the Standard of Review for Writ of Habeas Corpus under 28 U.S.C. § 2254, that he has acknowledged that § 2254 collateral review is an examination of, and reserved for State prisoner/inmates, that have been convicted and sentenced. Judge Counts cited to **Harrington v. Richter 568 U.S. 86, 92 (2011)**, to say "Collateral review provides an important, but limited examination of an **inmate's conviction and sentence.** ('[S]tate Courts are the principal forum for asserting constitutional challenges to **State Convictions.)'.** Accordingly, the Federal Habeas Courts role in reviewing

State prisoner petitions is exceedingly narrow. Id. 'Indeed Federal Courts do not sit as courts of appeal and error for **State court convictions**. **Dillard v. Blacburn 780 F.2d 509, 513 (5th Cir 1986)**." (Emphasis added to show Supreme Court thinks §2254 petitions are for people with a conviction and sentence).

Morrison asserts that while stating the Standard for Review for a 2254, Judge Counts has laid the foundation, and acquiesed that a § 2254 petition only applies to State prisoners who have a conviction and sentence. Morrison ackknowledges that § 2254 petitions can also apply to petitioners who challenge their conviction who are not imprisoned, by being on parole, or suffering some collateral consequense of the conviction, but the common element of those cases is that a conviction and sentence had been given.(See **Maleng v. Cook 109 S.Ct. 1923 (1989)**; and Morrison's Reply at pp.4-5, and 18-19).

The reason Morrison brings this to the attention of this Court is because Judge Counts on pages 8-14 of his Report, is recommending that this Court time bar Morrison's constitutional issues in grounds 2-7, and 12, since Morrison did not raise these claims in a § 2254 petition before June 5, 2005, despite the fact at that time Morrison was not yet convicted or sentenced to a prison term.

Morrison raises the jurisdictional question of whether he could have sought relief for those grounds, through a Federal § 2254, collateral attack, before June 5, 2005 while not having a conviction and sentence. Despite what the Fifth Circuit claims in **Tharp v Thaler 628 F.3d 719 (2010)**, (where Tharp did not raise the issue of jurisdiction of whether he could seek relief through § 2254 before a judgment of conviction and sentence), Morrison avers that it would have been impossible to raise his issues on 2254 at that time because of the following reasons:

1) In order to accept the deferred adjudication probation (**"deferred probation"**) through his involuntary plea agreement, Morrison had to waive his right to appeal. (See RR1 p.14)[1]. Therefore, the only way for him to satisfy 28 U.S.C. § 2244(d)(1), to trigger the 1-year limitation period would be for his judgment to become final by the conclusion of Direct review or the expiration of time for seeking such review.

What Judge Counts fails to mention is that Morrison was restricted by State law from seeking Direct Review in June 2004 to June 2005.. Therefore, he could not have triggered the 1-year limitation period 30 days after the May 6, 2004 deferred probation order, (resulting in the limitation period starting to tick on June 5, 2004 and expiring on June 5, 2005), as Miss Vindell, Judge Counts, and the Fifth Circuit in **Tharp** claim. (See pp.14-16 of Reply).

The Supreme Court in **Gonzalez v Thaler 132 S.Ct 641, 653 (2012)** gave the two 2244(d)(1)(A) prongs a narrow reading that supports Morrison's logic. There is only

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1. RR is Reporter's Record. The number following RR is volume. P is the page.

two options in 2254(d)(1)(A) that trigger the AEDPA 1-year limitation, and because Morrison was not allowed to appeal, he is not subject to either until he appealed in 2011. The Supreme Court stated in **Gonzalez at 132 S.Ct** 653:

> "The text of § 2244(d)(1)(A), which marks finality of 'the conclusion of direct review or the expiration of time for seeking such review', consists of two prongs. Each prong- the 'conclusion of direct review' and the 'expiration of time for seeking such review'- relates to a distinct catagory of petitioners. For petitioners who pursue Direct Review all the way to [the Supreme Court], the judgment becomes final at the 'conclusion of Direct Review'- when [the Supreme Court] affirms a **conviction** on the merits or denies a Petition for Certiorari. For **all other petitioners**, the judgment becomes final at the 'expiration of time for seeking such review'- when the time for pursing Direct Review in [the Supreme Court] or in State court expires". (Emphasis added to show Morrison does not fit into either prong).

In order for something to expire, it must have a start or beginning. Morrison's time for taking Direct Review never started or began. The Supreme Court goes on to say:

> "Courts should determine both the 'conclusion of Direct Review' and the 'expiration of time for seeking such review'. For every person who does not seek certiorari, then start the 1-year clock from the 'latest of' the two dates."
>
> "Our reading does so by applying one **'or'** the other, depending on whether the Direct Review process concludes or expires. Treating the judgment as final on one date **'or'** the other is consistent with the disjunctive language of the provision."

Morrison could not appeal so he surely does not fit in the "conclusion for Direct Review" prong. And since he could not appeal, he could not seek Direct Review to have an expiration date to satisfy the second prong of "expiration of time for seeking such review". Morrison asserts that since it was impossible for him to appeal his deferred probation order, he is not subject to the AEDPA time limitation under § 2244(d)(1)(A) until he was convicted and sentenced and allowed to seek Direct Review in April 2011.

Perhaps it could be argued that since Morrison gave up his right to appeal at the May 6, 2004 deferred probation plea bargain hearing, then his Direct Review expired on that date. But if that is the case, Morrison would still be barred from doing a 2254 petition at that time, because he could not have exausted his state remedies pursuant to 2254(b)(1)(A). Morrison argued this argument in his Reply by saying the plain language of 2244(d)(1) would not allow the 1-year limitation period to start at the deferred probation order, because defendants who take deferred probation in lieu of going to trial, waive their right to appeal and have no way of seeking Direct Review to finalize their deferred probation order, at that time to trigger the 1-year limitation period as required in 2244(d)(1)(A). A defeered adjudication order cannot be finalized anyway, until either the probationer successfully completes his deferred

probation, or they do something to get it revoked, hense, the name deferred adjudication probation. (See Reply pages 14-16). Even though Morrison argued this in his Reply, Judge Counts did not address this formidable argument.

2) During the time prior to April 28, 2011 (Morrison's revocation hearing), Morrison could not have raised his issues in a State collateral attack/post-conviction writ of habeas corpus, pursuant to 2244(d)(2), to toll the limitation period, without having a conviction. Therefore, 2244(d)(2) could not apply and its language would be rendered void. Since Morrison was on deferred probation and could not collaterally attack his deferred adjudication order until he was convicted and sentenced, Morrison would have been unable to exaust his State remedies through collateral attack, resulting in him being procedurally defaulted by 2254(b)(1)(A), had he attempted a § 2254 petition between June 5, 2004 and June 5, 2006, as Judge Counts alleges should have been done. (See Reply pp.14-16). Judge Counts failed to address this formidable argument aswell.

3) The Supreme Court's decision in **Burton v. Stewart 127 S.Ct 793, 166 L.Ed2d 628 (2007)** supports that Morrison could not have been subject to the AEDPA 1-year limitation period at the point of his deferred probation order, because at that time Morrison was not in custody of the state pursuant the judgment of a state court. See § 2244(d)(1). In **Burton**, the Supreme Court defined the term judgment at **186 L.Ed2d 636-637:**

> "Final judgment in a criminal case **means sentence**, the **sentence is the judgment**; (inside citations omitted). Accordingly Burton's limitation period did not begin until both his **conviction and sentence became final by the conclusion of Direct Review or by the expiration of time for seeking Direct Review.**" (Emphasis added).

That definition is further support that Morrison was not subject to the 1-year limitation period prior to April 28, 2011, since he had no conviction or sentence, nor proper jurisdiction in the Federal Courts through 2254(a). Prior to April 28, 2011 Morrison was "placed on", not sentenced to deferred probation. Morrison could not be sentenced because he had not been convicted. Morrison was not convicted and sentenced until April 28, 2011. Morrison argued this further in his Reply at pp.14-23. Judge Counts failed to address this formidable argument aswell.

4) There are plenty of other Supreme Court, Fifth Circuit, and State case law that show Morrison was not in custody pursuant to a judgment of a state court, while being on deferred probation, before his revocation hearing in April 2011, in order for him to qualify for jurisdiction in the Federal Courts to file a § 2254 petition, had he

wanted to or known to back in June 2004 to June 2005. The Supreme Court said:

> "It is of course, well settled that the fact that constitutional error occured in the proceeding that led to a state court **conviction** may not alone be sufficient reason for concluding that a **prisoner** is entitled to the remedies of habeas corpus." **Terry Williams v. Taylor 529 U.S. 362, 375 (2000)** (Emphasis added).

Justice O'Conner's concurring opinion, in **Williams**, also supports that AEDPA affects habeas corpus for State prisoners, who are in custody of the state as opposed to deferred adjudication probationers who are not imprisoned. See **Williams at 529 U.S. 399:**

"In 1996 Congress enacted [AEDPA]. In that act, Congress places a new restriction on the power of Federal Courts to grant writ of habeas corpus to **State prisoners.**"

28 U.S.C. § 2241(C)(3) also makes it clear § 2254 is for prisoners, when it said the writ of habeas corpus shall not extend to a **prisoner** unless....(3) he is in custody in violation of the constitution or laws or treaties of the United States...."

Further proof that writ of habeas under § 2254 is for state prisoners and those with convictions is discussed in **Bousley v. United States 118 S.Ct 1604, 1610**, while discussing the Teague doctrine:

> "The Teague Doctrine is founded on the notion that one of the principal functions of habeas corpus [is] 'to assure that no man has been **incarcerated** under a procedure which creates an impermissibly large risk that the innocent will be **convicted.**"

Also see **Gonzalez v. Thaler 132 S.Ct 641, 646,and 652 (2012):**

> "The second provison, 28 U.S.C. § 2244(d)(1)(A) establishes a 1-year limitation period for **State prisoners** to file Federal habeas petitions, running from 'the date on which the judgment became final by the conclusion of Direct Review or expiration of time for seeking such review', we hold for a **State prisoner** who does not seek review in the State's highest court, the judgment [which is a conviction and sentence] becomes 'final' on the date and time for seeking such review expires".

In **Yellow Bear v. Wyoming Att. Gen. 525 F.3d 921, 923 (10th Cir 2008)** said:(2254 is the habeas procedure applicable to **State prisoners** who have been **convicted** and wants to test the legitimacy of the **conviction**).

In **Solomon v. State 39 S.W.3d 704 (2001)** this court said: (A habeas corpus applicant who has been granted community supervision which has not been revoked has not suffered a 'final' **conviction** for purposes of the statute governing applications for writ of habeas corpus in non-capital felony cases; thus applicant cannot obtain habeas relief under that statute.).

Kelly v. Quarterman 260 Fed App'x 629 (5th Cir 2007) said: (State habeas petition was not "properly filed" in Texas Court of Criminal Appeals so as to toll 1-year limitation period for filing for Federal habeas petition where state petition was

filed before State court **conviction** was final.).

Carter v. Procunier 755 F.2d 1126 (5th Cir 1985) said: (A habeas corpus petitioner meets statutory "in custody" requirements when; at the time he files petition, he is in custody pursuant to a **conviction** he attacks).

Hilgeford v. Peoples Bank Inc. 652 F.Supp 730 said: (Sole purpose of Section 2254 is to challenge **confinement** pursuant to a **state conviction**).

Finklestien v. Spitzer 455 F.3d 131 (2nd Cir 2006) said: (Provision of habeas statute allowing a Federal court to entertain a habeas corpus petition for relief from a State court's judgment only on the grounds that the petitioner is in custody in violation of the Constitution or laws and treaties of the United States **requires** the petitioner to be in custody under **the conviction or sentence under attack at the time his petition is filed.**). See **Maleng v. Cook 490 U.S. 488, 490-491 (1989).**

Jones v. Cunningham 83 S.Ct 373 (1967) (For a Federal Court to have jurisdiction a petitioner must be in custody under the **conviction** he is attacking at the time the habeas petition is filed. The term "custody" extends beyond physical confinement and encompasses other "significant restraints on liberty".). Also see **Leyva v. Williams 504 F.3d 357 (3rd Cir 2007); Defoy v. McCullough 393 F.3d 439 (3rd Cir 2005).**

Knowles v. Mirzayance 173 L.Ed2d 251, 260-261 (2009) said:

> "Under the AEDPA, 28 U.S.C. § 2254(d)(1), a Federal Court may not grant a **State prisoner's** habeas application unless the relevant state court decision 'was contrary to, or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States."

The opinion in **Harrington v. Richter 131 S.Ct 770 (2011)** starts out by saying:

> "The writ of habeas corpus stands as a safeguard against **imprisonment** of those **held** in violation of the law." **at 777.**

The Court continues to persuade the reader that writ of habeas corpus is for prisoners whose convictions and sentences are final see **i.d. at 786-787:**

> "As a condition for obtaining habeas corpus relief from a Federal Court a **State Prisoner** must show that the State Court's ruling on the claim being presented in Federal Court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. the reasonsfor this approach are familiar. 'Federal habeas review of **State convictions** frustrates both States' sovereign power to punish offenders and their good faith attempt to honor constitutional rights'".

The Supreme Court in **Richter** goes on to say at 787:

> "Section 2254(d) is part of the basic structure of Federal habeas jurisdiction, designed to confirm the State courts are the principal forum for asserting constitutional challenges to **State convictions.** Under the exhaustion requirements a habeas petitioner challenging a **state conviction** must first attempt to present his claim in State Court."

Morrison could not have satisfied the exhaustion requirements from June 5, 2004 to June 5, 2005 to raise his 2254 constitutional issues since at that time he had no conviction, no sentence, nor was he imprisoned.

Also see **Dretke v. Haley 541 U.S. 386, 398-399; Engle v. Isaac 456 U.S. 107, 126 (1982)** where the Supreme Court said: "Habeas corpus is, and has been for centuries, been a bulwark against **convictions** that violate fundamental fairness."

These are just a small number of Federal cases that show that AEDPA and § 2254 Writ of Habeas Corpus is for people with a conviction and sentence. People who do not have a conviction and sentence cannot invoke jurisdiction in Federal Courts to file a § 2254 petition. Yet, despite all of the past precident that says writ of habeas corpus, and AEDPA is for prisoners or people with a conviction and sentence, Judge Counts is recommending that Morrison's Grounds 2-7, and 12 be barred by the statute of limitations under 2244(d), since Morrison did not file for habeas corpus relief before June 5, 2005, from well before Morrison was convicted, sentenced, and imprisoned; back when Morrison was coerced into pleading guilty by trial counsel, and placed on deferred probation.

Judge Counts, Miss Vindell, and the Fifth Circuit's holdings in **Tharp Supra**, that say Morrison's 1-year limitation period started 30 days after the trial court's order of deferred adjudication, by being the conclusion of Direct Review or expiration of time for seeking such review is absurd, not true, and a complete violation of Morrison's right to writ of habeas corpus in the Federals Courts. The Supreme Court has not held, or even insinuated that a person on deferred probation who is not yet convicted or sentenced is subject to the AEDPA 1-year time limitation, before their conviction and sentence has been given through the judgment of the trial court. The Supreme Court's holdings actually oppose the view, as Morrison has shown, that he should be time barred from raising his constitutional issues before conviction and sentence. Morrison has proved this in his Reply, and in the above cited to cases that the § 2254 writ of habeas corpus is only for those who have been convicted and sentenced, and are imprisoned unconstitutionally. Morrison has not seen a case, nor has Judge Counts, Miss Vindell, or the Fifth Circuit provided an instance where the Supreme Court has held that a person on deferred probation who has not yet been convicted and sentenced, and who gave up their right to Direct Appeal can meet the

jurisdictional requirements to even do a § 2254 writ of habeas corpus petition, while not being held in custody of the State, nor being convicted and sentenced.

Like previously stated, deferred adjudication probationers cannot even do a State collateral attack, because they have no conviction, nor can they do a Direct Appeal, because in order to accept the deferred probation, they must waive their right to appeal. Therefore, it would be impossible for a deferred adjudication probationer to exhaust his state court remedies before filing a § 2254 petition in the time period that Judge Counts is expecting Morrison and all other deferred adjudication probationers to file for habeas corpus relief.

So to use Morrison's lack of jurisdiction of being able to file a § 2254 petition while being placed on deferred probation before being convicted and sentenced, or unconstitutionally imprisoned against him at this juncture, Morrison asserts, is a sandbagging scheme that is surely not intended by Congress when they established AEDPA. (See Reply pp.14-23, pp.25-26, 31). Judge Counts failed to address this formidable argument aswell.

5) Morrison asserts that because of the State created impediments of not being able to appeal, or do a state post-conviction relief, by way of his involuntary guilty plea, 2244(d)(1)(B) is applicable. Morrison argued that 2244(d)(1)(B) should apply in further detail in his reply at p.23, andpp.25-38. Judge Counts also failed to address Morrison's 2244(d)(1)(B) arguments. Morrison hopes this Court will consider all of his arguments he raised that Judge Counts failed to address, when it does its de novo review.

Judge Counts starts out on page 8 explaining that Morrison's claims in Grounds two, three, four, five, six, seven, and ten are barred by § 2244(d). He states that"each of these claims attempt to undermine Morrison's original guilty plea that led to the trial court's order of deferred adjudication."

That claim is not true. Miss Vindell also attempted to argue this by saying, "these claims clearly attack his original guilty plea that led to the order of deferred adjudication entered on May 6, 2004.", therefore, concluding that **Tharp v. Thaler 628 F.3d at 724** says Morrison is barred by the AEDPA statute of limitations, since the Fifth Circuit in **Tharp** defined an order of deferred adjudication as a "judgment" for AEDPA purposes.

Morrison has already explained why an order of deferred probation cannot be considered a judgment for purposes of AEDPA or the 1-year limitation period. Morrison also argued in his Reply at pages 12-17 that most of Morrison's grounds

do not relate to or attack, nor do they "undermine" Morrison's original guilty plea. Morrison is confident this Court will look at the Reply for this argument so he will only summarize it here.

Morrison contends that most of his constitutional issues, that Judge Counts is saying undermines the original guilty plea, contain a past, present, and future harm to him, and others not before the Court. Since the constitutional violations implicate the First Amendment, Morrison can argue them for others who are not before the Court at anytime, and argue his present and future harm at anytime. His grounds should also not be barred by the statute of limitations because they do not attack the guilty plea. Most grounds have nothing to do with his 2004 guilty plea, they attack 22.011 on its face, and attack the Court of Appeals' erroneous strict liability interpretation that has caused 22.011 to become uncontitutionally vague, and overbroad, and of violating Morrison's and others' equal protection right, resulting in Morrison rejecting the seven year plea agreement in 2011, and him receiveing 16 years in prison instead of seven years.

Except for Morrison's actual innocence claim, Morriosn's constitutional issues do not undermine his 2004 guilty plea. Morrison's actual innocence claim is not a constitutional issue in itself, he uses it mainly as a miscarraige of justice exception to the 1-year limitation period default that is being alleged. Morrison also posits that since he raised his ground 2 and 5 issues at the 2011 revocation hearing... or raised them in the infancy stages of those grounds, then they should be ruled on the merits. Likewise, since Morrison raised his ground 12 IAC claim in the 2011 revocation hearing it should be ruled on the merits without being barred by the 1-year limitation period default.

In **Frey v. Stephens 616 F.App'x 704 (5th Cir 2015)**, the Fifth Circuit remanded a District Court's decision to bar Frey's claims, by §2244(d)(1),saying the claims challenged only the 2010 guilty plea proceeding. However, because Hanson, Frey's alleged victim, testified at the 2011 revocation hearing the Fifth Circuit remanded back the decision so the District Court could rule on the merits of Frey's claims that had to do with Hanson, even if they were also challenging his 2010 plea hearing. Morrison contends this same logic should apply to the grounds Judge Counts is recommending not be ruled on because of 2244(d)(1), since he raised his grounds 2, 5, 12, and 14 at the revocation hearing in 2011.

Again on page 9, Judge Counts acknowledges that the AEDPA 1-year limitation applies to "inmates" and not non-prisoner probationers who do not have a conviction and sentence. Judge Counts admits that, "AEDPA provides that a one-year limitation period for **inmates** seeking federal habeas relief". If it is so ingrained in the

Federal Judges' minds that a writ of habeas corpus and AEDPA is for prisoners, that they continually, in their opinions (as stated above on pages 5-8 regarding cases stating "prisoner", "inmate", "conviction" ect.), use those terms when discussing AEDPA standards relating to § 2244(d)(1), and 2254(a), then how can they say on one hand, that a person who was not imprisoned, not convicted, and not sentenced (as someone on deferred probation) is subject to 2244(d)(1), when on the other hand, they say in those same opinions that 2244(d)(1) applies to prisoners with convictions and sentences? This is the confusion Morrison talked about in his Reply at pages 14-15 when the Fifth Circuit, in **Tharp**, did the same thing.

ACTUAL INNOCENCE

On pages 9-10, 12-13 of Judge Counts' report, Judge Counts discusses Morrison's ground 14 actual innocent claim, that Miss Vindell did not mention in the respondant's answer. On pages 9-10 Judge Counts lays out the standard for a **McQuiggins v. Perkins 133 S.Ct 1924 (2013)** actual innocence claim. Then he steps away from the actual innocence claim topic for a page and a half to discuss 2244(d)(1)(A)-(D), and the Fifth Circuit's outlook on how 2244(d)(1) is applied to deferred adjudication probationers. He starts out by saying that, "Morrison's second, third, fourth, fifth, sixth, seventh, and tenth claims do not concern a constitutional right recognized by the Supreme Court within the last year and made retroactive to cases on collateral review, [referring to 2244(d)(1)(C)], nor does the record reflect that any unconstitutional state action impeded Morrison from filing for federal habeas relief prior to the end of the limitation period", referring to 2244(d)(1)(B). He continued, "In addition, the record does not demonstrate that Morrison lacked knowledge of the factual predicate of his claim until a certain date. [Referring to 2244(d)(1)(D)], Thus, the federal limitation period expired one year after 'the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review." Referring to 2244(d)(1)(A).

Judge Counts is basically saying, that Morrison has not shown or there is no place in the record that demonstrates that Morrison can bypass the 1-year limitation stated in 2244(d)(1)(A) by way of the latter dates that encompass 2244(d)(1)(B),(C),(D).

In regards to 2244(d)(1)(C), Morrison agrees with Judge Counts' conclusion, since as far as Morrison knows, there has been no Supreme Court cases that have come out in the last year, that would have made a newly recognized right that would help Morrison. All the Constitutional rights that Morrison raised in his § 2254 are constitutional rights that have been well established for years. Morrison did not attempt to raise a claim under 2244(d)(1)(C) to bypass the alleged timebar.

Judge Counts, however is mistaken when he said that the record does not reflect that any unconstitutional state action impeded Morrison from filing for federal habeas relief prior to the end of the June 5, 2005 limitation period. Morrison objects to this statement because the record is replete with instances in which unconstitutional state actions impeded Morrison from filing his 2254 issues before June 5, 2005. Morrison lodged his ground 12 IAC claim against trial attorney Ian Cantacuzene in order to show he was prevented from raising these issues prior to June 5, 2005, which Judge Counts is also recommending that ground 12 IAC claim be barred by the limitation period, it is, however, still part of the record and clearly shows Morrison was prevented from raising these § 2254 claims prior to when he was finally able to raise them in 2011.

In regards to that IAC claim, Morrison also pointed to the Reporter's Record several times in his 2254 brief, and Reply to show Cantacuzene would not allow Morrison to get permission from the trial Judge to allow him to appeal. (See RR1 P.14; Reply p.7; Brief pp.157-158).

Morrison also dedicated over 20 pages of argument in his Reply to show how, the state created impediments kept him from raising his claims prior to June 5, 2005. See Reply pp.9-10 where Morrison lists all the state created impediments including the IAC claim in ground 12, and other impediments that occured after June 5, 2005 that also impeded Morrison from filing these issues until he filed his State writ of habeas corpus. Morrison specifically mentioned that he asserts and wishes for this Court to construe the listed impediments as applying to 2244(d)(1)(B). That is part of the record at Doc # 17 pp.9-10.

On pages 18-23 of Reply, Morrison showed how he could not have been in custody to confer federal habeas jurisdiction for purposes of 2254(a). He also explained; because of how the plain language of the 2254 petition was written, he could not have filed a 2254 petition while being on deferred probation without having a conviction and sentence, or being held or confined in a prison or jail. The questions in the PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY, clearly speak to people who have a conviction, sentence, and/or are being held in a jail or prison, or someone who had a parole revocation hearing, or prison disciplinary hearing.

Starting on page 25 of his Reply, Morrison dedicated 13 pages and a complete section (see section V pp.25-37 of Reply) to showing how 2244(d)(1)(B) should start the 1-year limitation period at the time the unconstitutional state actions were removed, and that the unconstitutional state created impediments that prevented him from filing his claims before he first attempted raising his claims in March of 2011 were removed at that time. Morrison also showed how further unconstitutional impediments by the state, and the Direct Review David Rogers filed, in 2011, kept him from filing writ

of habeas corpus for the state from March 2011 to December 19, 2011 when Morrison was finally able to file for state collateral review, which tolled the AEDPA 1-year limitation period. Morrison used 2244(d)(1)(B) to start the 1-year time limitation period when the impediments came off. That date was January 20, 2014, and was tolled during the pending review of his state 11.07 collateral review. The 11.07 was pending between December 19, 2014 and April 29, 2015. Pursuant to 2244(d)(1)(B) and 2244(d)(2) the limitation period to file the instant 2254 petition did not expire until May 31, 2015. Morrison filed the 2254 petition on May 8, 2015, within the limitation period. Judge Counts did not address any of Morrison's 2244(d)(1)(B) arguments, which were made part of the record, when Morrison's Reply was filed. In the Reply, there were also citations to other portions of the record, and to Supreme Court precident that said 2244(d)(1)(B) should apply.

When Morrison filed his 2254 Petition, he also filed the Statement of Facts in which he also explained the unconstitutional state created impediments that prevented him from filing his 2254 petition before June 5, 2005. (See Statement of Facts pp.2-3).

During the 11.07 proceedings, Morrison's Counsel Cantucuzene, and Jason's counsel Morgan, filed affidavits with the court informing the court that they did not file any motions regarding Morrison's intentionally or knowingly culpable mental state issue, because it was not considered the law in Texas, and any motions would be frivolous. Their affidavit prove that they did not in any way conduct an investigation into the state court's questionable interpretation of 22.011, and they admitted to telling Morrison that knowledge or lack of knowledge about the age of the female in his offense would not matter. Seven years later, Morrison found out that what was told to him and his brother at trial in 2004 was not correct, since the plain language of 22.011, 6.02, 2.01, and 8.02 Penal Code (which is the law), said that knowledge of the complainant being a minor did matter because there was an intentionally or knowingly mental requirement prescribed in the heading of the statute. Morrison's § 2254 claims related to this issue are that the state courts violated the separation of pwers doctrine and violated the equal protection of laws when they made law, suspended law, and changed the law by negating the prescribed culpable mental state (**"CMS"**) in 22.011 and suspending 6.02, 2.01, and 8.02 to the offenders of 22.011. By doing that, 22.011 became unconstitutionally vague and overbroad.

Morrison has shown in his 2254 brief that these grounds do have merit as they are supported by Fifth Circuit and Supreme Court holdings. Morrison also proved in his brief that his constitutional rights were violated by the Texas courts suspending the legislature's law, and not allowing him equal protection of the law.

Cantacuzene's affidavit shows that Cantacuzene, without any further investigation or research, strictly went off of the Court of Appeals' erroneous and

unconstitutional interpretation of 22.011, by saying it was the law in Texas, in which Morrison has proved it is not the law since the Legislature is the one that makes the law. Morrison has also shown that plenty of reasonable jurists would agree with his interpretation of 22.011 that the mens rea requirement modifies "of a child", when he cited to five or six Supreme Court holdings that involved cases of mens rea statutorial interpretation in statutes written very similar to 22.011

Cantacuzene's affidavit shows that he did no research or investigation into the law regarding Morrison's claims as asserted in ground 12, and showing that Morrison was prevented by counsel from raising these claims until 2011, when he found the factual predicate of the constitutional claims that was withheld from him at trial. (See Reply pp.28-34), where Morrison proved how the IAC at the plea hearing in 2004 should be construed as an unconstitutional state created impediment for purposes of 2244(d)(1)(B).

MOrrison's original pro se pleading (Exhibit "D') is also in the record and explains and explains the unconstitutional State created impediments that prevented Morrison from filing his claims prior to that first pleading in 2011. Morrison has shown that the record is replete with examples of how unconstitutional state actions have impeded him from filing his constitutional claims to qualify for the 2244(d)(1)(B) exception to the 2244(d)(1)(A) time limitation period.

It is unfortunate, and a terrible malfunction of justice that every one who has had the opportunity to address Morrison's constitutional claims, instead of addressing them, has either only given a bare naked assertion that they are without merit, giving no reason as to why they are without merit, or ignoring the issues by trying to bar Morrison from raising them, since Morrison did not raise the issues prior to June 5, 2005, from before he was convicted, sentenced, or in prison.

Morrison has shown that he has been prevented from raising these issues because of unconstitutional state action at every stage he has had the opportunity to raise them. Since there are so many instances where Morrison has shown that he has been prevented by the State from raising his claims, any reasonable jurists who reads Morrison's 2254 brief, Exhibits, Petition, and Reply, then "after due consideration" of them, would be unlikely to say: "Nor does the record reflect that any unconstitutional state action impeded Morrison from filing for federal habeas relief prior to the end of the limitation period", (see Judge Counts' Report pp.1, and 10), especially when Morrison devoted such a large portion of his filings to let the courts know about his struggles with getting his claims ruled on.

Morrison respectfully requests that when this Court does its de novo review on this issue it will not merely ignore Morrison's arguments regarding 2244(d)(1)(B), and it will give that argument a fair and objective consideration.

Judge Counts, also on page 10, said: "In,addition, the record does not demonstrate that Morrison lacked knowledge of the factual predicate of his claims until a certain date", citing 2244(d)(1)(D). This statement is also made in error.

As explained, also, all through out Morrison's 2254 Petition, brief, Exhibits, and Reply, Morrison had proved he was unaware of the factual predicate of his claims until he became aware of them in Februrary 2011, by going to the law library and reading the plain language of 22.011, which conflicted with what he was told by Cantacuzene and Morgan in 2004. Because of what he was told by counsel in 2004, Morrison, unschooled in the law, believed what his attorney said for 7 years, until he got locked up, then while in jail, he went to the law library and found out that what he was told by trial counsel was not true. After Morrison did find out the factual predicate of his claim, he remained diligent in trying to raise his claims to the courts. (See letter to Judge Darr Exhibit "D"; Statement of Facts pp.2-6; David Rogers' affidavit says when Morrison found out about the factual predicate of his claims they discussed it in their March 24, 2011 meeting; Cantacuzene's affidavit where he admits to telling Morrison ignorance of age is no defense; Morgan's affidavit same; Exhibits "D"-"R" show that Morrison had no knowledge of the factual predicate of his claims prior to Februrary 2011, and they also show his diligence in raising the claims after he discovered them; Statement of Facts portion of 2254 Brief pp.2-3 shows a brief history of how Morrison found the factual predicate of his claims that were in conflict with what his trial counsel told him, and his diligence in asserting his rights, there after; Facts portion of Ground one pp.15-16 shows Morrison discovering the factual predicate, and discussing it with David Rogers; Supporting Facts for Ground Eight pp.132-133 of Brief, and argument pp.134-136, and 142 of Brief shows Morrison's factual predicate that he discovered in Februrary 2011, and his diligence in raising the claims thereafter; Supporting Facts for Ground Twelve pp.153-154 of Brief also shows Morriosn did not know about factual predicate until he discovered the claim seven years after his involuntary guilty plea; Reply pp.9, 26-27, and 32-34 again show Morrison's lack of knowledge of the factual predicate until he discovered the basis for the claim in 2011; RR2 shows in court that Morrison had discovered his factual predicate of his claims, and remained diligent in pursuing his rights.).

All of the above citations are part of the record, and there are plenty more not listed above. Therefore Morrison should also be allowed to have the 1-year limitation period start on the date of which the factual predicate of the claim was discovered through the exercise of due diligence, pursuant to 2244(d)(1)(D). The day Morrison first found out about the factual predicate was in Februrary 2011, actual date

unknown, but Morrison filed his first letter discussing his concerns on March 1, 2011 (see Exhibit "C"). Morrison continued to be diligent in asserting his claims, but found out his efforts would prove to be impossible, as he ran into obstical after obstical, until finally he was able to file his 11.07 State Writ of Habeas Corpus on December 19, 2014. Morrison clearly described all the obsticals that prevented him from filing prior to that. (See pp.28-37 of Reply). With all the evidence Morrison has shown that is in the record, it is clear that the date of the 1-year limitation period should have started on January 20, 2014, and expired on January 20, 2015, minus tolling for state collateral review.

On page 11, Judge Counts swithces his argument to rely on the Fifth Circuit's ruling in **Tharp 628 F.3d 719 supra**, saying that:

> "(1) One limitation period applies to claims relating to the deferred adjudication order; and (2) and another limitation period applies to claims relating to the adjudication of guilt."

Morrison has already argued that this holding is not applicable to him because:
1) His claims did not only relate to the deferred adjudication order, they also related to the adjudication of guilt. (See argument earlier in these objections, and pp.12-14 of Reply).
2) There is no way he could have raised these claims through a 2254 Petition at the time of his deferred adjudication order because he could not appeal, nor could he do a state post-conviction writ of habeas corpus. (See earlier arguments, and pp.14-16 of Reply).
3) Morrison could not have had jurisdiction in the Federal Courts to file a 2254 Petition without his deferred probation order not being finalized without a conviction sentence, or being in prison. (See earlier arguments, and pp.16-25 of reply).

Judge Counts then errors when he says: "The trial Court's order of deferred adjudication bacame final on June 5, 2005, upon the expiration of Morrison's thirty day period for taking Direct Appeal", citing to Tex. R. App. P. 26.2(a).

What Judge Counts fails to include is that since Morrison pled guilty to the charge in order to take deferred probation, the State made him waive his right to Direct Appeal under Tex. R. App. P. 25.2. Therefore Morrison could not have appealed his deferred adjudication order unless his issues were raised by written motion and ruled on before the trial or after getting the trial court's permission to appeal. This is proved by the Reporter's Record in RR1 p.14 where Cantacuzene said there were no pretrial motions filed, and he stopped Morrison from trying to get the trial judge's permission to appeal, by saying there was nothing to appeal. Therefore,

it was impossible for Morrison to initiate a Direct Appeal within 30 days of the deferred adjudication order. Even if Morrison's other arguments that put the **Tharp** holding into question fail, it is clear that since Morrison could not do a Direct Appeal on his deferred adjudication order, the 1-year limitation period did not start at June 5, 2004, nor could it have expired on June 5, 2005. In order for Morrison's conviction to become final for purposes of AEDPA's 2244(d)(1)(A) statute of limitations, Morrison must have first been convicted and sentenced, and given the opportunity to do a Direct Appeal so to finalize his conviction. That date occurred on April 28, 2011, and Morrison at that time appealed his conviction and sentence.

Judge Counts again errors on page 11, when he expected Morrison to do the impossible... or something futile. He said: "Morrison was required to submit a properly filed state application for post-conviction relief, as contemplated by 28 U.S.C. § 2244(d)(1) [sic] on or before June 5, 2005".

There is no way Morrison could have filed for post-conviction habeas relief as contemplated by 28 U.S.C. § 2244(d)(1), or (d)(2), since at that time, on or before June 5, 2005, Morrison was not yet convicted. Morrison has already shown Federal and State cases that stated Morrison could not file for post-conviction relief while not having a conviction and being on deferred adjudication probation. The only way Morrison could file for post-conviction relief in the state courts for purposes of § 2244(d)(2), would be for his deferred probation to be revoked and for him to be convicted and sentenced. That happened on April 28, 2011, not May 6, 2004. After conviction, Morrison filed for state collateral review on December 19, 2014, after his conviction was final by the expiration of time for seeking direct review. Morrison's state habeas application did not challenge the deferred adjudication order as Judge Counts claims. It challenged his unconstitutional conviction and prison sentence. Except for Ground 12 and 14, no where in the state 11.07, nor the 2254 is Morrison challenging his deferred probation order. Morrison said he is being held against his will by William Stephens, due to an unconstitutional conviction and prison sentence that was handed out on April 28, 2011, in which he clearly laid out how he is wrongfully convicted of 22.011, and put in prison for 16 years. The only grounds that can be said to complain about the deferred probation order is ground 12 IAC claim regarding trial counsel, and the Ground 14 actual innocence claim, but since Morrison raised those issues in 2011, they actually attack the 2011 revocation hearing aswell. All other claims either attack the Texas Court of Appeals' and the trial court's erroneous strict liability interpretation of 22.011, other

equal protection issues, the affects of the unconstitutional strict liability interpretation that pose future constitutional violations on Morrison's and others' First Amendment right to copulate and freedóm of intimate association with the 18-25 year age group, or events that occured during the 2011 revocation hearing or on appeal.

Because of the above arguments, and arguments laid out in his Reply, Morrison asserts, to this Court, that it would have been impossible for him to file this § 2254 Petition by June 5, 2005, as Judge Counts says Morrison should have done, in order for him not to be barred by the 1-year limitation period. (See page 12 of Judge Counts' Report).

Morrison prays that this Court will see how it was impossible for Morrison to file the instant claims in a Federal § 2254 Petition on or before June 5, 2005, well before Morrison was convicted, sentenced, and could not appeal or raise these issues on collateral attack at that time, and then this Honorable Senior District Judge allows him a pass on the alleged time bar, then this Court fairly and objectively rules on the merits of Grounds 2,3,4,5,6,7, and 12.

On page 12 of Judge Counts' Report, he picks back up about discussing Morrison's actual innocence claim, that Morrison used in his Reply to excuse the alleged 1-year limitation period default. (See Reply pp.4-9). Morrison objects to everything Judge Counts said on pages 12 and 13 talking about the Ground 14 actual innocence claim.

Judge Counts first trys to recommend to this Court that Morrison has not shown the courts any "new evidence" since Morrison "failed to present any 'exculpatory scientific evidence', 'trustworthy eyewitness accounts', or 'critical physical evidence'". Judge Counts gets this list from **Schlup v. Delo 513 U.S. at 324**, where the Supreme Court said:

> "To be credible, such a claim requires petitioner to support his allegations of contstitutional error with new reliable evidence- whether it be exculpatory scientific evidence, trustworthy eye witness accounts, or critical physical evidence- that was not presented at trial."

This is not an all inclusive list as this Court mentions in **Young v. Stephens 2014 U.S. Dist. LEXIS 16007 at page 166:**

> "....Such 'new reliable evidence' **may include by way of example** 'exulpatory scientific evidence, credibile declarations of guilt by another, trustworthy eyewitness accounts, and certain physical evidence.'" Quoting **McGowen v. Thaler 675 F.3d at 499-500.** (Emphasis added to show the three listed are only examples).

Those three examples of types of new evidence are just that, examples that may be included as ways to raise an actual innocence claim. Morrison's new evidence that he discovered in 2011 (i.e. the plain language of 22.011, 2.01, 6.02, and 8.02 Penal

code that called into question the incorrect and unreasonable strict liability interpretation of 22.011), as shown in grounds 2 and 5, is evidence that was withheld from him at the time of trial on May 6, 2004. Morrison contends that the State, Trial court, and his trial counsel applied the unrealistic and rigid strict liability interpretation, without determining that the Legislature's required intentionally or knowingly mental elements that were prescribed into the offense in 1983, modified "of a child". Morrison asserts that if that determination was made, there is a reasonable probability that he would have been acquitted of the 22.011 charge because of the evidence he had at the time of trial that could prove he reasonably thought the complainant in his case was an adult, therefore, he did not intentionally or knowingly have sexual conduct with a child.

Since Morrison did not receive proper notice of the offense to which he pleaded guilty, his plea was involuntary, thus when he was put on deferred probation, that order was entered involutarily. Morrison did not complain about that until seven years later, when after he was imprisoned and going to be convicted of the 22.011 charge, he found the new evidence that was withheld from him at trial. Subsequently, Morrison proved with Supreme Court, Fifth Circuit, and Texas Court of Criminal Appeals' holdings in his 11.07 and 2254 that the new evidence that he found that said; according to the plain language of 22.011, 6.02, 2.01, and 8.02, the state should have had to prove Morrison knowingly had sex with a child. That new evidence would have allowed him to present the old evidence, that everyone already knew, i.e. that Morrison reasonably thought the minor was an adult, to the court, and with the new evidence together with the old evidence that was available in 2004, no reasonable juror would have voted to find him guilty beyond a reasonable doubt.

Morrison is unsure how Judge Counts has concluded that he "Did not produce any new evidence to the state habeas court and he has not produced such evidence to this Court, therefore Morrison has not presented an actual innocence claim under the standard in **McQuiggin 133 S.Ct at 1935**". Morrison presented plenty of evidence in his grounds 2 and 5 that proves the new evidence he discovered in 2011, if presented to a jury, then no juror acting reasonably would have found him guilty beyond a reasonable doubt. The reason Morrison cited to the **Johnson v. State 967 S.W.2d 848** case throughout his 2254 Brief was not only to show the ambiguity of 22.011 can cause selective enforcement, but also to show that no reasonable jury would have convicted him, as the juror did in Johnson's similar 22.021 case.

If this Court agrees that:

1) The above three types of new evidence are not the only types of new evidence that can be used to support a **McQuiggin** actual innocence claim, and

2) Morrison has persuaded this Court that inlight of the new evidence (as shown in grounds 2 and 5 in conjunction with the evidence that was available at trial that Morrison reasonably thought M.M. was an adult) no juror acting reasonably, would have found him guilty beyond a reasonable doubt, and/or

3) Morrison has shown "that a constitutional violation has probably resulted in the conviction of one who is actually innocent". See **Shlup v. Delo 513 U.S. 298 (1995), Murray v. Carrier 477 U.S. 478 (1986),**

then it will accept Morrison's actual innocence claim and reject the alleged 1-year limitation default and rule on the merits of Morrison's constitutional claims in grounds 2-7, and 12.

Perhaps Judge Counts was not satisfied with having the new evidence Morrison presented, and he needed to know that Morrison is telling the truth about his reasonable belief that the complainant was 21 years. If that is the case, Morrison will gladly travel to Midland and have an evidentiary hearing on the matter, if this Court so wishes. Morrison, however asserts that this Court may be satisfied by knowing that is true by looking into the record where it supports that he reasonably believed the complainant was an adult. (See RR1 p.15 where Morrison's mother testified to the trial court that her sons had no idea she was underage. Both affidavits from trial counsel Tom Morgan and Ian Cantacuzene prove both Morrison and his brother believed the conplainant was an adult. The affidavit of Jason Morrison, Exhibit "G" shows this aswell. Morrison has always, since he was interviewed about the offense by the police, said he thought the complainant was 21 years. This claim has never been denied or disputed by any person from the State, nor has there been any evidence brought to refute it. The only thing anybody has ever said to argue against Morrison's belief the complainant was an adult is that the State does not have to prove Morrison knew the victim was under the age of 17, and mistake of fact defense does not apply to 22.011.

Despite what Judge Counts says about Morrison not presenting any new evidence that would meet the standards of a **McQuiggin's** actual innocence claim, Morrison objects, and is confident that this Court will judiciously go through everthing in the record and conclude that through Morrison's well researched and articulated claims (however, longwinded), he has shown sufficient proof that the new evidence he discovered in 2011, as properly interpreted as he has proved, if presented to a reasonable jury, with the old evidence that was available at the time of trial, none of the jurors would have voted to find him guilty beyond a reasonable doubt of "Intentionally" or "Knowingly" causing the penetration of the sexual organ "of a child" by any means.

Judge Counts cited to **Bousley v United States 523 U.S. 614, 623-624 (1998)** to say

in this context, newly discovered evidence of a petitioner's actual innocence refers to factual innocence, not legal sufficiency. Morrison agrees, and has shown like Bousley did, that he at the plea hearing, was misinformed about the true nature of the offense by counsel, the court, and the prosecutor. Morrison did not present a legal insufficiency of the evidence claim, Morrison said he is factuallyinnocent of 22.011 because he did not fulfill all the elements of 22.011 as the plain language mandates. The language in 22.011, like the language in 18 U.S.C. 924(c)(1) in Bousley's case, both had a different interpretation by the Government and courts, at the time of trial, but later, in Bousley, thetrue defination of the word "uses" came out in **Bailey v. United States** 116 **S.Ct 501 (1995)**, and the proper interpretation of 22.011 came out in Morrison's case. In Bousley the Supreme Court held: Although Bousley's claim was procedurally defaulted he may be entitled to a hearing on the merits if he makes a necessary showing to relieve the default. Only a voluntary and intelligent guilty plea is constitutionally valid, a plea is not intelligent unless a defendant first recieves real notice of the nature of the charge against him. Petitioner's plea would be constitutionally invalid if he proved that the district Court misinformed him as to the elements of a 924(c)(1) offense. The Supreme Court ended up remanding the case to allow Bousley to attempt to make a showing of actual innocence, by demonstrating that he did not "use" a firearm as the term was defined in **Bailey**.

Also, Bousley failed to raise his actual innocence claim in his 2255, and first raised it in his Writ of Certiorari. That is why the Supreme Court remanded to allow a showing of actual innocence to excuse the procedural default, as opposed to automatically remanding the case to be ruled on the merits by way of actual innocence. The District Court had not had a chance to address his actual innocence.

Morrison has raised his actual innocence claim, first in 2011, when he attempted to do his pre-conviction writ of habeas corpus, then he raised it in his state 11.07, and federal 2254. Morrison actually claimed his actual innocence based off him not knowing M.M. was a child from the very start. Morrison believes, and hopes this Court agrees, that there is sufficient evidence, in the record, to satisfy the actual innocent claim that proves:

1) He reasonably believed the complainat was an adult, and
2) That the plain language of 22.011 in conjunction with 6.02, 2.01, and 8.02, and Supreme Court holdings as discussed in grounds 2 and 5, prove that for someone to commit the 22.011 offense they must intentionally or knowingly have sex with a child from 14 to 16 years, and the government must prove beyond a reasonable doubt that the defendant knew he had sex with a child or intended to have sex with a child.

Or that the defendant could use his reasonable mistake as a defense through the Mistake of fact defense.

Since this evidence is sufficient in the record, Morrison hopes this Court will put evidence 1 and 2 together, and not adopt the Magistrate Judge's recommendations regarding his actual innocent claim, and this Court will allow Morrison's **McQuiggin** actual innocence claim to bypass the alleged time limitation default, and rule on the merits of Morrison's issues in grounds 2-7, and 12. Or if this Court believes it needs more evidence then Morrison requests an evidentiary hearing.

EQUITABLE TOLLING

On pages 13-14 of Judge Counts' report, Judge Counts has clearly erred in his recommendation regarding the equitable tolling issue that Morrison raised in his Reply at pp8-17, that showed according to **Holland v. Florida 177 L.Ed.2d 130 (2010)**, and **Magwood v. Patterson 177 L.Ed.2d 592 (2010)**, Morrison met the equitable tolling doctine's standard to excuse the alleged 1 year limitation period default that was said to expire on June 5, 2005.

Judge Counts first starts out by laying out the two prongs a person must do to qualify for equitable tolling:

1)"That he has been pursing his rights diligently, and

2) that some extraordinary circumstance stood in his way and prevented timely filing". Judge Counts further claims that Morrison does not allege any rare and exceptional circumstances to warrant equitable tolling. Then Judge Counts cherry picks only parts of Morrison's comments about Morrison saying he was not diligent in pursuing his rights. See Reply, Doc 17 at 7, "Morrison did not specifically allege any facts that could support a finding that 'equitable tolling' ahould apply.... at the time Morrison filed his 2254, he was not even contemplating the notion that he could be time barred...." (id at 9). (See Judge Counts' Report page 13).

The two comments that Morrison made, if read with the context of the rest of his equitable tolling argument will show that what Judge Counts is insinuating is not what really happened. When Morrison admitted in his Reply, that he was not diligent in puruing his rights, (see Reply p.7) Morrison did not say he was not diligent in pursuing his rights after the extraordinary circumstances that stood in his way, from timely filing his claims, were no longer in his way, in 2011, after he found the new evidence that formed the basis of his claims. Morrison made that comment when he was articulating his actual innocence claim, and showing how the **McQuiggin** case was distingushable from his case in the sense that Perkins was not diligent in pursuing his claims for six years **after** he found out about the new evidence. Morrison almost immediately filed his claims with the trial court, after he found

the new evidence that could acquit him. It is in the record that he did so to the detriment of himself because in remaining diligent, it got him 9 more years in prison to do before he gets out. Even then Morrison has remained diligent in pursuing his rights ever since.

Morrison at first explained the delay from filing his claims from May 2004 to March 2011, on page 8 of his Reply, attributing the delay to IAC, and he explained on pages 6-8 that he was diligent in pursuing his rights before his involuntary guilty plea, when he proclaimed his innocence(based on the new evidence found in 2011), when he was at the revocation hearing in 2004. (See RR1 pp.9, and 14; and affidavits of Ian Cantacuzene and Tom Morgan where Morrison proclaimed his innocence based on his reasonable belief the complainant was an adult).

When Morrison made the comment about admitting to, "not being diligent in pursuing his rights", his actual words were (when referring to the advice of three legal professionals that his mistake of M.M's age would not matter because "ignorance of the law is no defense") "Morrison relied on that advise for seven years, and admits he was not diligent in finding the new evidence at that time because he thought that was the law". He went on to say that, "however, despite what his counselors told him, he did want to appeal the issues". Then he gave proof from RR1 p.14 where he wanted to appeal but Cantacuzene would not let him.

Should Morrison be penalized for relying on erroneous advice of counsel, when he knew nothing about the law? Is it reasonable for someone who is unschooled in the law, who hires an attorney to be diligent in pursuing their rights to believe their attorney when they told them a certain right did not exist, or should that person not believe his counsel, and act on his own and pursue his rights every time counsel says something that is not in his client's favor? The equitable tolling standards do not require someone to be diligent in pursuing their rights that they did not think they had based from counsel's advice. The standard only requires that the person be diligent in pursuing their rights after they have found new evidence that supports that the right exists. On page 8 of Morrison's Reply he, as Judge Counts left untold, explains, unlike Perkins had done, that "after discovering the new evidence that was kept from him by counsel, Morrison was diligent and continued to be very diligent in pursuing his actual innocence claim, and other constitutional issues and questions of law he is raising in this instant 2254...."

Judge Counts' second comment that is intended to deny Morrison relief from equitable tolling is also completely taken out of context and Morrison objects. Morrison did say that he did not specifically allege any facts that could support a finding that equitable tolling should apply, but he meant that to refer to in his

§ 2254 Brief, and Petition, which was filed before he knew he could be time barred by the 1-year time limitation period. Morrison said that because Miss Vindell, in her Answer on page 8, said that Morrison did not allege any facts (at that point) that could support a finding that equitable tolling applied. Morrison agreed to the point that he did not mention "equitable tolling" in his 2254, as the quotations in his admission point out, since he was not expecting to be time barred by the 1-year limitation period from before he even had jurisdiction to do a § 2254 Petition as explained in reason 7 of his Reply. (See Reply pp.18-23).

Morrison then listed all the reasons he was unable to file his 2254 before he filed for state collateral relief in December 2014, by showing, in a good potion of his 2254, cause and actual prejudice to bypass any procedural bars that may have arisen. See pp.9-10 of Reply for reasons Morrison listed that prevented him from raising the claims prior to December 19, 2014. Morrison then tells this Court that, "by showing all the things that inhibited Morrison from filing his seven claims before 2014, contrary to what Miss Vindell claims, Morrison has shown that he is entitled to equitable tolling that allows him to pass the time limitation and procedural bars." (See page 10 of Reply). Morrison raised his equitable tolling issues, specifically alleging the facts that could support that equitable tolling should apply, not in his 2254 Brief or Petition, but in his Reply to the Respondant's Answer. A reading of the Reply will show that extraordinary circumstances stood in Morrison's way and prevented him from filing his constitutional claims in Grounds 2-7, and 12 before the alleged expiration of the limitation period. Just because Morrison raised his equitable tolling arguments in his Reply as opposed to his § 2254 Brief or Petition does not mean that, "Morrison did not specifically allege any facts that could support a finding that 'equitable tolling' should apply".

Judge Counts misses the purpose of the equitable tolling exception to timely filing when he says Morrison argues that he was actively misled by counsel regarding the plain language of Texas Penal Code 22.011. Then he erroneously uses Morrison's lack of knowledge about the law as a basis to deny equitable tolling. He first says Morrison insists that the plain language means that "to commit the 22.011 offense, he had to **Know** he was penetrating the **Sexual organ of** a **child,** or that he had **intent** to penetrate a **child's sexual organ**, which is the only element that makes 22.011 a crime." He then goes on to say his counsel advised him that "it is not a legal defense at the guilt or innocence phase of trial that the victim may have lied about her age or that Morrison reasonably believed that the victim was of legal age to consent to sexual contact." That is one of the ways Morrison used to explain that Cantacuzene did not understand the law, and he misled Morrison as to the plain language of 22.011

as explained above and in Morrison's Ground 2 and 12.

Judge Counts then quoted **Johnson** v. State **967** S.**W**.2d **848, 849 (Tex. Crim Ap. 1998)** to say, "Indencency with a child statute does not require the state to prove that a defendant knew the victim was under the age of 17." (See page 14 of Judge Counts' Report). Morrison agrees with this conclusion. Indecency with a child, Penal Code 21.11, like Penal Code 21.09 (22.011's predecessor) does not have an intentionally or knowingly CMS that can be and has been interpreted as modifying "of a child" as 22.011 does. Morrison was not charged with indecency with a child, so what Judge Counts says about **Johnson** applying to him is in error. Johnson, however, was also charged with the simalarly written statute of 22.021, but was aquitted on that charge because he reasonably believed the minor in his case was of legal age. (See **Johnson at 858**). Morrison uses Johnson several times in his 2254 and 11.07 as support for his position. Judge Counts said at page 28 of his report that Morrison was not able to use Judge Baird's dissent in **Johnson** as a support for his position because a dissenting opinion is not binding precedent. However, Morriosn was not challenging the holdings of **Johnson's** majority opinion in regards to indecency of a child, Morrison was using Judge Baird's dissent as a factual matter that was announced in an open records hearing that reasonable jurors would not have convicted him of 22.011, since there were also reasonable jurors who acquitted Johnson with Morrison's same logic regarding 22.011, a statute that has the exact same mens rea requirement as 22.021. Morrison also used Johnson's dissent at 858 to show how the vagueness and ambiguity in 22.011 and 22.021 has caused selective enforcement in his Ground 7. The jury acquitting Johnson, based on Morrison's same logic, was also a reason Morrison used it in his as-applied vagueness claim, which showed the reason why he rejected the seven year plea offer in 2011, and was sentenced to 16 years instead.

Morrison believes the reason Judge Counts uses the **Johnson** opinion is because it is a Court of Criminal Appeals opinion that held that the State does not have to prove the victim was under the age 17, and since the State's highest court determined that holding, and it was the only holding by the state's highest court at the time of Morrison's offense that determined that, then that is the law in Texas.

Morrison asserts that since the state's highest court has never specifically ruled on a 22.011 case with an opinion that has rebuted Morrison's arguments, then everything said to Morrison by counsel about it not being a legal defense.... that the victim may have lied about her age, or that Morrison's reasonable belief that the victim was of legal age to consent is not a valid defense in Texas, was not even the law as determined by the state's highest court. Therefore it is not Morrison who has the lack of knowledge about the law, it was the intermediate Court of Appeals,

counsel, the trial court, and the State who have an incorrect and rigid interpretation of the law, which is not even based on the 22.011 statute. The Legislature makes the law, and when they made 22.011, they clearly said: For someone to commit the offense a person must intentionally or knowingly cause the penetration of the sexual organ of a child by any means. No where has the Legislature dispensed with the required mental elements or said they should not attach to "of a child". Based on the letter of the law, as determined by the Legislature and not by the State's highest court, Morrison was misled by his counsel, the courts, and the state about the true nature of the elements of 22.011 as the plain language mandates, until he discovered, in 2011, that the plain language of 22.011 does not allow for it to be a strict liability crime, as counsel, the courts, and the state have led him to believe. Their knowledge of the law was based on the state's highest court saying 21.09 or 21.11 are strict liability crimes. But that changed in 1983 when 22.011 was prescribed a mens rea requirement. The Texas Court of Criminal Appeals has not ever held that 22.011 is strict liability, therefore, the legislature's language is the law in Texas. See **Young v. Dretke 356 F.3d 616, 627-628 (5th Cir 2004)** where the Fifth Circuit discusses the difference between case law that has not been acknowledged by the Supreme Court as being: Not a final statement of law, but that that the law that the legislature passes is final statement of law. Also see **Lockhart v, Fretwell 113 S.Ct 838 (1993), and Williams v. Taylor 120 S.Ct 1495(2000).**

According to **Young** and **Fretwell** Moriison is entitled to the final "vested" rights conferred upon him by the duly enacted Texas statutes of 22.011, 6.02, 2.01, and 8.02. Morrison asserts that since Fretwell was not lawfully entitled to claim the benefit of a judicial rule that had not been finally authoritive, then the state also cannot be lawfully entitled to claim that 22.011 is strict liability, when that intermediate court of appeals holding has not been finally authorized by a final statement of law by the state's highest court, or the Supreme Court of the United States, especially since the holding is in clear contrast to the legislature's intent.

Equitable tolling should apply since Morrison has shown that he was misled- about the nature of his claims until 2011- when he then diligently continued to pursue his claims, but was further prevented from properly raising his claims, until he filed for state post-conviction relief in 2014.

Everyone who has had the opportunity to rule on Morrison's issues has stated that the law in Texas is that Morrison is guilty of 22.011, even though he did not intentionally or knowingly have sex with a child, because his mistake of her age does not matter. Everyone who has said that points to case law like **Johnson v State** supra, or **Vasquez v. State 622 S.W.2d 864 (Tx. Crim Ap. 1981)**, or other Texas Court

of Appeal's cases that either do not discuss 22.011, or if they do, then they base their decision on **Vasquez** for support, which is erroneous because **Vasquez** was a 21.09 case, where 21.09, rape of a child, did not even have a mental requirement in its statute, as does 22.011. It is also flawed reasoning to rely on an intermediate court of appeals' clearly erroneous interpretation, when someone has proved the interpretation as unreasonable and erroneous.

It is Morrison's hope that it will be this Court that puts it foot down and stops all the nonsence of pointing to different courts of appeals' cases that rely on **Vasquez**, or to Court of Criminal Appeal's cases that rely on other statutes that are not 22.011. Morrison has shown what the law is in Texas, as mandated by the Legislature, and he has shown how his constitutitonal rights have been violated and will continue to be violated because the Courts of Appeals' erroneous and unconstitutional strict liability interpretation of 22.011. Morrison hopes this Court will look at his claims objectively and fairly, then understand that he has been prevented from raising his issues, and has been diligently seeking relief since he was finally able to raise his claims, and that he is actually innocent of the charge as the plain language of 22.011 demands, and this Court excuses the alleged 1-year time limitation default, then rules on the merits of his constitutional claims impartially and fairly and in accordance with the Contitution and laws of this Great Country.

GROUND 8 (SUSPENSION OF RIGHT TO WRIT OF HABEAS CORPUS)

Judge Counts on pages 14-20 of his report discusses Morrison's Ground 8. Judge Counts first starts with stating Miss Vindell's reconstructed version of Morrison's Ground 8, by saying Morrison claims that the trial court abused its discretion by:

1) Refusing to continue his revocation hearing so that he could file an application for pre-conviction writ of habeas corpus; and
2) Failing to appoint effective counsel regarding his application for writ of habeas corpus.

He then correctly states what Morrison did say: "The Motion for Contiuance- if granted, would have allowed Morrison to assert his rationale- was overruled by the trial court because the pro se letter he sent to the court was not considered a writ of habeas corpus."

Judge Counts then explained the Respondant's answer and mentions what the State habeas court said about Morrison's ground 8 claims, in which Morrison refuted their arguments in his reply and 2254 repectively.

Morrison asserts that by using the reconstructed version of his Ground 8, Judge Counts may have inadvertantly misconstrued what Morrison intended his Ground 8's abuse of discretion issue to focus on. It seems Judge Counts focused the trial court's abuse of discretion on the trial judge not granting Morrison's Motion for Continuance, as opposed to what Morrison claimed the trial court's abuse of discretion was: "Morrison's rights under the Sixth, Fourteenth, and **Article 1 § 9 Clause 2 of the United States Constitution** were violated when the trial court abused its discretion in overruling Morrison's Motion for continuance, which prevented Morrison from **exercising his constitutional right to writ of habeas corpus in the trial court.**" (Emphasis added). The trial court suspended Morrison's right to writ of habeas corpus through the guise of not granting his Motion for Continuance that was properly before the court, because Morrison's pre-conviction habeas corpus letter was a pro se letter, which Morrison could not file because he had counsel, despite the fact counsel was not appointed to do any writs of habeas corpus, and would not help Morrison exersise in his right to file a pre-conviction writ of habeas corpus. Therefore, all the discussion in Judge Counts' report on pages 15-16 about a Motion for Continuance is irrelevant to Morrison's case. See pp.39-44 of Reply and pp.132-142 of Brief where Morrison argues his intention for this ground is the trial court's suspension of his right to habeas corpus.

Morrison, however, did show that since the trial court did not allow him to exercise his right to writ of habeas corpus, when it denied his continuance, that in doing so his rights to Due Process were denied also by him not being able to be heard, not being able to present evidence of his actual innocence when he filed a pre-conviction writ of habeas corpus, and the trial court denied him the ability to confront witnesses against him in regards to his habeas issues. Not one person heard his arguments in court.

> "Due Process requires not just that probationers receive a full opportunity to present evidence on their own behalf at a probation revocation hearing, but the judge actually considers the evidence presented at the hearing." **Gonzalas v. Johnson 944 F.Supp 759 (1997).** Also see p.45 of Reply.

The decision of the trial court to deny continuance was an abuse of discretion that was "so arbitrarily and fundamentally unfair that it violated constitutional principals of Due Process." (Citations omitted). See page 16 of Judge Counts' Report.

On page 17 of his report, Judge Counts says that Morrison and respondant dispute whether Morrison's pro se letter to the trial court was a pre-conviction or post-conviction application, and the distinction is not meaniful to the discussion below. Morrison disagrees and objects to that statement because he has proven with Supreme Court precedent on pages 51-53 of his Reply that since he was an indigent

criminal defendant, who has not yet been convicted and sentenced, and was facing a conviction that would send him to prison, then the State had to afford him effective counsel at that hearing not only for the revocation of probation, but also to look out for his best interests, and if that included Morrison filing a proper writ of habeas corpus before conviction, then Morrison had that right to effective counsel to do that.

The reason Judge Counts is in error when saying the distinction is not meaninful to his subsequent argument is because Morrison was not yet convicted or sentenced to the 22.011 charge, and therefore, was due court appointed counsel to help him file any pre-conviction writs of habeas corpus that he needed to file. Had Morriosn already been convicted and was doing post-conviction writ of habeas corpus, he would not be entitled to counsel. Morrison was simply denied effective counsel to file his pre-conviction writ of habeas corpus that with a little bit of due diligence did prove to have merit.

Judge Counts' subsequent argument, like what the trial judge did, in not allowing Morrison's writ of habeas corpus to be heard, said Morrison incorrectly filed his letter as an application for a pre-conviction writ of habeas corpus by filing it pro se instead of through counsel, because a defendant has no right to file documents with the court while represented by counsel.

Morrison could not hire an attorney to file his writ of habeas corpus for him since he was indigent. He was disallowed by the court to file one pro se. And his court appointed counsel would not do one for him, nor help him file one as he admitted to twice in the record. Morrison will once again ask the question that nobody has been able to answer, and keeps avoiding:

> "Under the trial Court's reasoning to deny Morrison's continuance, how is a regular citizen suppose to exercise in their right to writ of habeas corpus if they 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?"

Morrison contends that since Judge Counts also agrees that Morrison could not exercise his right to habeas corpus while having court appointed counsel, whom would not help Morrison with it, because he was not assigned to do any writs, then Judge Counts' argument is the same exact situation that brought Morrison's Ground 8 to this Court in the first place, and therefore, it does nothing more or nothing less than what Morrison has argued all along. Judge Counts' no right to hybrid counsel argument is what suspended Morrison's right to habeas corpus. The Constitution does not give us the right to habeas corpus through counsel, nor does it say if we have counsel we cannot do a habeas corpus pro se. The suspension clause says citizens have that right regardless.

Judge Counts' next argument on page 17 about Morrison's letter not being a proper writ of habeas corpus since it did not contain specific facts that if proven to be true might entitle the applicant to relief. And Morrison's contention that he is innocent of the offence because of his lack of knowledge concerning the victim's minority is not the law in Texas, is unavailing because ,again, Judge Counts cites to **Johnson v. State supra**, which is an indecency with a child case, which Morrison pointed to earlier, is distinguishable from his case. Since Judge Counts uses the holdings in **Johnson** as the basis for this argument Morrison objects and asserts that his letter did contain specific facts that if proven to be true would entitle MOrrison to relief, because like previously stated, 22.011's plain language as written by the legislature is the law in Texas. The holdings in Johnson cannot make the law, or change the law regarding 22.011's mens rea requirement. Even if the court, had heard Morrison's writ of habeas corpus issues, that he has proven do contain specific facts that if proven would entitle him to relief, and the court would have denied relief, Morrison could have then appealed that decision to the Court of Appeals to challenge the erroneous strict liability interpretation, and with his arguments that he has raised in Grounds 2 and 5 citing Supreme Court cases that deal with statutorial construction and mens rea issues, that prove that if a proper statutorial construction analysis would be done on 22.011, any reasonable jurist would agree that the purview of the intentionall or knowingly mens rea requirement would modify the entire statute including "of a child", as the Supreme Court has demonstrated in cases that Morrison cited to in his Brief. I.e. **Flores-Figueroa v. U.S. 173 L.Ed.2d 853 (2009); U.S. v. Williams 170 L.Ed.2d 650 (2008); U.S. v. X-Citement Video 115 S.Ct 464 (1994); Staples v. U.S. 114 S.Ct 1793; Liparota v. U.S. 105 S.Ct 2084 (1985).**

Like Morrison said in his 2254, had he been able to raise his pre-conviction writ of habeas corpus issues in the trial court in 2011, before he was convicted, because of all the Supreme Court cases that were available at that time that supported his logic, there is a reasonable probability he would have received relief with a new trial and an acquittal, or atleast a more favorable sentence than 16 years. If not through pre-conviction writ of habeas corpus relief, then Morrison could have appealed to the Court of Appeals with this issue, asking the Court of Appeals to do a proper statutorial construction analysis of 22.011 under the Supreme Court's model, then there would be a reasonable probability Morrison would have recieved relief on appeal.

On page 18 of his report, Judge Counts says that Morrison failed to demonstrate any reason why the trial court needed to continue the revocation hearing so as to properly consider Morrison's alleged application for writ of habeas corpus. To support his argument he said, "A trial court may **properly consider**, in a single

hearing, both a motion to proceed with a adjudication of guilt and an application for a writ of habeas corpus." **Kniatt v. State 206 S.W.3d 657,666.**

In **Kniatt**, the court gave kniatt an evidentiary hearing and **properly considered** his claims. In Morrison's case, Morrison was never even allowed the luxury of the court properly considering his writ of habeas corpus. So in all actuality, the citation that Judge Counts points to really helps prove Morrison was entitled an evidentiary hearing for the court to properly consider his Pre-conviction writ of habeas corpus. Despite what Judge Counts said, Morrison did provide reason as to why the court needed to continue the revocation hearing. See RR3 pp.6-7 where counsel admonished the court that if she went ahead with the revocation hearing without hearing the writ of habeas corpus, it would violate Morrison's right to file a writ of habeas corpus in the trial court, and he would be harmed in that he faces obvious severe penalties that could include incarceration. As Rogers warned, Morrison was harmed by the court, exactly like he said, by the court not considereing his writ of habeas corpus, he was sentenced to 16 years prison. He lost the chance for the trial court to do an evidentiary hearing to hear his issues, where there is a reasonable probability Morrison would have received relief, or because of the inherent mitigating factors of Morrison's lack of mental culpability, there is a reasonable probability the court would have sentenced him to a less severe sentence that 16 years. Also had the court heard his writ of habeas corpus issues, the court could have explained to Morrison that according to the Court of Appeals his ratioanale was an incorrect legal rule, and then offered him a chance to take the seven year plea offer. But none of that could have led to a reasonable opportuninity for the court to sentence Morrison to less than 16 years or grant his writ because the court did not properly consider his writ of habeas corpus issues because he had filed the letter pro se while having counsel, despite the fact counsel admitted seeing the letter and telling Morrison he could not help him with it, even at Morrison's request. (See RR3 p.9). Morriosn argued these prejudices in his Reply at pp.39-49, and brief at 137-139.

In the last paragraph on page 18 Judge Counts finally mentions, although briefly, and very puzzling, Morrison's actual Ground 8 issue, i.e. the trial court suspended his right to writ of habeas corpus. Judge Counts said: "[T]o the extent Morrison claims he was denied the chance to file an application for pre-conviction writ of habeas this argument fails."

Judge Counts then said a series of things that Morrison is having trouble understanding how they made his actual Ground 8 argument fail. Judge Counts continued by saying:

1) Under Texas law an application for writ of habeas corpus filed before the trail court revokes the defendant's community supervision and proceeds with an adjudication of guilt is a pre conviction writ of habeas corpus. (citation omitted).

That statement is true. Morrison does not question that statement, and it surely does not cause his Ground 8 issue to fail.

2) Had Morrison's letter been an appropriate application for habeas relief it would be considered a pre-conviction application under Texas law.

Morrison also agrees with that statement, and in fact argued this already to show he was not yet convicted at the time he filed for writ of habeas corpus and should have been afforded counsel to help him properly file his claims through a proper pre-conviction writ of habeas corpus. Morrison is unsure how this statement causes his argument about being denied the chance to file a pre-conviction writ of habeas corpus fails.

3) The trial court's decision to proceed with the revocation hearing instead of granting Morrison's motion for continuance would not have affected the pre- or post-conviction classification of his letter.

Morrison cannot see how that statement causes Morrison's argument in Ground 8 to fail. The above three statements are the only thing Judge Counts said regarding Morrison's actual Ground 8 argument failing. Morriosn is puzzled because Judge Counts did not state a claim as to how or what caused Morrison's claim that his right to writ of habeas corpus being suspended has failed. In fact, Judge Counts did not ever mention Morrison's actual argument of how the trial court suspended his right to writ of habeas corpus, by putting him in a catch-22 by not allowing him to file a pro se writ, nor allowing counsel to do it for him. Judge Counts is actually supporting Morrison's right of habeas corpus being suspended when he argued that Morrison has no right to file a habeas corpus pro se while having counsel. That argument is in clear contradiction to the United States Constitution's suspension clause where we are guaranteed the ability to exercise in the privilege of writ of habeas corpus and that privilege "shall **not** be suspended, unless when in cases of rebellion or invasion the public safety may require it." Morrison was not rebelling or invading the United States or Texas. All he was trying to do was alert the court that he was being unconstitutionally imprisoned because from according to the plain language of the statute he was in jail for, he did not fulfill the elements of it.

Judge Counts' entire argument regarding this claim is in error. Morrison respectfully asks this court for an objective and fair de novo review of this claim.

On page 19 of Judge Counts' report things start to get even More puzzling to Morrison. On the page before, as explained above, Judge Counts acknowledged the fact that according to the law, what Morrison had filed was a pre-conviction writ of habeas

corpus. Then on pages 19-20 Judge Counts reverts back to it being referred to by the state habeas court, as a post-conviction writ of habeas corpus. He then cited to several cases that agree with the Supreme Court of the United States, and the Supreme Court of Texas that have held that neither the federal nor the Texas constitutions require appointment of counsel to pursue the available remedy of writ of habeas corpus. All the examples of the cases Judge Counts cited to involved people who have been convicted and were doing post-conviction writs of habeas corpus, not a pre-conviction writ, therfore, Morrison's case is distinguishable. In fact Morrison has proven that since he was facing the deprivation of his liberty, and was indigent at the time of his revocation hearing, then the State according to the Sixth and Fourteenth Amendments and Supreme Court holdings in **Scott v. Illinois 99 S.Ct 1158, 1162 (1979); Lassiter v. Dept. of Soc. Serv. of Durham City 101 S.Ct 2153, 2159 (1981);** and **Argersinger v. Hamlin 92 S.Ct 2006 (1972)**, must appoint him effective counsel. (See page 52 of Reply). Morrison has proved he was not provided with effective counsel during a proceeding that jeopardized his liberty when Rogers admitted on record he would not help Morrison with his habeas corpus issues since it was out of his scope of counsel, and he was not appointed to do any writs. (See RR3 pp.6-9).

If the Supreme Court has a holding that says counsel is not required to be appointed for an indigent defendant's pre-conviction writ of habeas corpus, who has shown a legitimate cause for relief, to override the above three holdings, Morrison will concede the issue, if there is no such holding, then Morrison has proved he was denied actual effective assistance of counsel which demands automatic relief, as explained in Morrison's Brief at pages 22-23 where he argued this same argument. Morrison has proved that he should have been afforded court appointed counsel to help him properly file his pre-conviction writ of habeas corpus issues before he was convicted and sentenced to prison. The trial court abused its dicretion and erred in not appointing counsel for that reason.

Since Judge Counts first acknowledged that Morrison has filed or attempted to file a pre-conviction writ of habeas corpus, then said Morrison did not have a right to counsel for post-conviction writs, Morrison objects to his conclusions and respectfully requests a fair and impartial de novo review of this issue from this Honorable District Court.

INEFFECTIVE ASSISTANCE OF COUNSEL (REVOCATION COUNSEL)

On pages 21-22, After Judge Counts laid out the standard for IAC claims for Federal Habeas Petitioners, he stated, "Having independantly 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." Morrison objects to that and has shown reason why the evidence that is in the record i.e., Exhibits "A"-"S", Counsel's Affidavits, Morrison's motions to Object or Disqualify Counsel's Affidavits, RR1, and RR3, all prove that trial counsel Cantuccuzene and revocation counsel Rogers' performance fell below an objective standard of reasonableness, because they were not acting as counsel as guaranteed to Morrison by the Sixth Amendment, and had in not been for their deficient performance, there is a reasonable probability that the outcome of the proceedings would have been different. Morrison has also shown that there could be no sound trial strategy for counsels unreasonable deficient conduct. (see Grounds 1, 12, and 13).

Judge Counts also states, "Under AEDPA Review, in order to obtain federal habeas relief on an IAC claim rejected on the merits by a state court, the petitioner must do more than convince the federal court the state court applied Strickland incorrectly - the petitioner must show the state court applied Strickland to the facts of the case in an objectively unreasonable manner." Judge Counts then describes the state court findings, and states their decision is not an unreasonable application of the Strickland standard or an unreasonable determination of the facts in light of the evidence presented.

Judge Counts clearly erred in his conclusion in regards to Morrison's case concerning the 2254(d)(1),(2) standards for federal habeas relief. First of all, Morrison did not raise the "unreasonable application" prong od 2254(d)(1) in any of his claims of IAC since the state habeas court did not follow the Strickland or Lafler v. Cooper standards of IAC that were required in the review of Morrison's IAC Ground 1 or the Strickland standards that were required in Ground 13. The state habeas court merely made its determination strickly off of counsel's, unsupported by the record, affidavits, without giving any consideration to Strickland's deficient performance or prejudice standards, or the other standards that are now in Lafler v. Cooper, which apply to IAC cases when counsel's deficient performance caused defendant to reject a plea offer, and they ultimately suffered a more severe sentence because of the deficient performance. In order to use the unreasonable application prong of 2254(d)(1), a state court must identify

the correct governing legal principlals from the Supreme Courts' decision but unreasonably apply the principal to the facts of petitioner's case. **Brown** v.Payton, 544 **U**.S. 133, 141(2002). In answering Morrison's IAC claims, the state habeas court failed to "identify", much less even mention Strickland, Cooper, or any of its prongs, therefore, Morrison did not raise the "unreasonable application" prong of 2254(d)(1). Instead Morrison proved by the State Habeas court only relying on the counsel's affidavits, which stated disputed facts that were not in the record, (which actually contradicted the record), that the state habeas court's decision was "contrary to" Strickland and Cooper.

Since the state habeas court failed to identify the Strickland standard, Morrison should receive a de novo review in accordance with **Rompilla** v. **Beard**, 125 S.Ct. 2546, 2567(2005). See pg 11-29 of Brief, and Pg 53-57 of Reply for Morrison's arguments for Ground 1, and pg 153-158 of Brief and Pg 57-65 of Reply for Morrison's Grounds 12 and 13's argument.

Morrison further bolstered his proof that the state court's decision was unreasonable because the state court made an unreasonable determination of the facts that Morrison presented to the state court in the 11.07 proceedings. This argument, contrary to what Judge Counts asserts, does satisfy 2254(d)(2), to allow for federal habeas relief. (see the above citation for this argument as well). Also please see Appendix "1", which contains evidence that Morrison presented to the state habeas court, that prove with clear and convincing evidence that what Rogers said in his affidavit was untrue, and he did not counsel Morrison about the things that he claimed to have conseled him about in his post-hoc rationalizations that he swore to in the affidavit of David Rogers. A look to Exhibits "A"-"S", the motion to disqualify the affidavit of David Rogers, Ground 1, Pages 53 - 57 of Reply, and pg 155-158 of Brief prove that David Rogers' Affidavit was not true. His performance fell below an objectively reasonable standard, and had he properly counseled Morrison, the outcome of the trial would have been different, as is explained in Morrison's Grounds 1, and 13 IAC claims.

Morrison objects to what Judge Counts states on page 22-23 as well, regarding his arguments that state, "Morrison **cannot** show that the revocation counsel's performance was deficient and that it prejudiced him." Judge Counts lays out the respondent's arguments that Morrison proved in his reply were unreasonable, erroneous, and clearly without merit. Then he claims that Morrison's claims fail because Morrison did not carry his burden to show the state court's conclusion that he failed to make out an IAC claim was unreasonable or incorrect. Like Morrison said earlier, he proved that the state habeas court's decision was

"contrary to" Strickland and Cooper, and through the clear and convincing evidence he presented, the state court's decision to only rely on the untrue statements of Rogers, in his affidavit was an unreasonable determination of the facts in light of the evidence that Morrison did present to the state court, which proved the state court's decision was not only objectively unreasonable, but also incorrect by proof of the clear and convincing evidence. Morrison satisfied both the 2254 (d)(1) "contrary to" prong and 2254(d)(2). So Judge Counts stating that Morrison cannot show that revocation counsel's performance was deficient and that it prejudiced him, sounds to Morrison like JudgeCounts has made the AEDPA's "doubly differential" standard not only demanding to cvercome, but impossible.

Morrison will not reply to the claims that he has already abandoned that Judge Counts discussed on pg 23-25 of his Report and Recommendations.

On pages 25-27 Judge Counts discusses Morrison's Ground 1 IAC claim. And on pages 27-30 he discusses Morrison's Ground 13 IAC claim. On page 25, he strictly bases his recommendation to deny relief, regarding Morrison's Ground 1, on the state habeas court's findings that "both his plea counsel and revocation counsel apprised Morrison of Texas Law that his knowledge concerning whether the female victim was a minor was not relevant to his criminal conviction. He then states the law as the state court did when it stated exactly what the appellate courts determined when they violated the separation of powers doctrine, by suspending the CMS in 22.011, 6.02, 2.01, and 8.02 without constitutional authority, and violating Morrison's equal protection of the law rights, in essence also causing the state habeas court to also violate the separation of powers doctrine and violate Morrison's Fourteenth Amendment right to equal protection of the law, as proved in Grounds 2 and 5. Judge Counts then relys on what the state habeas court said about Morrison's plea counsel (Cantucuzene) and Morrison's revocation counsel (Rogers) both clearly and correctly informing him of the law applicable to the offense of Sexual Assault of a Child (22.011).

As stated in Morrison's Brief and Reply, Cantucuzene had nothing to do with Morrison's Ground 1 IAC claim, except that he was mentioned in the facts portion describing how Morrison came to accept the deferred adjudication plea offer in 2004. Morrison has never disputed the fact that Cantucuzene informed him that his lack of knowledge about the complainant's true age would not matter at trial. Cantucuzene did tell Morrison that, but the reason he gave was because Morrison's "ignorance of the law is no defense", which Morrison later found to be not true, because he was not really claiming Ignorance of the law, he was claiming mistake of fact, which is a defense. That information, plus what he

learned in regards to 22.011's plain language is the reasoning Morrison rejected the 7 year plea bargain in 2011, and sent the trial court a preconviction writ of habeas corpus letter asking for a new jury trial since Cantucuzene misinformed him about the true nature of the law concerning 22.011's culpable mental state elements, as the plain language in 22.011, 6.02, and 2.01 state. Therefore, Morrison contends that what Cantucuzene told him in 2004 at the pretrial hearing, should have no bearing on his decision to reject a plea offer in 2011, since what he told Morrison was being challenged by Morrison in the pro se pre-conviction writ of habeas corpus that he attempted to file with the trial court.

Regarding Morrison's revocation counsel clearly and correctly informing Morrison of the applicable laws that affected his decision to reject the 7 year plea offer, Judge Counts must not have looked at any of the evidence in Appendix "1" that Morrison presented to the state habeas court and to this Court, which clearly and convincingly proves that Rogers did not clearly and correctly counsel Morrison about the laws that were applicable to 22.011. Judge Counts, nor has any one else who has had the opportunity to review Morrison's IAC claims, addressed any of the evidence Morrison presented in Exhibits "A" - "S", or Morrisons motion to disqualify the affidavits of David Rogers, or the other things that Morrison mentioned in his Ground 1 and his Reply that prove Rogers did not inform Morrison about the applicable laws that affected his decision to reject the 7 year plea. In fact Judge Counts stated on page 26 that, "Morrison failed to establish how 'counsel did not properly counsel Morrison that his rational was an incorrect legal rule, or that his improperly filed pleadings would be futile', and demonstrate to a reasonable probability that he would have accepted the plea deal of 7 years. Morrison has asserted nothing more than speculative arguments that his revocation counsel provided IAC by failing to advise Morrison of Morrison's incorrect understanding of the law. Morrison has failed to provide the court with any evidence refuting the state habeas court's factual findings that Morrison was clearly and effectively counseled on the law regarding his offer by his trial counsel and his revocation counsel prior to rejecting the plea of seven years." This statement is completely untrue. Morrison understands congress' and the Supreme Court's reasoning for the AEDPA's deferential standard, but Judge Counts takes it to the extreme, by stating, "Morrison has failed to provide the Court with <u>any</u> evidence..." Morrison objects since he did establish with more than speculation, by providing this Court with ample evidence that proves Rogers did not properly counsel Morrison that his rationale was an incorrect legal rule, or that his improperly filed pleadings would be futile. And Morrison did demonstrate that there is a reasonable

probability that he would have accepted the plea of 7 years had counsel not been ineffective. A look to exhibits "E"-"S", the motion to disqualify affidavit of David Rogers, Ground 1 pg 11-29 in Brief, and pg 53-57 of Reply clearly and convincingly show proof that the state court's decision to deny relief, by solely relying on, the unsupported by the record, affidavit by David Rogers, and ignoring all the evidence Morrison presented was an unreasonable determination of the facts as stated in 2254(d)(2).

Morrison humbly pleads with this Court, that during its de novo review it does not discount and ignore the evidence he has presented in appendix "1" and in Ground 1, that proves Rogers did not properly counsel him, as the state habeas courts, Miss Vindell, and Judge Counts have done. And prays this Court takes it into consideration by realizing that the exhibits, reporters record, and other evidence Morrison provided, proves that Roger's post-hoc rationalizations in his affidavit are not true. On May 22, 2017 Morrison will have done 7 years in prison in which, had Rogers properly counseled him, Morrison would be discharging his prison sentence in less than two months. Morrison's brother, Jason, who did accept the 7 year plea, through proper advise from his counsel has been out of prison since January 31, 2017. Also Morrison respectfully asks this Court, when reviewing Morrison's case de novo, to objectively weigh these questions:

1. Is it fair that Morrison must do an additional 9 years in prison simply because he interpreted the law literally as it is written by the legislature, and then rejected the seven year plea due to lack of proper counsel, as shown in the above stated evidence?
2. Is it any less fair to imprison someone for 9 more years in prison, who challenge the law as interprited by an intermediate court of appeals, when it is clear from the plain language of the law the interpretation was erroneous and in clear contrast of what the legislature wrote into the statute?

On pages 26-27 Judge Counts does not seem phased by the fairness or unfairness of those questions, or the unfairness of the situation, and he wants Morrison to remain in prison for the next nine years, solely because, "Throughout the record it is abundantly clear that multiple persons, including revocation counsel, advised Morrison that the Texas law does not require the state to prove he knew the victim was a minor." He further makes the point that, " In numerous filings with the court, Morrison devoted 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." Judge Counts uses Morrison's resolve that he is right from the proof of his pleadings that were presented to this Court (which actually

prove he is right), as a way to say since Morrison has been sentenced to 16 years in prison, but nevertheless contends in his 2254 that he is innocent of 22.011. Then despite what he said in Ground 1's IAC claim about accepting the 7 year plea had counsel told him he was wrong, and since Morrison still contends that he is innocent, then there is no evidence he would have accepted responsibility and accepted the 7 year plea, had counsel properly informed him about the law.

Judge Counts' logic is in error because Morrison asserted several times in his Ground One that he would have still raised his claims on post-conviction writ of habeas corpus, had Rogers informed him about the applicable laws that affected his decision to reject a seven year plea, but he would have done so with a seven year prison sentence instead of the 16 he got.(see pg 20, 21 of Brief)

Morrison contends that it is surely unfair to imprison someone for 9 more years than they would have been sentenced to, merely because they were unlearned in the law, did not know how to properly raise their claims, and challenged what was told to them by counsel, at plea negotiations, about the elements of the offense that from what they learned by the literal plain language of the statute, was contradictory to what counsel told them, which was they did not fulfill all the elements of the crime, in order to plead guilty.

Like Morrison had previously said in his Brief, this is why the constitution does not allow for ambiguous and vague statutes in criminal law. Nor does it allow courts to change law by interpreting statutes through extratextual means, by going against what the legislature plainly wrote into the statute.

It is Morrison's hope that this Court will understand how he, or anyone else, could read 22.011, 6.02, 2.01, and 8.02 the way he has read them. And this Court will see the vagueness in the strict liability interpretation that the court of appeals has caused, by making 22.011 strict liability when there is absolutely no strict liability language in the statute. And then this Court graciously corrects his sentence to seven years through the relief asked for in Ground 1; the as-applied vaguness Ground 7 at pg 126-127 of Brief, or through Rule of lenity as explained on pages 24, 120-121, and 127 of Brief, and page 7,9 of the Petition. Morrison prays through the above considerations, and the fact that Morrison's brother, who did the same crime, is out of prison. That this Court orders his immediate release from prison.

On page 27 Judge Counts moves to Morrison's Ground 13 regarding revocation counsel's failure to investigate and preserve for further review Morrison's habeas corpus issues. On page 28, he states, while stating the standard for IAC claims dealing with failure to investigate IAC claims, "...The movant must do

more than merely allege a failure to investigate, he must state with specificity what the investigation would have divuldged and why it would have been likely to make any difference in trial or sentencing." (citations omitted). Morrison has shown in his Ground 1 and 12,13 a bounty of evidence to sate this test.

Morrison contends that when this Court does its de novo review on the issues of Morrison's Ground 12 and 13, and it reads Morrison's other Grounds as shown in Grounds 2-7, and 14, that this Court will understand that Morrison is not only "reiterat[ing] multiple times that he believes he is innocent because he was unaware of the victim's age when he engaged in sexual conduct with her," but he is raising numerous other constitutional violations that were created by the court of appeals when they encroached upon the legislature's duties by suspending their law as Morrison has stated. See Ground 2-7. All of these are the issues that Rogers failed to investigate and raise after Morrison pointed it out to him that the legislature did prescribe an intentionally or knowingly mental element into 22.011, but Cantucuzene, his trial counsel, for some reason told him it did not matter that he thought the girl in his case was an adult, he was still liable for the offense because his ignorance of the law was no defense.

If there is any merit in Morrison's constitutional claims, which he avers that there is plenty of merit, as he has proved with Supreme Court precident, therefore, what Judge Counts states throughout his opinion, that what Morrison thought about his innocence not being relevant to his criminal conviction or revocation of community supervision, since the Johnson v State, 967 S.W.2d 848, an indecency of a child case said what the law is, as it relates to 22.011, and despite the fact, that those are two different statutes as Morrison explained earlier, then Judge Counts like everyone else who has reviewed Morrison's case, is saying all the Supreme Court support and evidence Morrison has shown in all of his constitutional issues that shows 22.011 is unconstitutional, with the strict liability interpretation, amounts to nothing because of a couple of Court of Criminal Apppeals cases that have nothing to do with 22.011 or Morrison's same issues, i.e., Johnson v. State or Vasquez v. State, or a couple of court of appeals cases that may include 22.011, but their opinion is predicated from Vasquez, and they still do not address Morrison's constitutional issues that he has raised, which Morrison asserts that with a little bit of due diligence both Rogers and Cantucuzene, could have discovered had they investigated Morrison's case as the Sixth Amendment demands.

As Morrison has shown by citing to Judge Bairds' Dissent in Johnson v. State at 858, which Judge Counts says his dissent does not matter because it is a dissenting opinion and is not binding precident, but since Johnson was acquitted of 22.021,

a statute written like 22.011, Morrison asserts that the dissent that Judge Baird gave discussing 22.021, as a factual matter, is more binding with 22.011, than the majority's opinion and holdings dealing with indecency with a child.

Morrison has proven that not only the jurors in the Johnson case would reasonably acquit him, but also that other reasonable jurists i.e., Supreme Court Justices, would also interpret 22.011 the same way as they have shown they would in a lot of similarly written statutes that came in front of the Court on the exact same statutorial interpretation question of law that Morrison asked in his Ground 2. Therefore, since the Court of Criminal Appeals has not ever ruled on Morrison's statutorial construction analysis questions, or other constitutional issues raised relating to 22.011. Nor have they ever determined that the purview of the mens rea element in 22.011 does not modify "of a child", or determine that 6.02, 2.01, and 8.02 does not apply to 22.011, then the law in Texas about 22.011 being strict liability as Judge Darr said in her findings, Miss Vindell said in her findings, and now Judge Counts said in his findings is not clear. The only thing that is clear about the law regarding 22.011, is from the plain language that the Texas legistature gave in the statute, and in the plain language there is absolutely no strict liability language. Morrison did explain with sufficient specificity in his 2254 and 11.07 what a proper investigation would have divuldged and why it would have been likely to make a difference in Morrison's revocation hearing had Rogers properly investigated his issues and then properly raised them. (see pg 155-158 of Brief, and pg 57-65 of Reply). Therefore, contrary to what Judge Counts states about Morrison's belief that he is innocent because he was unaware of the victim's age when he engaged in sexual conduct with her, his belief is in all reality relevant to his criminal conviction and revocation of his community supervision. Because had the courts not have suspended the Texaslaws, as Morrison has proven they did, He would have been acquitted, or had Morrison been fairly warned about 22.011 being a strict liability offense, through the statute as required by the due process clause's vagueness doctrine, then Morrison would have accepted the 7-year plea agreement and been sentenced to 7 years instead of 16 years.

On page 29 Judge Counts first claims that Morrison **cannot** demonstrate IAC with baseless accusations that counsel did not research and pursue an unfounded argument. Morrison's allegations that counsel's failure to investigate and present relevant facts and law is ~~more~~ mere conjecture without any factual support. Morrison objects to that statement because like he has already shown, he has presented plenty of support that his Grounds are not mere conjecture. And they

are not an unfounded argument. Morrison cited to numerous Supreme Court holdings that supported each of his Grounds, which had Rogers properly investigated, and raised, then there is a reasonable probability Morrison would have received relief from the trial court or appellate courts. Morrison has also shown that what is baseless is the trial court's conclusory one sentence statement that denied relief on Grounds 2-7, and 14, i.e., "The above stated Ground is without merit." Also everyones' assertion of what the law is in Texas regarding 22.011 Secxual Assault of a Child's statute, is baseless because when they say what the law is regarding 22.011, they quote some court case that made a strict liability holding on a completely different statute, that is written nothing like 22.011, which contains a culpable mental state.

It is de novo review Morrison suspects Judge Junell will do his homework, as it is obvious he has done in other cases Morrison has read of his. For example the 257 page opinion in Young v. Stephens, 2014 U.S. Dist. LEXIS 16007, or his brother's 2255 case. And in doing the thorough research, this Court may raise the fact that the Court of Criminal Appeals did in fact rule on a 22.021 case in 2014. It is Fleming v. State, 441 S.W.3d 253 (Tex.Crim.App.2014).[1] If so, Morrison wants the Court to consider the fact that five out of the nine Justices in Fliming stated they would have ruled in Morrison's favor in 22.011 cases, as opposed to a 22.021 case. Three or four dissented, and Judge Alcala stated if the victim in Fliming would have been 14-16, she would have voted in favor of a mens rea. Also Fleming did not raise the same question presented that Morrison has raised. (see Morrison's objections to the trial court's findings/Fleming Brief). Also, they still have never specifically ruled on a 22.011 case.

Judge Counts then errors by stating, "Morrison does not raise factual support as to why he would have taken the plea offer instead of proceeding to trial if counsel had investigated or objected to Morrison hot knowing the age of the victim. Judge Counts then quotes a portion Morrison's Ground 13, where Morrison claimed and showed revocation counsel was deficient for not objecting and raising the issues before the trial court. Judge Counts, by going off Miss Vindell's reconstruction of Morrison's Grounds 1 and 13, inadvertantly meshed Morrison's Ground 1 and 13 together. Morrison never claimed that he would have taken the plea offer instead of going to trial if his counsel had investigated or objected to Morrison's not knowing the age of the victim. Morrison said in his Ground one that he would

1. The correct citing for Fleming is: 455 S.W.3d 577(Tex.Crim.App.2014)

have accepted the 7 year plea had Rogers properly informed him about the applicable laws that affected his decision to reject the 7 year plea, i.e., The court of appeals interpretation about strict liability, or that he would not get a new trial by going about it the way he was pursuing it. (see Ground 1).

Ground 13 was stating that Rogers was ineffective for not doing a proper investigation into the unconstitutional and questionable nature of the strict liabilty interpretation of 22.011. And for not raising Morrison's other easily discoverable issues before the trial court before he was convicted, so he would get a new trial or at least preserve the issues for appeal.

Ground 14 was meant to be an alternative argument for Grounds 2-7, and 14. Ground 13 was mainly used for showing cause and actual prejudice in case there were any issues with procedural bars being raised as to why Morrison did not object to his issues at trial, or raise them on direct appeal. It was also used as a last resort, if this Court found counsel to be deficient and Morrison was prejudiced, then the logical fix would be to remand back to the point of counsel's deficient performance, then Morrison could then raise these issues properly before the trial court, then had a reasonable probability of receiving relief through a new trial, or on appeal as stated earlier.

In the last paragraph on page 29, Judge Counts states Morrison has offered nothing more than speculation that the trial court or appelate court would have made a different dwcision concerning the revocation of community supervision had revocation counsel investigated these issues. Judge Counts errored in that statement. Morrison never said that the trial court or court of appeals **would-have** made a different decision concerning the revocation of his community supervision had Rogers investigated these issues. That kind of certainty is not the standard for the prejudice prong of Stricklands IAC claims. The prejudice prong is that the petitioner has to show that had counsel not been deficient, then there is a **reasonable probability**, that the outcome of the proceedings, be it any critical stage of trial or appeal, would have turned out different. All Morrison is saying is that he informed Rogers before going to the revocation hearing about his issues regarding 22.011 not being "strict liability" as he was told in 2004, because he had found out by reading the statute and other statutes that he was not guility of all the elements of the crime as the mens rea requirement demanded in 22.011, supported by 6.02, and 2.01, and 8.02. And that he wanted to petition the court for a new trial so he could prove he did not intentionally or knowingly have sex with a child, since he reasonably believed the girl in his case was in fact an adult. He talked to Rogers and asked him

to help him get a new trial or an evidentiary hearing on the matter before he was convicted of the charge at the revocation hearing. Morrison is saying, had Rogers through the exercise of due diligence, investigated what Morrison was saying, he could have very easily, as Morrison had done, since he has been in T.D.C.J., read 5 or 6 cases, and determined that the court of appeals errored when they made 22.011 strict liability, by basing the strict liability interpretation from Vasquez v. State, supra, which was a 21.09 case that was actually superceeded by 22.011. A little more research would have discovered not only that 21.09 did not have a mens rea requirement like 21.011 does, but the courts cannot suspend the legislature's written law like they did. Rogers then could have raised the equal protection of law claim and separation of powers claim as Morrison did in Ground 2 and 5. And he could have very easily discovered through a little further research on basic constitutional law that by diong what the courts did made the statute unconstitutionally vague and overbroad. Basically, had Rogers or Cantucuzene bothered to open up the books to investigate and research Morrison's claim, and discovered the other claims as he did, and because of all the Supreme Court, Fifth Circuit, and Court of Criminal Appeals holdings that Morrison has shown in his Grounds 2,3,4,5,6,7 and 14 that do have merit, then had Rogers and Cantucuzene been reasonably deligent in the investigation and raised these constitutional issues to the trial court, there is a reasonable probability, because of all the Supreme Court support that was available, that Morrison would have received relief with a new jury trial, or been given a less severe sentence than 16 years as Morrison explained earlier. If not, then there is a reasonable probability he would have received relief on appeal. As Morrison has shown, just because an intermediate Texas court of appeals has said 22.011 is strict liability, does not mean that Morrison's Grounds 2,3,4,5,6,7 and 14 are unfounded arguments or that they lack merit.

> "The elevation of defense counsel's performance under the first prong of Strickland is an objective one focusing on the reasonableness of said counsel's conduct in view of the information in the possession of defense counsel and the information which through the exercise of due diligence, defense counsel could and should have had at their disposal." Young v. Stephens, U.S. Dist. LEXIS 16007 at pg 115.

Morrison has shown specific facts, and evidence that his counsel, David Rogers, and Ian Cantucuzene were aware of, or through the exercise of due diligence could have learned the specific facts about the law that Morrison has raised in his Grounds 2-7, and 14, and had they properly presented the easily obtainable issues, there is a reasonable probability the outcome of the revo-

cation hearing and plea hearing would have been different.

Contrary to what Judge Counts claims on page 30, Morrison's Grounds were more than just his innocence resting on his ignorance of the victim's minority. See Grounds 2,3,4,5,6, and 7 where Morrison raised constitutional questions of law that went deeper than just his innocence resting on his ignorance of the victim's minority. Morrison did prove the state court's decision regarding Ground 13 was contrary to Strickland, and an unreasonable determination of the facts. see pg 156-158 of Brief.

Morrison discusses his Ground 12 issues here because he is confident that this Court will rule on it since "The Supreme Court's opinion in Trevino v. Thaler, 133 S.CT. at 1912 and Martinez v. Ryan, 132 S.Ct. at 1309, compel this Court to examine the merits of even procedurally defaulted IAC claims, when as here, there are allegations by a federal habeas petitioner that his state counsel rendered ineffective assistance during a prior state habeas corpus proceeding and thereby caused the procedural default of a claim of ineffective assistance by the petitioner's state trial counsel. In Martinez [The Supreme Court] held that 'a procedural default will not bar a federal habeas court from hearing a substantial claim of IAC at trial if, in the [state's] initial review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Young v. Stephens, supra at 129.

Morrison's first opportunity to raise the trial counsel's ineffectiveness was when he discovered the new evidence that showed trial counsel was ineffective. At that time his revocation counsel would not entertain or help Morrison raise the claim because he was not assigned to do any 11.07 writs. Nor would the trial judge appoint Mirrison counsel to assist him in raising the trial counsel IAC claim that he tried to file pro se, but was not allowed to because he had counsel. Considering that, Morrison hopes this Court will also rule on the merits of his Ground 12 IAC claim.

APPELLATE COUNSEL IAC

Regarding Judge Counts' argument concerning Morrison's appellate counsel on page 30-33 of his report, Morrison's previous argument about counsel's lack of imvestigation and that his, as already explained, meritable issues do encompass more constitutional issues than his actual innocence that is based on his belief the minor was an adult, should also apply to appellate counsel, since he was the same counsel that did the revocation of probation. And was same counsel that Morrison had raised the issues to.

Morrison would like to point to several cases where a person on community

supervision filed for pre-conviction writ of habeas corpus and appelled the decision of the trial court to the Texas court of appeals. See Ex Parte Meltzer, 180 S.W.3d 252(Tex.Crim.App.2005); Solomon v. State, 39 S.W.3d 704(Tex.Crim.App. 2001); and Ex Parte McCullough, 996 S.W.2d 529 (Tex.Crim.App.1998). Morrison shows these examples, as a way of showing how revocation counsel could have and should have appealed the denial of Morrison's motion for continuance because he was harmed by the trial court's abuse of discretion by not being able to exercise his right to writ of habeas corpus. Morrison objects to Judge Counts' recommendation to deny his Ground 11 IAC claim of appellate counsel.

On page 31 Judge Counts states the state habeas court found the affidavit of Morrison's appellate counsel more compelling than Morrison's argument of IAC regarding appellate counsel. As Morrison has shown with the other IAC claims, only making its decision to deny an IAC claim by reviewing an affidavit that is unsupported by the record is not the standard the state habeas court is to use under the existing federal law as determined in Strickland. Since the state courts decision to deny relief was contrary to Strickland by not raising the deficient performance or prejudice standards, Morrison requests a de novo review of this claim.

Morrison has shown with a mountain of evidence that proves his issues do have merit, as explained in Grounds 2-7, and previously stated in this motion when discussing revocation counsel and plea counsel not properly investigating or raising these issues, that had appellate counsel took the time to investigate his claims, then had appellate counsel properly appealed the trial courts abuse of discretion for denying Morrison's motion for continuance and writ of habeas corpus as shown in Ground 8, then there is a reasonable probability, by the evidence shown in Ground 8, and Grounds 2-7, and 14, that the appellate court would have remanded the case back to the trial court with instructions to allow Morrison the opportunity to present his claims before that court. Then because of the strong evidence that Morrison has presented in Grounds 2-7, and 14, there is a reasonable prbability that the trial court would have granted relief. If not, the issue would have been appealable to the court of appeals. And there is a reasonable probability they would have granted relief since Morrison has proved his Grounds have merit, are supported by Supreme Court precident, or at least, they would have had to rule on the merits of Morrison's Grounds, 2-7., and 14 with more than a conclusory denial on the merits. That in itself is a reasonable probability that had appellate counsel not been deficient, the results would be different. At least Morrison would have had someone rule on the merits with more

than a one sentence conclusory denial, or claiming the Grounds are time barred, So they dont have to face the tough questions of law that Morrison has raised.

Morrison has shown that the state habeas court's credibility finding regarding Rogers was incorrect because his research he claims he did regarding the law being that 22.011 is strict liability and the state did not have to prove Morrison's knowledge of the victim's age, in all actuality, as discussed earlier, has not been ruled on by the states highest court concerning 22.011. What Rogers claimed is from other statutes like indecency with a child 21.11, or rape of a child 21.09. Had Rogers raised the issues specifically to 22.011 as Morrison has raised them regarding 22.011's plain language, then there is a reasonable probability the outcome of the appeal would have been different. i.e., Morrison would have gotten relief, or the court of appeals would have addressed his issues with more than a conclusory denial of the merits as the state habeas court has done.

On page 33 of Judge Counts' report, Judge Counts recommends that a certificate of appealability be denied. Morrison objects to the denial of a certificate of appealability since he has made a substantial showing that he has suffered a denial of a constitutional right on the issues before this Court, as shown in Grounds 1,2,3,4,5,6,7,8,11,12,13 and 14 of the petition for writ of habeas corpus, and its Brief in support, which is supported by the Supreme Court's precident he has provided. Some of those Grounds also show a substantial future violation of his rights, and the denial of constitutional rights of others not before the court. These issues are also debatable among jurists of reason.

Morrison has shown that Judge Counts' recommendation that Grounds 2-7, and 12 be barred for review by the alleged 1-year AEDPA time limitation default is debateable among jurists of reason because those jurists would find it debatable whether Morrison's petition states a valid claim that a denial of a constitutional right has occured, and those jurists would also find it debatable whether the denial of the procedural ruling is correct. morrison asserts that his arguments in his Reply at pg 4-38, regarding him not being subject to the 1-year limit-ations period 30 days after his deferred adjudication community supervision order are at least debatable among jurists of reason, or they would find it debatable that the issues presented are adequate to deserve encouragement to proceed further, since Morrison has made several cogent arguments that makes the Fifth Circuit's decision in Tharp v. Thaler, supra, questionable. Morrison also believes his actual innocence and equitable tolling arguments laid out in his Reply are also debatable among jurists of reason and are adequate to deserve encouragement to proceed further. Therefore, Morrison humbly asks this Court to

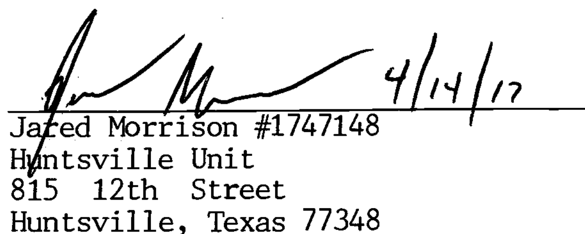
allow a certificate of appealability if it cannot, for some reason, grant his writ of habeas corpus, and rule in his favor.

Morrison is confident, after reviewing several of this Court's opinions, especially the 257 page opinion in Young v. Stephens, 2014 U.S. Dist. LEXIS 16007. That this Court will be very diligent in reviewing all of Morrison's claims and arguments, including the Exhibits and other evidence he has presented. And this Court will give an opinion, whether it be in Morrison's favor or not, that is well researched, prepared, and thorough. All Morrison can ask for is a Jugde to look at all of his arguments objectively without any partiality, and research the issues, and give an opinion that is in accordance with the law. morrison is confident this Court can do that.

"Morrison apologizes to this Court for the semi-sloppyness of this hand-written draft. Morrison finished his first draft on Sunday, April 2, 2017, and on Monday Morning they locked down the Huntsville Unit. Morrison has until Tuesday, April 4, 2017 to file these objections by mailing them to this Court. He requested an extension of time on March 23 and has yet to hear anything back if it has been granted or denied. Out of an abundance of caution Morrison has been working diligently on doing this second draft so it would be cleaner than the first draft and so he can make a carbon copy to serve the assistant Attorney General with. If Morrison gets word that this Court grants the extension of time, and if he has enough time when he comes off lockdown, he will try to do a typed version of this and send it to the Court." This is the typed version meant to supplement the hand written version.

PRAYER FOR RELIEF

ALL THINGS CONSIDERED, Morrison prays that this Honorable Court will not adopt the Magistrate Judges' Report and Recommendation, and after a de novo review of Morrison's 2254, This Court will objectively rule on the merits of his constitutional issues, grant this writ of habeas corpus, and order the immediate release from prison for Morrison who is unconstitutionally imprisoned at the Huntsville Unit in Huntsville, Texas.

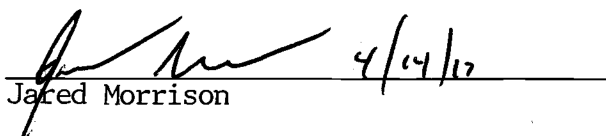


Jared Morrison #1747148
Huntsville Unit
815 12th Street
Huntsville, Texas 77348

PRISONER'S UNSWORN DECLARATION

I, Jared Morrison, do declare under the penalty of perjury that the aforementioned statements in this objections to the U.S. Magistrate Judges' Report and Recommendations are all true and correct.

Executed this 14 day April ,2017.



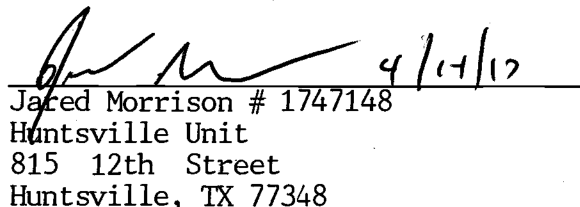
Jared Morrison

CERTIFICATE OF SERVICE

Petitioner, Jared Morrison, does hereby certify that a true and correct copy of this objections to the U.S. Magistrate Judge's Report and Recommendation is being sent to the respondent's attorney, Gwendolyn S. Vindell, by giving to a proper prison official to place in the prison mailbox recepticle with postage prepaid to the following addresses on this 14 day April ,2017. The original is being sent to the United States District Court for the Western District of Texas, Midland Odessa Division on the same day.

Clerk U.S. District Court
Western District of Texas
United States Courthouse
200 E Wall Street, Rm,222
Midland, TX 79701———Original

Gwendolyn S. Vindell
Assistant Attorney General
P.O. Box 12548
Austin, TX 78711-2548 ——— Copy



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