

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

JARED MORRISON (PETITIONER)	§	CASE NUMBER: MO-15-CV-069
V.	§	STATE WRIT NUMBER: WR-83,021-01
WILLIAM STEPHENS (RESPONDENT)	§	TRIAL COURT NUMBER: CR29320-A

PETITIONER'S BRIEF IN SUPPORT OF TITLE 28 USC SECTION 2254

To the Honorable Judge of this court:

Comes now Jared Morrison (**"Morrison"**), petitioner pro se, and files this Petitioner's Brief in Support of Title 28 USC Section 2254, and in support thereof shows the following:

I. STATEMENTS OF THE CASE

A. Nature of the case:

This is a Title 28 USC § 2254 Petition for Writ of Habeas Corpus. Morrison was charged with the crime of sexual assault of a child, Texas Penal Code 22.011(a)(2)(A) (Statutory Rape) (**"22.011"** hereinafter), after an incident on June 11, 2003, where Morrison's cousin Tyler White (**"White"**) brought a 15 year old female M.M. to Morrison and his brother Jason Morrison's (**"Jason"**) house to party. Both M.M. and White told the Morrisons she was 21 years old, and subsequently Morrison, Jason, and White engaged in consensual-in-fact sexual activities with M.M. Later that night, after she got home, M.M. wrote about the events in her diary, which her mother read about four months later, then informed the police. Both Morrison and Jason were arrested, White was not charged because he was 18 years and fell into the three year age difference defense the statute offers under 22.011(E)(2). (See Statement of Facts Pp 1-2 which was filed with Petition on May 19, 2015).

B. Course of the Proceedings:

During the latter part of November 2003, both Morrisons were called separately to the police department, to talk to a detective where they admitted to the offense, by explaining their actions to the detective with the initial understanding that they were being investigated for a regular sexual assault. Morrison admitted to the events of the offense, trying to clear his name, because he did not know until after the admission to the offense that M.M. was a child. He told the detective what happened thinking the sexual activities were consensual and not a sexual assault because he thought, until after he was informed of her minority, that M.M.

was 21 years. Morrison and Jason were arrested on December 28, 2003 for the 22.011 violation.

They both ended up pleading guilty to the 22.011 violation on May 6, 2004, after their attornies told them that their ignorance of her not being a child would not matter because "Ignorance of the law is no defense". They were sentenced to nine years deferred adjudication probation. Morrison was charged with several probation violations in April 2010. During the time of his incarceration at the Midland County Jail, Morrison went to the law library and read the Texas Penal Code, regarding the statutes that affected his his culpable mental state ("CMS") about his lack of mens rea in commiting the offense in 2003. Because of how he interpreted the plain language of the prescribed CMS in 22.011, in conjunction with Penal Codes 2.01, 6.02, and 8.02, Morrison was under the impression that the CMS prescribed in 22.011 modified all elements of the statute that followed the prescribed intentionally or knowingly requirement, including it modifying "of a child", the only element that makes 22.011 a crime.

Morrison then read a Court of Criminal Appeals case that supported his logic: It was **Johnson v. State 967 S.W.2d 848 (Tex. Crim 1998)** At 858, (Where a jury of ordinary intelligence also interpreted the similarly written statute 22.021 the same way he interpreted 22.011, and they acquitted Johnson based off of the intentionally or knowingly CMS). Morriosn used what he learned from Johnson and the plain language of 22.011, 2.01, 6.02, and 8.02 and he petitioned the trial court for a new jury trial so he could also be acquitted before he was convicted at the Motion to Revoke Probation hearing. Morrison therefore rejected a state plea offer of seven years prison, because he thought the trial court would also interpret the statutes literaaly, by their plain language, and grant him a new jury trial, where he would be acquitted of the original charge based off of the rationale he garnered from how the legislature wrote the statutes, supported by Johnson. The court did not grant him relief, and it denied his motion for continuance which his attorny filed to allow him to have a writ of habeas corpus hearing prior to the revocation hearing. His probation violations were found to be true, and he was sentenced to 16 years prison. (See Statements of Facts Pp.2-13).

After an unsuccessful appeal done by trial counsel, and unsuccessful petition for Discretionalry Review, done pro se, Morrison filed a State-Application for Writ of Habeas Corpus 11.07 ("**11.07**") with the trial court. It was filed on December 30, 2014. It contained 14 grounds most of which stemmed from his interpretation of the plain language of the statutes: 2.01, 6.02, 8.02, and 22.011, and how the Texas Courts of Appeals' subjective strict liability interpretation has made 22.011 unconstitutional on its face ans as-applied to MOrrison's

situation, by violating the Equal Protection of Laws, and causing the statute to be unconstitutionally vague and overbroad. Also the Texas Courts of Appeals violated the Separation of Powers Doctrine by going against the plain language and legislative intent to suspend the aforementioned statutes without constitutional authority. Morrison also raised several Ineffective Assistance of Counsel ("IAC"), claims, as well as some trial court abuse of discretion claims, and an actual innocence claim.

The Texas Court of Criminal Appeals denied without written order, based on the trial court's findings, Morrison's 11.07 without a hearing, on April 29, 2015. Morrison presented to this Honorable Court the same issues on May 19, 2015 and now presents this brief to support the 2254 petition. Due to the fact that the 2254 petition only allows a total of 20 pages for the petition, and because of the numerous grounds Morrison has, Morrison had to eliminate some of the facts supporting the ground in several of the grounds in the 2254 petition. Morrison will present those facts supporting the grounds in this brief. Those supporting facts that Morrison is including in this brief were asserted in the 11.07 proceedings, they are not asserting a new ground for relief, nor do they differ in both time and type from those the original pleading set forth, and Morrison hopes and prays that the court does not construe the additional supporting facts as time barred.

II. EXHAUSTION/LIMITATION/SUCCESSIVE

Morrison has exhausted all grounds presented in this petition when he presented these same grounds to the Texas Court of Criminal Appeals during his Application for Writ of Habeas Corpus 11.07 proceeding. This petition is not time barred under 28 USC § 2244(d), nor is it subject to a succesive bar under 2244(b).

III. SUMMARY OF GROUNDS RAISED IN STATE 11.07 AND FEDERAL 2254

The unconstitutional claims surrounding this Petition for Writ of Habeas Corpus are mainly predicated upon how the plain language of several Texas statutes in the Texas Penal Code (22.011, 2.01, 6.02, and 8.02) have been disregarded, suspended, and given no effect by the Texas courts, and how the Texas Courts of Appeals' misinterpretation and suspension of those laws have violated Morrison's and others' constitutional rights to due process and Equal Protection of the Laws mandated by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and how those constitutional violations have prejudiced Morrison, and will continue to prejudice Morrison and the others whom these laws pertain.

Since Morrison reasonably believed that the female in his offense was 21 years, at the time of the offense, he did not intentionally or knowingly cause the penetration of the sexual organ "of a child" by any means. 22.011 on its face

requires an intentionally or knowingly CMS in the heading of the statute, and no where, in any statute, is it written to dispense with any mental element, pursuant to 6.02(b), including the mental element of the sexual organ being one "of a child". Despite the plain language and legislative intent, the interpretation by the Texas courts have negated the prescribed CMS requirement from applying to "of a child". Because there are no strict liability indicators written into the face of the statute, or anywhere else by the Texas Legislature, the Courts of Appeals' strict interpretation causes 22.011 to be unconstitutionally vague and ambiguous because people of ordinary intelligence, Morrison included, have not been properly notified nor given fair notice about the strict liability interpretation of the provision.

Morrison has proven by citing Johnson v. State 967 S.W.2d Supra at 858, and has shown by his own personal experiance with the statutes, and the prejudice the ambiguity caused him by relying on the Johnson jury that 22.011 also does not give definite guidelines to policemen, judges, or juries, which has and will continue to cause arbitrary and discriminatory enforcement which is contrary to clearly established federal law as determined by The Supreme Court. (See Ground seven).

22.011 was enacted by the 68th legislature in 1983. The Courts of Appeals have relied on pre-1983 case law, mostly dictum, to justify 22.011 as being strict liability, in spite of the numerous mens rea and statutory construction cases held by the Supreme Court that said statutes that are written like 22.011 are not to be construed as strict liability crimes. In doing so the Texas courts have negated the required CMS that was prescribed in the statute by the Texas legislators, and suspended 6.02, 8.02, and 2.01, changing the law that was promulgated by the legislature, thus violating the Separation of Powers Doctrine, and the Equal Protection of the Laws as set out by the Supreme Court precedent regarding mens rea, statutory construction analysis, and strict liability issues. Because of this constitutional violation, Morrison was denied the right of his mens rea being proved as the plain language of 22.011, 6.02, and 2.01 demand. He was also denied his right to a mistake of fact defense as 8.02 demands. (See Grounds Two ans Five).

Because 22.011 has been interpreted to be absolute strict liability, and even a fake identy card presented to a defendant that showed the complainant was an adult, would not save a defendant from conviction or prison sentence, Morrison and others' fundamental, First Amendment protected right to copulate and freedom of intimate association with the 17 to 25 year age group (who are a lot of times indistinguishable from the 14 to 16 year age group) have been and will continue to be chilled in fear that they will go to prison for seemingly engaging in this constitutionally protected conduct with an adult who turned out to be a promiscuous and precocious 14 to 16 year old minor. (See Ground Six).

22.011 also violates the Equal Protection Clause of the Fourteenth Amendment, by subjecting adults who engage in the prohibited acts described in the provision, who are not married to the 14 to 16 year old child to 20 years in prison, and a lifetime of registering as a sex offender, but allowing the same exact acts to an adult who wishes to marry the 14 to 16 year old child. This disparity of treatment is not wholly related to the legitimate or compelling interests of the state in creating 22.011, and it is underinclusive. (See Ground Three).

Morrison's Equal Protection Rights were violated because he was sentenced to 16 years prison for unwittingly doing the prohibited acts, when his cousin, White, who brought the girl to Morrison's house, and told him she was 21 years, did the same exact acts to the same minor, at the same time, but White was not charged with the offense because he was 18 years and fell into the three year defense the statute offers. In this particular situation, the disparity of treatment between Morrison and White does not wholly relate to the objectives of the statute or the three year defense. (See Ground Four).

The plain language of 22.011, 2.01, 6.02, and 8.02 discussed above caused Morrison to reject a plea offer of seven years prison, resulting in him being sentenced to 16 years prison instead. Morrison's counsel,David Rogers, ("Rogers") failed to properly counsel Morrison about the relevant laws that affected his decision to reject the seven year state plea offer. Rogers also failed to alert him to the fact that his attempt to seek relief would be futile the way he attempted it. He failed to counsel Morrison on the proper way to file a pre-conviction writ of habeas corpus. Morrison was basically left in the dark, without any guiding hand of counsel, in hopes that he would get an evidentiary hearing, and new jury trial, then acquitted, based off of the rationale he developed after reading the plain language of the aforementioned statutes. But to his detriment, he was not, and he went into the probation revocation hearing, knowing the allegations to be true, and he was sentenced to 16 years instead of seven because the trial judge denied his Motion for Continuance, and found his probation violation allegations to be true. If Rogers would have properly counseled Morrison, Morrison would have accepted the seven year plea offer, or he would have properly filed the pre-conviction writ of habeas corpus, where he would have presented the issues he now presents, and there is a reasonable probability he would have been given relief, or sentenced to a less harsh sentence than 16 years, and his issues would have been properly presereved for further review. (See Ground One).

Morrison's constitutional right to Writ of Habeas Corpus in the trial court was suspended, when the trial court denied his Motion for Continuance, which if granted

would have allowed him the opportunity to assert his Writ of Habeas Corpus issues. But because the pro se letter he wrote to the court was not construed as a writ because he had counsel, and he could not file a pro se writ while having counsel, and his court appointed counsel said he would not file one because it was out of his scope of counsel. Morrison had no way to writ of habeas corpus because he was not allowed to do one pro se while having counsel, and his counsel would not do one either. Therefore, there was no way to assert his writ of habeas corpus issues at the trial court level, which in essance was the trial court suspending his right to Writ of Habeas Corpus. This state created impediment prevented Morrison from properly preserving his writ issues at the trial court level, which resulted in him being able to present them to the appellate court as well.(See Ground Eight).

Morrison's constitutional right to address the court on his own behalf was also violated by the trial court and Rogers when they denied him the opportunity to speak. Morrison wanted to preserve the issues on record that he now raises, and to also request a separate punishment hearing so he could have the opportunity to call several character witnesses that would have offered testimony, and there is a reasonable probability that that testimony would have mitigated Morrison's sentence and he would have been sentenced to a lesser sentence than 16 years. But he was not allowed to speak and that did not happen.

Rogers was also ineffective for not requesting a separate punishment hearing to allow Morrison the opportunity to call character witnesses that could have mitigated his sentence. If the judge would have heard mitigating testimony from character witnesses, there is a reasonable probability she would have sentenced Morrison to less than 16 years. If he was allowed to speak his issues would have been preserved for further review.(See Grounds Nine and Ten).

Rogers was ineffective for not appealing the trial court's err of violating Morrison's rights, when the trial court erroneously denied Motion for Continuance. If counsel would have appealed this issue, these issues would have been in front of the Texas Court of Appeals, and properly preserved for collateral attack, and there is a reasonable probability (by reasonings stated in Ground Eight) that Morrison would have been given relief by the Texas Court of Appeals, or other reasons they saw necessary. (See Ground Eleven).

Both of Morrison's counsels: Rogers in 2011, and Ian Cantacuzene ("Cantacuzene") in 2004, wereineffective because they failed to properly research, investigate, object, and preserve for further review the relevant laws that affected Morrison's case. Despite the plain language of the statutes, and clearly established federallaw as

determined by the Supreme Court regarding proper statutory construction analysis, strict liability, and mens rea issues, they failed to recognize that the strict liability interpretation was predicated from pre-1983/22.011 law and was unconstitutional as Morrison has proved in Grounds 2-7. If they would have properly investigated and researched these relevant laws, as Morrison has done, then those issues now presented would have been properly objected to, raised, and preserved for direct appeal and collateral attack, and there is a reasonable probability that Morrison would have received relief from the trial court or Court of Appeals and gone to a jury trial and been acquitted. Morrison was obstructed from preserving the issues he now raises all throughout his case, which is a violation of due process and an exception to the general procedural bar of not properly preserving issues for federal habeas review. (See Grounds Twelve and Thirteen).

Because the courts of Texas have unconstitutionally suspended the laws that affect 22.011's CMS and Mens rea requirement, and they have violated Morrison's right to the Equal Protection of the Laws as proved in Ground Two and Five, Morrison was left without Due Process of Law and denied amistake of age/fact defense, and denied of his right that the prosecutor has to prove every element of the crime he was charged, as the plain language and legislative intent of 22.011, 2.01, 6.02, and 8.02 mandate. Therefore, Morrison is actually innocent of 22.011. If the courts would not have violated the Separation of Powers Doctrine, nor violated Morrison's rights under Equal Protection of the Laws, the prosecutor would not have been able to prove Morrison **intentionally** or **knowingly** caused the penetration of the sexual organ of a **child** by any means, and he would have been acquitted at a jury trial. (See Ground Fourteen).

IV. JURISDICTION

Morrison invokes the jurisdiction of this court pursuant to Article 3 of the United States Constitution, and Title 28 USC Section 2254, and the laws applicable thereto.

V. PROCEDURAL BAR EXCEPTIONS

A. Judicial Bar Standard/Exception

It is well settled that section 2254 Habeas' are not available to test the legality of matters that should have been raised on Direct Appeal. Consequently, a petitioner may not assert issues which were not raised on appeal, unless he establishes cause for his default and the prejudice resulting therefrom, or can show that a fundamental miscarriage of justice will occur if his claim is not addressed. The procedural default rules developed in the context of habeas corpus

cases apply with equal force in section 2254 cases. See **U.S. v. Frady 456 U.S. 152, 166-69 (1982).**

The "Cause" standard requires a defendant to show that some objective factor external to the defense impeded his ability to raise the issue on direct appeal. See **Murray v. Carrier 477 U.S. 478, 488 (1986).** Examples of such external factors include the discovery of new evidence, or a change in the law. Id. IAC is another example of an external factor that may constitute "cause" excusing a procedural default. See **Anderson v. Collins 18 F.3d 1208, 1215 (5th Cir. 1994).**

As for prejudice, a defendant must show "actual prejudice" resulting from errors which he complains. see **Frady** at 168. The fundamental miscarraige of justice exception requires that a defendant demonstrate that he is actually innocent of the crime of which he was convicted. **McLesky v. Zant 499 U.S. 467, 494 (1991).**

Under proceedings on a Motion to Vacate Pursuant to § 2254, a petitioner may not raise constitutional errors for the first time on collateral review without establishing both "cause" for procedural default and "actual prejudice" resulting from such error. **Cook v. Lynaugh 821 F.2d 1072, 1078-79 (5th Cir. 1987),** which also states that IAC excuses default.

Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a habeas petitioner has "cause" for his failure to raise the claim in accordance with applicable state procedures. See **Reed v. Ross 468 U.S. 1, 16 (1984).**

Here in the instant case Morrison's constitutional issues he raises are sufficiently novel at the time of trial and appeal, to excuse counsel's failure to raise the issues at that time because the state of law at the time of trial and appeal did not offer a "reasonable basis" upon which to challenge these issues. Compare to **Reed v. Ross Id.**

Morrison has shown in grounds 8-13 that he has been obstructed at every avenue, through IAC and the trial judges abuse of discretion, from properly preserving his issues for review (cause), he has also shown the prejudice it caused (actual prejudice). See Grounds 8-13.

Morrison has also shown that he is excused from procedural bar because he is actually innocent of the 22.011 violation, and because if there is not an exception to procedural default there will be a fundamental miscarriage of justice because of the constitutional violations discussed in grounds Two and Five. (fundamental miscarraige of justice exception). (See Ground Fourteen).

The facial and as-applied constitutional violations challenged in Grounds 2-7 are also novel arguments that reasonably have merit under the Supreme Court precident and logic, therefore these issues should pass this bar for this reason as well.

B. AEDPA Bar Standard

Review of this Petition for Writ of Habeas Corpus is governed by the AEDPA. See **Penry v. Johnson 121 S.Ct 1910, 1918 (2001).** Under the AEDPA standards of review, this court cannot grant federal habeas corpus relief in this cause in connection with any claim that was adjudicated on the merits in a state court proceeding, unless the adjudication of the claims either:

1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States, or
2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. See **Williams v. Taylor 120 S.Ct 1495, 1519 (2000):** 28 USC § 2254(d)(1),(2).

The Supreme Court has concluded that the "contrary to" and "unreasonable application" clauses of 2254(d)(1) have independant meanings. **Bell v. Cone 122 S.Ct 1843, 1850 (2002).** Under the contrary to clause, a federal court may grant relief if:

1) The state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or
2) Where a state court decides a case differently than the Supreme Court, on a set of materially indistinguishable facts. **Mitchell v. Esparza 124 S.Ct 7, 10 (2003):**

> "A state Court's decision is contrary to our clearly established law if it applies a rule that contradicts the governing law set forth in our cases or it confronts a set of facts that are materially indistinquishable from a decision of this court and neverhteless arrives at a result different from our precedents."

Under the "unreasonable application" clause a federal habeas court may grant relief if the state court identifies the correct governing legal principal from the Supreme Court decision, but unreasonably applies that principal to the facts of the petitioner's case. **Wiggins v. Smith 123 S.Ct 2527, 2534-35 (2003).** The Federal Court making the unreasonable application inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable" Id at 2335. It is the habeas applicant's burden to show that the state court applied a Supreme Court case in an objectively unreasonable manner. **Price v. Vincent 123 S.Ct 1848, 1853 (2003).**

Because the trial court in its findings, did not even attempt to address any of the Supreme Court's holdings to deny Morrison's claims in his 11.07, Morrison will not address the "unreasonable application" clause, except in Ground Seven where they misapplied how unconstitutionally vague statutes are to be tested.

Legal principals are "clearly established" for purposes of AEDPA review when the holdings, as opposed to the dicta, of Supreme Court decisions as of the time

of the relevant state court decision establishes those principals. **Yarborough v. Alvardo 124 S.Ct 2140, 2147 (2004).**

Morrison will show that the Texas Courts of Appeals has based their strict liability interpretation on dicta, and allowed a few dicta comments to overrule all of the Supreme Courts holdings that clearly say statutes like 22.011 cannot be strict liability. (See Grounds Two and Five).

The AEDPA also significantly restricts the scope of federal habeas review of state court factual findings. A petitioner challenging a state court's factual findings must establish by clear and convincing evidence that the state court's findings are erroneous. **Schriro at 127 S.Ct 1939-40.** However, the deference to which the state court factual findings are entitled under the AEDPA does not imply an abandoment or abdication of federal judicial review. **Miller-El v. Dretke 125 S.Ct 2317, 2325 (2005).** The standard is demanding but not insatiable. Because the AEDPA requires this federal habeas court to presume the correctness of the state court's findings, unless the applicant rebuts this presumption with clear and convincing evidence See **Schriro at Id,** Morrison will argue his grounds, then he will summarize the clearly established federal law as determined by the Supreme Court that supports his argument, then he will show with clear and convincing evidence how the state court's findings are erroneous, and satisfy 2254(d)(1) and (2). Morrison has also shown the Court of Criminal Appeals how the trial court's findings were erroneous. (See Motion to object to trial court's findings of fact and conclusion of law/Fleming v. State supplimental brief).

Reviewing a state court's rejection on the merits of a claim for relief pursuant to AEDPA must focus exclusively on the propriety of the decision and not evaluate the quality of the state court's written decision, it is the ultimate conclusion and result that must be objectively unreasonable. **Anderson v. Johnson 378 F.3d 382, 390 (5th Cir. 2003).**

In assessing this Writ of Habeas Corpus, Morrison respectfully asks that this judicious court construe the Petition for Writ of Habeas Corpus 2254, and this brief that supports the petition, liberally. See **Haines v. Kerner 404 U.S. 519 (1972); Hernandez v. Thaler 630 F.3d 420, 426 (5th Cir):**

> "Pro se Habeas petitions are construed liberally and not held to the same stringent and rigorous standards as are pleadings filed by lawyers."

Morrison has cited to several exhibits in this brief. Those exhibits are included in Appendix "1" (Exhibits "A"-"S"). Above some of the citations is a color that is handwritten, that color coordinates to the highlighted coordinating color on the relevant portion of the exhibit that the ground is referring. Morrison did this for the ease of the reader and he hopes it does not cause a problem.

VI. CONSTITUTIONAL VIOLATION AND SUPPORTING FACTS FOR GROUND ONE

GROUND ONE: Counsel failed to properly inform petitioner ("Morrison") of the applicable laws that affected his decision to reject a plea offer of seven years incarceration, in violation of his rights under the Sixth and Fourteenth Amendments of the United States Constitution. (Ineffective assistance of counsel).

SUPPORTING FACTS FOR GROUND ONE:

(1) On May 6, 2004 Morrison was pressured into pleading guilty to a Texas Penal Code 22.011(a)(2)(A) ("22011") violation. He was sentenced to nine years deferred adjudication probation.

(2) On April 7, 2010 the state filed a motion to revoke Morrison's probation, stemming from several probation violations including failure to comply with Chapter 62 of the Texas Code of Criminal Procedure.

(3) On January 13, 2011 Morrison pled guilty to a federal S.O.R.N.A. violation in the United States District Court for the Western District of Texas Midland/Odessa Division. (The Honorable Judge Junell preciding)

(4) On March 1, and March 5, 2011 Morrison sent pro se letters to the court requesting to withdraw his involuntary 2004 guilty plea. He also requested a new jury trial and new counsel. He sent the letters because of the way he interpreted the plain language of Texas Penal Codes 22.011, 6.02, 8.02, and 2.01 to say the state must prove that he had the intent to penetrate the sexual organ "of a child", or that he knew the sexual organ he penetrated was a sexual organ "of a child". (See Exhibits "C", "D", "E").

(5) On March 18, 2011 David Rogers ("Rogers") replaced Morrison's original court appointed counsel Tom Morgan ("Morgan") to counsel Morrison, via the pro se letters Morrison sent to the court.

(6) On March 4 and again on March 28, 2011 Morrison rejected a plea offer of seven years incarceration because he was confident the court would grant him a jury trial or evidentiary hearing so he could prove that he was not criminally culpable of commiting the 22.011 violation because of the way he interpreted the plain language of the statute as saying his intent or knowledge that it was a child's sexual organ that he penetrated was an essential element of the crime which must be proved by the state. Morrison also thought that he was entitled to a mistake of fact defense, and because he was not yet convicted of the 22.011 charge, according to Texas Code of Criminal Procedure 11.07 § 2, the trial court would hand down the decision before his revocation hearing and give him the relief he requested.

(7) Rogers did not properly counsel Morrison about the applicable laws that affected his decision to reject the seven year plea offer:

(a) Morrison was never counseled about the Court of Appeals' interpretation that the prosecutor does not have to prove knowledge of complaintant's age, or that knowledge of age is not considered an element of 22.011, informing Morrison that his rationale, according to the Court of Appeals, was an incorrect legal rule.

(b) Morrison was never counseled about his improper pleadings to the court, nor told that his attempted request for relief would be futile. Morrison's ignorance in this matter caused him to go into the revocation hearing knowing he was guilty of the probation violations, and he knew the state had clear and convincing evidence that he was guilty of the violations, causing him to be sentenced to 16 years instead of seven years, all while Morrison was relying on hopes of a new jury trial. (See PINK EXHIBIT "E" p.7)

(c) Rogers never counseled Morrison how to properly file a Pre-conviction Writ of Habeas Corpus so Morrison could assert his argument before the trial court, before his deferred probation was revoked and he was convicted.

(d) Rogers never objected to the court overruling Morrison's Motion for Continuance on the basis that Morrison's letters were not considered a Writ of Habeas Corpus because of the judge's findings that Morrison was represented by counsel at that time. (See RR 3 p.9). Rogers should have objected to her finding because Morrison had a conflict of interest with Morgan at the time the pleadings were sent to the court, and Rogers was not yet appointed, thus making Morrison a pro se defendent which made the pleadings proper.

(e) Rogers never counseled Morrison that he could not file an appeal, or get a new trial on issues relating to Morrison's original 2004 plea proceeding from an order revoking probation, the way Morrison attempted it.

(8) Morrison was denied counsel in a critical stage of the criminal proceedings, or whenever his substantial rights were affected, by Rogers stating on record that he was not assigned to help Morrison with the Writ of Habeas Corpus, (See RR 3 p. 6, 9) despite the fact that Rogers was appointed to be Morrison's counsel by way of the same pleadings that encompassed the habeas corpus issues. The court also denied Morrison counsel in this critical stage of the criminal proceeding by not appointing him counsel to assist with his pre-conviction habeas corpus issues, even at Morrison's request.

(9) The prejudice caused is that Morrison went into revocation hearing and was sentenced to 16 years in prison instead of seven years.

A. Summary of Argument for Ground One

Rogers was ineffective and his performance fell below an objective standard of reasonableness because he failed to counsel Morrison about the consequenses of rejecting a seven year plea offer, and he failed to counsel him about the applicable laws that affected that decision. Rogers never informed Morrison that Morrison's rationale, about how he interpreted the plain language of the statutes regarding the CMS in 22.011, in conjunction with Texas Penal Code sections 6.02, 8.02, and 2.01, was an incorrect legal rule as interpreted by the Texas Courts of Appeals. Morrison thought he would get a new jury trial and then an acquittal based on his rationale that the state had to prove that he knew the complainant was under 17 years, or that he was entitled to a mistake of fact defense, therefore, he rejected the plea.

Rogers also never counseled Morrison about the improper filings of his pro se, ex parte communication with the court that Morrison filed in order to gain relief on his rationale, which led Morrison to think the court would grant relief by giving him a new jury trial or an evidentiary hearing, but instead the pleadings were never seen by the trial judge and ultimately overruled as a Writ of Habeas Corpus. (See RR 3 P.9).

If Rogers would have explained Morrison's errors to him through case law[1], or alerted him to the statutes in the Code of Criminal Procedure under 11.07 § 2 and 11.08, and Texas Rules of Appellate Procedure 73.1, 21.4, and 26.2, Morrison would then have known his rationale was misguided and he was filing the pleadings improperly. The outcome would then have been different because Morrison would have accepted the seven year plea offer and pled true to the probation violations that he knew he was guilty of, one in which he pled guilty to in this federal court before the revocation hearing, and he could have then asserted his logic in a post-conviction Writ of Habeas Corpus like he does now, but with seven years prison instead of 16. Or Morrison would have then known how to properly file a pre-conviction Writ Of Habeas Corpus and had a reasonable probability of getting relief from the trial court, or on direct appeal.

1. Scott v. State 36 S.W.3d 240 (2001); Jackson v. State 889 S.W.2d 615 (1994); Llano v. State 16 S.W.3d 197 (2000); Few v. State 136 S.W.3d 707 (2001; Manuel v. State 994 S.W.2d 668 (1999); Jordan v. State 54 S.W.3d 783 (Tex Crim. 2001); Caroll v. State 119 S.W.3d 838 (2003).

B. ARGUMENT FOR GROUND ONE

Counsel failed to properly inform Morrison of the applicable laws that affected his decision to reject offer of seven years in violation of his rights under the Sixth and Fourteenth Amendments of the United States Constitution and Article 1 § 10 of the Texas Constitution.

Morrison presents this application for Writ of Habeas Corpus and respectfully requests, under the Equal Protection Clause, that the same procedural and substantive protections, which were offered in **Strickland v. Washington** 104 S.Ct 2052 (1984); **Lafler v. Cooper** 132 S.Ct 1376 (2012); and **Childress v. Johnson** 103 F.3d 1221 (5th 1997), are offered to him.

The Sixth Amendment guarantees a defendant in a criminal case not simply the right to counsel, but to reasonably effective assistance of counsel. Strickland at 2063. It is a fundamental right that is made applicable to the states through the Fourteenth Amendment. **Gideon v. Wainwright** 372 U.S. 335 (1963). Of all the rights that an accused person has, the right to be represented by counsel is by far the most persuasive, for it affects his ability to assert other rights he may have. **U.S v. Cronic** 104 S.Ct 2039, 2044 (1984). Those other rights include the right for a defendant to be informed of the laws affecting his case. **Riley v. State** 345 SW3d 413, 417 (2011): Counsel has a duty to exert his best effort to insure that the clients decisions are based on correct information as to the applicable law. **Exparte Wilson** 724 SW2d 72, 73-74 (Tex Crim. 1987): Where the honorable Court of Criminal Appeals noted,

> "The State Bar of Professional Responsibility Considerations 7-7 provides:... A defense lawyer in a criminal case has a duty to advise his client fully on whether a particular plea to a charge appears to be desirable and to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken. Ethical Considerations 7-8 provides: A Lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of the relevant considerations."

It is well established that an accused is entitled to the effective assistance of counsel throughout all critical stages of a criminal proceeding, including the plea bargaining process. **Hill v. Lockhart** 106 S.Ct 366 (1985); Ex parte Wilson supra at 73; Lafler supra at 1384,

> "Defendants have a Sixth Amendment right to counsel, a right that extends to the plea bargaining process... During negotiations defendants are 'entitled to effective assistance of competent counsel'" (Quoting **Mcmann v. Richardson** 90 S.Ct 1441 (1970)); Also Childress at 1227. "Defendant has constitutional right to assistance of counsel at every critical stage or proceeding against him, or whenever his substantial rights may be affected."

The Supreme Court stated that on general claims of IAC, to prevail one must show:

1) Counsel's performance fell below an objective standard of reasonableness. Strickland at 2064.

2) That there is a reasonable probability, but for counsel's unprofessional errors, the result of the preceeding would have been different. id at 2068.

In the context of pleas a defendant must show the outcome of the plea would have been different with competent advice. Lafler at 1384; Hill at 370,

> The second or 'prejudice', requirement on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process.

in Hill when evaluating the petitioner's claim thatIAC led to the improvident acceptance of a guilty plea, the court requires the petitioner to show,

> "That there was reasonable probability but for counsel's error [the defendant] would not have pleaded guilty and would have insisted on going to trial." See **Lafler v. Cooper 132 S,Ct 1376, 1384, 85 (2012).**

In Lafler, Cooper prevailed on a very similar IAC claim that Morrison asserts in the instant case. Morrison uses Lafler to bolster his argument because,

> "The standard of IAC when a defendant rejects a plea offer and goes to trial must now be applied to [Lafler v. Cooper]." Lafler at 1390.

II.

Cooper was charged under Michigan law with assault, with intent to murder. He was offered a 51-85 month prison sentence in exchange for a guilty plea. He rejected the offer based on his attorney's advice that the prosecution would not be able to establish intent to murder because the victim had been shot below the waist. Cooper went to jury trial expecting an acquittal because he thought the prosecution could not prove intent, but was found guilty on all charges, and sentenced to 185-360 months. He subsequently file a Writ of Habeas Corpus based on IAC on the erroneous advice from counsel. The Supreme Court found counsel had provided deficient performance by advising Cooper of an incorrect legal rule, causing Cooper to suffer prejudice because he lost the opportunity to take a more favorable sentence offered with the plea. Morrison asks that this same logic be applied to his case.

Like with Cooper, Morrison's case "is in contrast to Hill in the respect that the IAC led not to the offers acceptance, but to its rejection. Having to stand trial, not choosing to waive it is the prejudice alleged." Quoted from Lafler at 1385.

There is, however, one difference. In Lafler, counsel explicitly gave Cooper bad advice about the incorrect legal rule which influenced him to reject the plea, and because of the incorrect legal rule told to him by counsel, he subjected himself to a harsher sentence in hopes for an acquittal. In Morrison's case it was counsel's lack of advice that caused him to reject the plea, which was based on Morrison's belief that he would get a new jury trial and an acquittal on an incorrect legal rule that he formulated from his interpretation of the plain language of several statutes. Since

22.011 never dispensed with any CMS, coupled with the combined syntax of 6.02 and 2.01, Morrison believed that the prescribed CMS of "intentionally" or "knowingly" in 22.011 (a)(2) Modified the entire statute, including "of a child", making the prosecution have to prove beyond a reasonable doubt that Morrison had the intent to penetrate a child's sexual organ, or that he knew that the sexual organ he penetrated was one of a child's, and since he was under the impression the female was an adult when he engaged in the charged offense, he thought he was not guilty of all the elements of 22.011, therefore, he rejected the plea. Rogers never counseled Morrison that his rationale was an incorrect legal rule and his efforts would be futile, nor did Rogers alert Morrison that his pleadings were not properly filed, which resulted in the court rejecting them. He was never counseled on how to properly file a pre-conviction Writ of Habeas Corpus so he could assert his argument before the trial court, nor did the court appoint him counsel to assist in the matter which violated his substantial right to effective assistance of counsel. (See ground 8). Those are the performance factors in question which caused Morrison to rely only on his misguided rationale, and improperly filed pleadings to not accept the seven year offer. Rogers' ineffectiveness was magnified by Rogers continually telling the court Morrison was filing a "post conviction Writ of Habeas Corpus". This shows that Rogers did not even know Morrison was on a deferred adjudication probation and thought Morrison was already convicted of 22.011, which that offense is not an offense that one who is found guilty of can receive a regular probation sentence for. (See RR 3 p 6, 9) and (Code of Crim. Proc. 42.12 3g(H), 5(G)). Because of this lack of counsel Morrison ended up missing the opportunity to accept the plea offer, and he went into the revocation hearing knowing he was guilty of several of the probation violations, while knowing the prosecutor had extreamly strong evidence in which he had no defense, and knowing he could face up to twenty years in prison, if the court found even one violation true. Morrison rejected the offer because he wanted a chance to withdraw his guilty plea and have a jury trial for the 22.011 charge he was put on probation for. (See Exhibit "E"), which shows Morrison's mind-set as to why he rejected the plea offer. Morrison was prejudiced because the court found the probation violations true without acknowledging Morrison's argument and sentenced him to 16 years in prison. (See Exibits "L" p.2 and "M" pp.7-8).

If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of plea opportunity led to a trial resulting in a conviction on more serious charges, or the imposition of a more severe sentence. Lafler at 1387. In these circumstances a defendant must show that but for the IAC there is a reasonable probability that the plea offer would have been presented to the court. (I.E. that the defendant would have accepted the plea and the prosecution would not withdrawn it in

light of intervening circumstances.), that the court would have accepted its terms, and the convictions, or sentence, or both under the offer's terms would have been less severe than under the judgement and sentence that infact were imposed. Lafler at 1385.

Morrison can show that a seven year offer was presented to the court, which is less severe that the ultimate sentence of 16 years, and the court and prosecutor would have accepted its terms. It is on record that Morrison was presented the offer in exchange for a plea of true on March 4,2011 in which he rejected in court while being represented by Morgan. Rogers received the same offer through a letter from the prosecutor on March 28, 2011.

Morrison's co-defendant/brother, Jason Morrison ("Jason") who had the same charges in the same court, and had the same rationale as Morrison (See Exhibit "F", and Exhibit "G" , showing a Writ of Habeas Corpus Jason sent to the trial court, and his affidavit), but was then counseled by his attorney Mark Dettman about the facts of the law after Morrison's error. Jason, therefore, pled true to the probation violations on August 4, 2011 and the court accepted the offer and sentenced him to seven years, (See Jason's plea agreement Exhibit "H"). Dettman's counsel compared to Rogers' counsel shows Rogers' assistance of counsel fell below an objective standard of reasonableness. Morrison would have accepted the plea had Rogers effectively counseled him about the legal rules and laws that affected his decision, like Dettman did in his brother's identical case. It also shows the court would have accepted Morrison's plea and sentenced him to seven years like they did Jason. This proves both performance and prejudice prongs in Strickland and the other conditions stated in Lafler at 1385.

It can also be inferred through common sense that Morrison would have taken the seven year offer, had he known the relevant facts concerning his case, since he knew he was guilty of the probation violation allegations, and the prosecutor had extremely strong evidence to prove them true at the revocation hearing, where he would be facing a 20 year sentence with no defense. No reasonable person in their right senses would put themselves in such a position to go into trial knowing they would be found guilty and subjecting themselves to 20 years imprisonment, after being offered seven years, unless they thought with all their heart and soul there was a lot better chance to get a better result than the seven year offer. (See Exhibit "I"), which shows Morrison's vehemence of why he did not accept offer, ALSO SEE Exhibits "N"-"R".

A court may take account of a defendant's earlier expressed willingness to accept responsibility for his actions. Lafler at 1389. Morrison expressed his willingness to accept responsibility for his actions when he pled guilty in federal court to a S.O.R.N.A. violation, on January 13, 2011, where he was sentenced to 18 months of federal prison and 16 years of supervised release. The S.O.R.N.A. violation along with the state equivalent failure to comply with sex offender registration were two of the

probation violations in his case. Morrison also accepted responsibility with the trial court through a pro se letter dated December 29, 2010 (Exhibit orange "A"), which in it he asked the court to adjudicate his sentence, appoint him counsel, and Morrison made it clear that he wanted to apologize to the court, the probation office, and to society for not completing his probation, indicating that he knew he was guilty of the violations and was taking responsibility for his actions. Morrison wrote that letter before he was extradited to Midland County Jail, where he went to the law library and found the premise for his rationale that spurred his decision to reject the seven year plea offer. This correspondence shows Morrison did not turn down the offer to plead not true to the probation violation allegations, he turned down the offer because he thought from what he learned at the law library that he would get a new jury trial on the 22.011 charge and be acquitted, and if he pled true he would be convicted, sentenced to prison, and lose his chance to get relief through the district court pursuant to 11.07 § 2. (See RR 3 Pg 6,9 and Exhibit green "E"). This is also proof that Morrison knew he was guilty of the probation violations and would have accepted the seven year offer had he properly been counseled, again proving both prongs in Strickland and also the other requirements in Lafler.

III.

Unfortunately for Morrison, **Johnson v. State 967 S.W.2d 848 (Tex Crim. 1998)** was the first and only case regarding 22.011's CMS that he read at that time, and Justice Baird's dissent at 858 fostered his rationale that he like Johnson would get acquitted based off of the CMS of "intentionally" or "knowingly" in 22.021 and 22.011. (See statement of the facts page 5). Morrison discussed Johnson, and his rationale with Rogers, and was never counseled about the Court of Appeals' holding that knowledge of the complaintant being a child is not considered an element of the crime, or that the state does not have to prove he knew she was a child, or that what he was trying to do would not prevail the way he was attempting it. Rogers should have advised Morrison to look up the Court of Appeals' decision in the very similar case of **Scott v. State 36 S.W.3d 240 (2001)**, where Scott had the same rationale as Morrison, and the Court of Appeals affirmed Scott's conviction because:

> Sexual assault statute, proscribing sexual penetration of a person younger than 17 years of age did not violate defendant's... rights, despite lack of knowledge of victim's age. At 240. Also see **Jackson v. State 889 S.W.2d 615 (1994)**: The jury was authorized to convict appellant of... sexual assault of a child 22.011 (a)(2)(A). These statutes do not require the state to show that appellant knew the victim was younger that 17 years of age. At 617.

Rogers also failed to counsel Morrison that the letter Morrison sent to the court, (See Exhibit "D") was not going to be seen or ruled on by the judge because the letter was a unilateral/ex parte communication with the court, (See RR 3 P. 9), which resulted in the district judge not reading Morrison's pleadings, nor giving him a new jury trial or continuance so he could have a habeas corpus hearing to assert his rationale before the trial court. Morrison was unaware of the proper protocols about communications with the court, (See Exhibit PINK "D" p.4, and RR 2 pp. 5-6). Rogers' lack of counsel about that caused Morrison's pleadings for relief and claim of defense to get overruled at the revocation hearing, without being seen by the judge. SEE EXHIBITS "P"-"R" which show MORRISON WAS NOT COUNSELED ABOUT PROPER COURT PROTOCOLS.

If Rogers would have informed Morrison about proper court procedure in filing certificates of services for pleadings pursuant to Texas Rules of Appellate Procedure ("T.R.A.P.") rule 9.5, Morrison would have made sure his pleadings for relief were properly filed with a certificate of service and copies properly forwarded to the district attorney's office, making the pleadings be seen by all parties including the judge, then there would have been a reasonable probability that the judge would have granted Morrison's continuance, or heard his argument alleged in ground 2 and 5 of this Writ of Habeas Corpus and granted him relief, or ruled against his argument and informed him that his rationale was mistaken and given him the opportunity to accept the seven year offer, either way Morrison would have been able to preserve his issues on record for further review. The court could have also recognized that his lack of mens rea could have been a mitigating factor that would have caused her to give him a more leniate sentence than 16 years. Whatever the results may have been, had Judge Darr read or ruled on Morrison's pleading, there would have been a reasonable probability he would have received a better result than a 16 year sentence.

The court also overruled Morrison's pleadings for relief because he filed the pleadings when he had counsel. (See RR 3 p.9):

> "I'm not going to consider that letter a writ, because he has counsel. And when you have counsel, then counsel files any motions that you see necessary."

This is actually an abuse of discretion by the trial judge, (See ground 8), because if Judge Darr would have read the pleadings or looked into the matter further, she would have known Morrison's counsel at the time he filed the pleadings was not Rogers, it was Morgan, who was a conflict of interest because of the pleading, making Morrison actually a pro se litigant when he filed the pleading. Rogers was ineffective for not objecting to that fact, and informing the court that he was not Morrison's counsel at the time Morrison sent the pro se pleading to the court on March 5, 2011.

Judge Darr asked Rogers if he had seen the letter. He said he has seen it, but he wasn't assigned to do any 11.07 writ. (See RR 3 p. 9). These statements show that Morrison was denied effective assistance of counsel and was barred from exercising his

constitutional right for Writ of Habeas Corpus by the trial court. He could not file a pro se Writ of Habeas Corpus, nor would his attorney file it for him because he was not assigned to. Morrison was left without any possibility of relief via a Writ of Habeas Corpus.

Rogers knew and read the pro se pleadings, and he knew he was Morrison's counsel via the pro se pleadings, therefore, he should have counseled Morrison about not being able to file pro se motions while having counsel, as stated in **Llano v. State 16 S.W.3d 197 (2000)** where Morrison did the same thing as Llano by filing a request for new trial because his plea of guilty was involuntary. (See Llano at 198). Since Rogers was Morrison's new attorney, he could have made sure he filed the pleadings correctly with the court, especially since Morrison asked Rogers several times to make sure it was filed correctly after Rogers informed him that he should have filed it as a Writ of Habeas Corpus instead of a Petition for Discretionary Review, (See Exhibit "E"). If Rogers would have filed the motions himself, or objected to the trial judge overruling the motions because Morrison had counsel, then Morrison could have argued his interpretation of the statutes before the revocation hearing. Rogers could have also filed a proper 11.07 § 2 or 11.08 and argued before the trial court the same issues that Morrison lodges in the remainder of this Writ of Habeas Corpus giving reasonable probability that the results would have turned out differently, as a better result for Morrison, and his issues would have been preserved on record for futher appellate or collateral review. That shows Morrison was prejudiced by counsel's ineffective assistance regarding the trial court overruling his motion for continuance and Writ of Habeas Corpus.

Rogers could have also let Morrison know in light of Scott and Jackson supra that Morrison's logic was misplaced at that time and to take the seven year offer because the court would probably go off those precidents and he would be better off challenging those issues in a post conviction 11.07 with a seven year sentence than risking not getting any relief and getting up to a 20 year sentence and challenging the issues on collateral attack with more than seven years like Morrison does now. If Rogers would have informed Morrison about that risk Morrison would have accepted the seven year offer, instead Morrison relied on false hope that his rationale would grant him a new trial and he would be acquitted, therefore, he rejected the plea and was sentenced to sixteen years instead of seven years prison.

IV.

Morrison was also unaware and never counseled by Rogers about how his attempted request for relief wouldfail in light of **Few v. State 136 S.W.3d 707, 711 (2001);**

Manuel v. State 994 S.W.2d 658, 661-62 (Tex. Crim. 1997); also Jordan v. State 54 S.W.3d 783 (Tex. Crim. 2001). Generally a person placed on deferred adjudication probation may raise issues relating to the original plea proceeding only in appeal taken when it is first imposed. Such issues may not be raised in an appeal from an order revoking probation or adjudicating guilt. There are two exceptions in Manuel, "void judgement" and "habeas corpus" exceptions, which was later overruled by Jordan.

Morrison initially raised his issues in two pro se letters to the court. The first (See Exhibit "C" Blue) requested an appeal, and the other (See Exhibit "D" Blue) requested a Petition for Discretionary Review. As written these pleadings were not one of the exceptions stated in Manuel or Few, that allowed an out of time appeal or new trial on original proceeding which is 30 days after judgement. (See T.R.A.P rule 21.4, 26.2). Jordan would have barred him from filing a Writ of Habeas Corpus at this juncture aswell. Morrison was never counseled about these rules which actually barred his chance of relief because he raised the issues almost seven years after he was placed on deferred adjudication probation. If Rogers would have counseled Morrison on the fact that he could not get an appeal or new trial on his original guilty plea after 30 days of the judgement, Morrison would have accepted the seven year offer and then attempted a post conviction Writ of Habeas Corpus on these issues from prison like he does now, except he would have seven years instead of sixteen. (See Jordan at 787 n. 18).

Morrison's claim of IAC that he asserted in Exhibit "D" is cognizable by a Writ of Habeas Corpus, and it was mentioned by Rogers at Morrison's revocation hearing that:

> "[Morrison] sent a letter to [the court] that he believes is a Writ of Habeas Corpus." (See RR3 p. 5).

Rogers also stated that he had seen the letter. (See RR 3 p. 9). According to Carrol v. State 119 S.W.3d 838, 840 (2003), and T.R.A.P. Rule 73.1, that lettercould not be construed as a Writ of Habeas Corpus which would grant Morrison relief because it was not written on the prescribed form. Rogers did inform Morrison that he should have filed the pleadings as a Writ of Habeas Corpus, but he never counseled Morrison about this law. If Rogers would have informed Morrison about rule 73.1, Carrol, or Jordan, Morrison would have been alerted to the fact that he was filing his only available means of relief on the wrong form. Morrison would have then filed the Writ of Habeas Corpus under 11.07 § 2 or 11.08, on the proper form. Had Morrison used the proper form, the court would have possibly given him the relief he requested, or alerted him about the precident from Scott, Jackson, or Jordan in which he would have then taken the offer of seven years and challenged his argument like he does now.

Because Rogers failed to effectively counsel Morrison on these matters, Morrison was left ignorant of the applicable laws that affected his decision to reject the plea offer in hopes of getting relief with a new jury trial. The impact of the aforementioned

cases and rules that were not disclosed to Morrison were certainly relevant to an informed and conscious choice regarding Morrison's right to accept a state's plea offer.

V.

Granted, there is no right, or requirement that a defendant be appointed counsel for post conviction writs, but Morrison was not convicted yet, and since Rogers testified on record that he wasn't assigned to do any kind of pre or post conviction writ. (See RR 3 pp. 6, 9), this shows Morrison was not given assistance of counsel in all critical stages of the criminal proceedings, or wherever his substantial rights may be affected. See Childress at 1227; also Texas Code of Criminal Procedure ("T.C.C.P.") Art. 1.05 (d) (2), (3). Morrison requested a new attorney to replace his original attorney Tom Morgan, in the same letter that asserted his habeas corpus issue. (See Exhibit "D"). Therefore, it should be inferred that the issues in that same pleading which requested new counsel should have also been in Rogers' scope of counsel since Rogers was appointed to replace Morgan via the same pleading that contained the habeas corpus issues. Or the court should have appointed Morrison counsel for that issue as well, and surely should not have overruled Morrison's continuance because he filed pro se pleadings while having counsel. Since Morrison asserted his interpretation of the law in a pleading that requested him to withdraw his guilty plea and be afforded a new jury trial, based off of an involuntary plea seven years earlier, and it was under the same cause number as the revocation of probation, and the pleadings affected his decision to reject a plea offer that was directly correlated with the revocation of probation, Rogers should have counseled Morrison on the relevant laws that affected Morrison's case, despite his scope of appointment.

Morrison has clearly shown that he was denied the effective assistance of counsel that is guaranteed by the Sixth Amendment of the United States Constitution and Article 1 § 10 of the Texas Constitution, and because Rogers' counsel fell below an objective standard of reasonableness, Morrison suffered clear prejudice and harm. Because of Rogers' ineffective assistance of counsel, Morrison believed he would receive a new trial and be acquitted, based on an incorrect legal theory, and improper pleadings, so he rejected a seven year plea offer for a probation revocation and was sentenced to a 16 year prison sentence instead of seven years.

VI.

Morrison's IAC claim is also in the scope of an actual or constructive denial of assistance of counsel since it can be established by the record that counsel was not merely incompetent, but inert in regards to Morrison's pleadings for relief, and his mistaken rationale, leaving him ignorant about the laws affecting his decision to

accept the plea agreement.

> "If proven, Actual or constructive denial of assistance of counsel, altogether is legally presumed to result in prejudice." See Strickland at 2067; also Childress at 1228: "The Supreme Court has dispensed with the Strickland prejudice inquiry in cases of actual or constructive denial of counsel." and they further explained: "That a constructive denial of counsel occurs when the defendant is deprived of the guiding hand of counsel." Also see **Powell v. Alabama 53 S.Ct 55 (1932).**

In **U.S. v. Taylor 933 F.2d 307 (5th cir. 1991)** they held that there is a great difference between having bad lawyering and having no lawyer, if the lawyering is merely ineffective then the decision to grant relief turns into a degree of incompetence and prejudice to the defendant. If the defendant has no lawyer, prejudice is legally presumed in every case and the defendant is entitled to relief in every case.

Because the trial court did not appoint counsel to assist Morrison with his pre-conviction habeas corpus issue (shown by Rogers saying he was not "Assigned" to help Morrison with, or to do any kind of 11.07 writ. See RR 3 pp. 6,9), and the court over-ruled Morrison's continuance which barred him from being able to assert his habeas corpus issues, ("Because [Morrison] has counsel. And when you have counsel, then counsel files any motions that [Morrison] see[s] necessary." See RR 3 p. 9). And because Rogers told Morrison the Writ of Habeas Corpus was out of his scope of appointment and would not help him file it correctly, or properly counsel him about it, was an actual denial of assistance of counsel, and was a state created impediment that barred Morrison from exercising his right to file a Writ of Habeas Corpus, which was a critical stage of the criminal proceeding where Morrison's substantial rights were affected causing him not to get the continuance he requested so he could assert his habeas issues, resulting in him being sentenced to 16 years instead of, at most, seven years had he been given effective counsel.

Rogers' failure to advise Morrison about his rationale and improper filing of the pleadings was a constructive denial of counsel, since Morrison was "deprived of the guiding hand of counsel" through such an important decision that affected a substantial right in the criminal proceeding. Even though Morrison has already proven prejudice, he askes this Honorable Federal District Court to consider his IAC claim to be an actual or constructive denial of assistance of counsel, and correct his sentence to seven years imprisonment.

C. SUMMARY AND REQUESTED RELIEF FOR GROUND ONE

Morrison has satisfied the Strickland two-part test in proving deficient performance and prejudice, and has satisfied the other requirements now required to be tested in light of Lafler v. Cooper at 1385, and he has shown strong evidence to support an actual and constructive denial of assistance of counsel which demands automatic relief.

Regarding counsel's deficient performance, whatever Rogers' reasonings for not counseling Morrison were, Morrison was denied effective assistance of counsel on the facts concerning his plea agreement, and it affected his right to accept the plea offer. Rogers' failure to counsel cannot be construed as a trial strategy because there is no sound trial strategy in allowing a defendant to go head first into a buzz saw, by going into a revocation hearing knowing the defendant was guilty of the probation violations, and would without a doubt be sentenced to more time than the plea offer. (SEE Red EXHIBIT "E" P.9)

> "Regardless for the reasons for failure to inform, an uninformed accused cannot be deemed to have made an informed election." Gallegos v. State 756 S.W.2d 45, 48 (1988

As to the prejudice, Morrison has shown that but for counsel's deficient performance there is reasonable probability that Morrison, the State, and the Court would have accepted the offer of seven years that was presented. In addition, as a result of not accepting the plea, Morrison received a sentence over twice as severe than what he would have received under the plea agreement, therefore, the standards of IAC under Strickland and Lafler have been satisfied.

As to the actual and constructive denial of assistance of counsel, Morrison did not have counsel at every critical stage or proceeding that affected his substatial rights. Morrison has shown by Rogers' admission in the record that he was not afforded counsel during the plea bargaining process because Rogers failed to properly counsel Morrison about a pro se Writ of Habeas Corpus/pleading Morrison sent to the court, which was the whole reason Morrison rejected the plea offer. (See RR 3 p. 9,; Exhibits "D","E","L","M", "G"). As a remedy to the constitutional violation, Morrison respectfully requests that this Honorable Federal Court vacate and remand his case back to the trial court for resentencing, and order state to reoffer the original seven year plea agreement, or if this honorable court sees fit to act sua sponte and reverse sentence of 16 years and change to seven years, that would be fine also in regards to this ground. Or because the ambiguity of the construction of 22.011, and how Morrison's interpretation of the ambiguous statute caused him to suffer a longer sentence than he would have received if the statute explicitly dispensed with the CMS regarding "of a child", Morrison asks the court to invoke the rule of lenity in his favor and reverse sentence of 16 years and change to seven years, or reverse sentence and grant an acquittal. (See Ground 7).

Morrison also requests an evidentiary hearing so in light of all circumstances, the identified acts and omissions of counsel that are outside the record will come into light for preservation of the record.

D. Clearly Established Federal Law as Detrmined by the Supreme Court, Summarized.

1) **Strickland v. Washington** 104 S.Ct 2052 (1984) (Held that to prevail on general IAC claims an applicant must show: 1) Counsel's performance fell below an objective standard of reasonableness, and 2) That there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding may have been different. Also they held if proven an actual or constructive denial of assistance of counsel, prejudice is presumed.)

2) **Lafler** v. **Cooper** 132 S.Ct 1376 (2012) (Held that this is the Supreme Court precedent now used when IAC causes a defendent to reject a plea offer and go to trial, resulting in a harsher sentence than the plea. To prove IAC a defendant must show, but for the IAC there is a reasonable probability that the plea offer would have been presented to the court, that the defendant would have accepted the plea, and the prosecution would not have withdrawn it in light of intervening circumstances, that the court would have accepted its terms, and the conviction and/or sentence under the offer's terms would have been less severe than under the judgement and sentence that were infact imposed.)

3) **Powell v. Alabama** 53 S.Ct 55 (1932) (Held that a constructive denial of IAC occurs when a defendant is deprived of the guiding hand of counsel.)

E. State Court's Disposition 2254(d)(1),(2)

The state's highest court, the Court of Criminal Appeals, denied without written order, based on the findings of the state-trial court, Morrison's 11.07, without a hearing. Therefore, Morrison will defer to the findings of the trial court to show how those findings to not recommend relief were erroneous and objectively unreasonable, and:

1) Contrary to, or involved an unreasonable application of clearly established federal law as determined by the Supreme Court, or

2) Resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented [by Morrison] in the state court's proceedings.

Morrison will show how these factors required by 2254(d)(1),(2) were satisfied by the state court during the 11.07 proceedings to allow Morrison a gateway for relief into this Fine Federal Court.

1. 2254(d)(2)

First of all, the trial court's decision to recommend the denial of relief regarding Ground One was based on an unreasonable determination of the facts that Morrison presented, because their decision overlooked the clear and convincing

evidence that Morrison presented, and pointed to in the record, which proves he was denied the effective assistance of counsel that is demanded by the Sixth Amendment, and was prejudiced by that deficient performance, therefore, relief should have been granted. (See State's 11.07 Memorandum of Law Pp.1-12; Exhibits "A"-"M"; Motion to Disqualify Affidavit of David Rogers; Exhibits "N"-"S"; Motion to Object to the Affidavit of Rodian Cantacuzene; and the Motion to object to Trial Court's Findings/Fleming Brief.)

The trial court's findings were based solely on the untrue claims in the affidavits of David Rogers and Ian Cantacuzene, Morrison's former counsel. Both affidavits are not supported by the record.

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

In Jordan, because the affidavit of attorney was not supported by the record, the Fifth Circuit remanded back to trial court for evidentiary hearing. Morrison asked the state court for a live evidentiary hearing so he could confront Rogers and Cantacuzene to prove their statements in the affidavits were untrue. Morrison also requested that the Midland County Jail video conference recording could be obtained to allow him to prove Rogers did not tell Morrison the things he claims. (See Motion for Live Evidentiary Hearing, filed in Appendix "1"). Rogers' Affidavit, is in all actuality, in opposition of the record. Morrison proved this in his Motion to object to the Affidavit of David Rogers, and Motion to object to trial court's findings/Fleming Brief.

Morrison proved with the clear and convincing evidence he presented to the state courts during the 11.07 proceeding that Rogers did not properly counsel him about the laws that affected his decision to reject a seven year plea offer, and that resulted in Morrison being sentenced to 16 years prison. For the sake of brevity in this already long brief, Morrison will not reargue this evidence here, but it is clear by reading Exhibits "D", "E", "I", "L", "M", and "N"-"R" that during the time Rogers was Morrison's counsel from March 18, 2011 (Trial counsel), and from April 28, 2011 to May 19, 2012 (date of Exhibit "M", during direct appeal), that Morrison's rationale and knowledge of the law that affected his decision to reject the seven year plea offer,was the same throughout that time period, and these letters show he was still expecting a new jury trial, evidentiary hearing, or relief on appeal because of his rationale, indicating that Rogers did nor properly counsel him as Rogers claims to have done in the Affidavit of David Rogers.

In the Motion to Disqualify the Affidavit of David Rogers, Morrison showed with clear and convincing evidence, using the exhibits, the record, and contradictions

of statements made by Rogers, how the affidavit could not be true. (See Motion to Object to trial Court Findings/Fleming Brief #13 on pages 11-12). The state courts unreasonably ignored all the evidence Morrison presented, and based its decision to deny relief, despite the strong evidence Morrison presented, only on the unsupported, and false claims made in the affidavits of David Rogers and Ian Cantacuzene, which Cantacuzene was not even part of the IAC claim raised in Ground one. (See Trial Court's findins Pp.40-57).

The decision to deny relief by unreasonably ignoring Morrison's evidence was based on an unreasonable determination of the facts in light of the evidence Morrison presented to them and that decision was clearly erroneous. 2254(d)(2) is satisfied.

2. 2245(d)(1)

The trial courts decision to recommend a denial of relief and the Court of Criminal Appeals decision to deny relief based on those erroneous findings was a conclusion that was contrary to the clearly established federal law as determined by the aforementioned Supreme Court holdings. In the trial court's findings, the trial court did not reasonably apply, or much less attempt to apply the proper Strickland or Lafler prongs to arrive at their decision to deny relief to Morrison. They also did not reasonably apply, or even address Morrison's actual or constructive denial of effective assistance of counsel under the holdings of Powell and Strickland. The only thing the trial court did to justify its recommendation to deny relief to Morrison was to subjectively discount and ignore Morrison's issues and the evidence he presented, then base their decision on the untrue claims of the unsupported by the record affidavits of David Rogers and Ian Cantacuzene. This resulted in a conclusion that was opposite to those holdings regarding the IAC question of law raised in Strickland, Lafler, and Powell, and because the state court's decision was decided differently than what the Supreme Court held in Strickland, Lafler, and Powell on a set of materially indistinguishable facts, 2254(d)(1) Has been satisfied. Morrison has proven with clear and convincing evidence that the trial court's findings are erroneous.

No where in the court's findings did they apply, much less mention any part of the prongs and holdings of Strickland or Lafler. Because the state court did not even attempt to apply the Strickland Two part test (deficient performance/prejudice), nor the other tests now required in Lafler, their decision to deny relief was contrary to the clearly established federal law holdings of Strickland and Lafler. When this happens, a de novo review is required by the federal habeas court. In evaluating Morrison's complaints about the performance of his counsel under the AEDPA, the issue before thiscourt is whether the Texas Court of Criminal Appeals

could reasonably have concluded that Morrison's complaints about his counsel's performance failed to satisfy either prong of the Strickland analysis. In making this determination, this Court must consider the underlying Strickland standards. See **Wiggins v. Smith 123 S.Ct 2527, 2542 (2003)**. In those instances when a state court fails to adjudicate either prong of the Strickland test, this Court's review of the unadjudicated prong is de novo. See **Rompilla v. Beard 125 S.Ct 2546, 2567 (2005)** (Holding de novo review of the prejudice prong of Strickland was required where the state courts rested their rejection of an IAC claim on deficient performance, and never addressed prejudice). In Morrison's case the state habeas court never addressed either prong. Morrison requests a de novo review of these issues, like done in Rompilla.

F. Conclusion

Morrison has raised and proven by showings of the record, citing clearly establishes federal law as determined by the Supreme Court, and through his exhibits and motions, that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment, and counsel's deficient performance caused him prejudice by him receiving a sentence that was over twice as severe as the sentence he would have received had counsel properly counseled him. Morrison has satisfied both prongs of Strickland and the other tests now required in light of Lafler v. Cooper at 1385. He has also shown strong evidence that supports an actual or constructive denial of assistance of counsel which demands automatic relief.

The Court of Criminal Appeals based its decision to deny relief on the trial court's erroneous and subjective findings of facts and conclusions of law, which Morrison has shown these decisions resulted in a decision that was contrary to clearly established federal law as determined by Strickland, Lafler, and Powell. Their decision to deny relief also resulted in a decision that was based on an unreasonable determination fo the facts in light of the evidence Morrison presented in the 11.07 state court proceedings, i.e. Exhibits "A"-"S", State memo of law pp.1-12, Motion to disqualify affidavit of David Rogers, Motion to object to the affidavit of Ian Cantacuzene, Motion to object to trial court's findings pp.11-12. Therefore, Morrison has satisfied both clauses in 2254(d). If this Honorable Court comes to a different conclusion regarding this Ground One, then please consider the following:

Ineffective assistance of counsel aside, the crux of this whole issue is the Texas Courts of Appeals' strict liability interpretation that has caused ambiguity in 22.011. If the required mental element of "Intentionally" or "Knowingly" would have been clearly dispensed with regarding ~~of~~ "of a child", pursuant to 6.02(b),

or if the legislature would have explicitly stated that knowledge of the complainant being a child does not matter like they have done in other statutes: 20A02 (Trafficking a person) or 43.05 (Compelling Prostitution), or if they would have explicitly made an exception to 6.02 as they did in Penal Code 49.11, Morrison would have then known to accept the sven year offer because he would have been properly notified that 22.011 was a strict liability offense, and he would have not been sentenced to 16 years prison. Morrison rejected the seven year plea offer only because he wanted to show the court, that by the plain language of 22.011, 6.02, 8.02, and 2.01, he was not guilty of the offense based off the letter of the law, and that he should get a new jury trial, not because he was not taking responsibility for his actions, or pleading not true to his probation violations. It was only because of the rationale he derived from the statutes' plain language, and the Johnson case that supported it. Morrison has shown his propensity to accept responsibility for his actions when he pled guilty to a federal SORNA violation in this court on January 13, 2011 where he was given 18 months prison and 16 years supervised release, also when he wrote and filed Exhibit "A" in the 385th District Court.

Unfortunately for Morrison he was punished more severely for interpreting the statutes of the Penal Code literally, by their plain language, not being properly counseled about the law, and wanting to raise his issues before the trial court, but not knowing how to properly do it. This case is a prime example why our constitution does not allow for ambiguous and vague statutes of criminal law, or allows courts to go against the plain legislative intent and create or suspend the laws that the legislators created by guise of statutory interpretation.

This ground is actually argued in the alternative, and Morrison prays this court will give relief if relief is not given in his other constitutional issues. If relief is given and Morrison is granted a new trial or his sentence and conviction is vacated and prosecution is ordered suspended and he is acquitted through a different ground, then may this issue be moot.

VII. CONSTITUTIONAL VIOLATIONS AND SUPPORTING FACTS FOR GROUND TWO

GROUND TWO: Texas courts have violated Article 3 § 1 and the Fourteenth Amendment of the United States Constitution by violating Article 2 § 1, Article 1 § 19, and Article 1 § 28 of the Texas Constitution in regards to how they have deemed 22.011(a)(2)(A) strict liability, despite the plain language of the prescribed culpable mental state in conjunction with Texas Penal Code section 6.02, 8.02, 2.01, and Government Code § § 312.002, 311.002, 311.011, 311.021, and 311.022. This seperation of powers violation has denied Morrison his right to due process.

SUPPORTING FACTS FOR GROUND TWO:

Since its reenactment in 1983, the Texas courts have violated the Seperation of Powers Doctrine by going outside of their constitutional boundries by making and changing law, while encroaching on the legislature's constitutional given duties by suspending or giving no effect to the said statutes, in opposition of the plain language and legislative intent of the statutes affecting 22.011's culpable mental state ("CMS"). the courts have continually justified 22.011 as being a strict liability offense, against legislative intent, by first going to extratextual factors outside of the plain language of the statutes and citing pre-1983 case law to determine:

(1) That the complaintant being a child is not an element of the crime in regards to the prescribed CMS, suspending Penal Code section 2.01 and the Fifth Amendment that supports that no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

(2) The state does not have to show that the actor "intentionally" penetrated the sexual organ "of a child", or had "knowledge" that the sexual organ he penetrated, in fact was one "of a child's", even though the statute never plainly dispenses with any mental element, suspending Penal Code section 6.02.

(3) Mistake of fact cannot be used as a defense in 22.011, suspending Penal Code section 8.02.

The courts' unlawful determination of these statutes along with them not following the Statutory Construction Code in Government Code § § 312.002, and 311.011 to properly interpret 22.011 violated Morrison's due process of law rights by depriving him of his valuable right to present a defense, causing Morrison to involuntarily plead guilty, even though he was, according to the plain language of the statute in 22.011 in conjunction with 6.02, 8.02, 2.01, and Government code chapter 311 and § 312.022 not guilty of all elements of the offense defined in 22.011(a)(2)(A). Morrison was ultimately sentenced to 16 years prison because of this seperation of powers violation.

A. ARGUMENT FOR GROUND TWO

Texas courts have violated the Seperation of Powers Doctrine of the Texas and United States Constitutions by suspending or giving no effect to the following statutes that were promulgated by the legislators in regards to the mens rea and CMS prescribed in 22.011(a)(2)(A):

(1) Texas Penal Code sections 2.01, 6.02, and 8.02.

(2) Texas Government Code § § 312.002, 311.002, 311.011, 311.021, 311.022.

Morrison wishes to assert these seperation of powers violations as an as-applied challenge to his particular situation, as well as the violations being unconstitutional on their face, a facial challenge, because of the unlawful way laws have been suspended or disregarded by the Texas courts regarding 22.011's plain language in conjunction with the above mentioned statutes.

On September 1, 1983 Texas Penal Code 22.011 went into effect enacted upon by the 68th legislature. 22.011 was renumerated as a reenactment of several rape statutes consisting of V.T.C.A Penal Code § § 21.02, 21.04, 21.09, and 21.10. Specifically 22.011 (a)(2)(A) was the reenactment of 21.09 (rape of a child).

22.011 (a)(2)(A) reads:

"a) A person commits an offense if the person:

2) Intentionally or Knowingly:

A) Causes the penetration of the sexual organ of a child by any means."

21.09 read:

"a) A person commits an offense if he has sexual intercourse with a female not his wife and she is younger than 17 years."

22.011 supersedes 21.09 making 21.09 obsolete and no longer controlling. The legislature expressly prescribed a CMS into the 1983 statute, 22.011 that the previous statute, 21,09 did not contain, and in 1983 the legislature did not dispense with any mental element including the intentionally or knowingly elements modifying "of a child", pursuant to 6.02(b), yet the Court of Appeals in **Byrne v. State 358 S.W.3d 745 (2011); Scott v. State 36 S.W.3d 240 (2001); Hicks v. State 15 S.W.3d 626 (2000);** and **Jackson v. State 889 S.W.2d 615 (1994)** have continually relied on cases like **Vasquez v. State 622 S.W.2d 864 (Tex Crim. 1981)** which was predicated from 21.09, or other pre-1983 opinions like **Morissette v. U.S. 72 S.Ct 240, 251 n. 8 (1952); Clark v. State 558 S.W.2d 887 (Tex Crim. 1977); Green v. State 571 S.W.2d 13 (1978)** in order to negate the prescribed CMS in 22.011 in regards to it modifying "of a child". See Byrne at 749:

"In Vasquez v. State the Court of Criminal Appeals determined that strict liability imposed for statutory rape under the now repealed section 21.09 of the Texas Penal Code was constitutional. Vasquez at 865."

The Byrne Court then compared 21.09 with 22.011 then said:

> "The [Vasquez] court noted approvingly that section 21.09 did not require the state to show that appellate knew the victim's age. Id. The court also highlighted the legislature's intent that 21.09 deny the affirmative defense of mistake of fact concerning the victim's age."

Also see Jackson supra at 617:

> "... 22.011(a)(2)(A) [does] not require the state to show that appellate knew the victim was younger than 17 years of age. The state has long denied the defense of ignorance or mistake in relation to sexual offense involving children." (Citing Vasquez).

Scott supra at 242 relies partly on Morissette supra to affirm Scott's conviction which the dictum footnote they rely on was written in 1952, where back then they did not expressly include a CMS/mens rea into the statute like they have done in the 1983 to current statutory rape statute.

Hicks supra at 631 relies on Johnson 967 S.W.2d 848 supra to overrule Hicks' mistake of age argument:

> "Johnson clearly reestablishes the long standing rule in Texas that the state is not required to show that the defendant knew the victim to be under 17 in sexual assault cases."

In Johnson at 849 the Court of Criminal Appeals affirmed Johnson's indecency with a child conviction by quoting Vasquez:

> "'[I]t follows that to require the state to allege and prove the appellate knew the prosecutrix to have been under the age of 17 would establish ignorance or mistake as a defense in contravention of clear legislative intent.' Vasquez at 866. Had the legislature intended to make a provision regarding the knowledge of the victim's age it would have expressly included the requirement within 21.11. Absent of such language proves otherwise."

According to the plain language of 22.011, (Read without any outside influence) the legislature did expressly include a knowledge requirement into the heading of 22.011, and the colon following the phrase intentionally or knowingly":" means that what follows the colon is an elaboration, summation, implication, ect. of what precedes the colon. See Webster's Encyclopedic Unabridged Dictionary of the English Language. 2001 New deluxe edition. Therefore, the intentionally or knowingly CMS according to the plain language of the statute modifies everything that follows the colon, including "of a child". So according to the majority opinion in Johnson, since the legislature did expressly include a knowledge requirement in 22.011, then they must have intended to make the knowledge requirement modify "of a child", especially since they never dispensed with any mental element pursuant to 6.02(b), and any opinion by the Court of Appeals to the contrary violates the Seperation of Powers Doctrine, and is clearly in contradiction to the previously quoted excerpt from the Court of Criminal Appeals in Johnson.

II.

Since 22.011 was enacted in 1983 all cases involving mistake or ignorance of age have been affirmed in the appellate courts and can be traced back to the justifications used in Vasquez, which should no longer control since 22.011 expressly prescribes the requirement of a CMS without dispensing with any mental element, which Vasquez could not firmly rely on. The 1983 to current version of the statutory rape provision should wipe out Vasquez and all its progeny. Compare to **Sanders v. State 1 S.W.3d 885, 887 (1999)** (Where the court held the new 1998 version of rule 606(b) wipes out **Buentello v. State 826 S.W.2d 610 (Tex Crim. 1992)**, and all of its progeny.)

III.

Regarding 22.011, the courts have never simply considered just the plain language of the statute without first going to extratextual factors such as legislative history referring to cases like Vasquez, Morissette, etc.

> "If the plain language of a statute would lead to absurd results, or if the language is not plain but rather ambiguous, then and only then, out of absolute necessity is it constitutionally permissible for a court to consider in arriving at a sensible interpretation, such . . . extratextual factors as executive or administrative interpretations of the statute, or legislative history." See **Boykin v. State 818 S.W.2d 782, 785-86 (Tex Crim. 1991).**

The language of 22.011 is plain, unambiguous, and does not lead to absurd results, therefore, it according to Boykin is unconstitutional for the courts to rely on legislative history prior to 1983 to negate the prescribed CMS in 22.011 without first analysing the plain language of the statute and giving effect to its meaning pursuant to Texas Government Code § 312.002 (Meaning of words), and § 311.021 (Intention in enactment of statutes). Boykin also gives the courts a guideline to follow in statutory interpretation, which it has not been followed by any Court of Appeals in regards to correctly interpreting 22.011. It has also never been analyzed by the Court of Criminal Appeals as to how far the purview of the prescribed CMS in 22.011 (a)(2) was meant to reach.

Morrison asks this court to use the guidelines stated in Boykin at 785 to interpret this reach by focussing its attention on the literal text of the statute, and to discern a fair and objective meaning of the text at the time of the enactment and at no point prior to the enactment, because like the Honorable Judge Campbell suggested:

> "There really is no other certain method for determining the collective legislative intent or purpose at some point in the past even assuming a single intent or purpose was dominate at the time of enactment." id.

For example, that single purpose being statutory rape being considered a strict liability crime at its reenactment. If it is found that the literal application of the plain language is not unclear or would lead to absurd results, then do not go beyond

the text of the statute in interpreting it, and apply the prescribed CMS to the entire statute including the complete verb's object "of a child", like the common usage of the English GRAMMER and syntax suggest. Compare to **Flores-Figueroa v. U.S. 173 L.Ed.2d 853 (2009)**, where the Supreme Court of the United States held that a similarily constructed statute, based on the plain language of the statute modified the entire statute:

> "As a matter of ordinary English grammer the CMS prescribed in 18 USC § 1028(A)(a)(1) is naturally read as applying to all the subsequently listed elements of the crime, [including the last three words of the statute "of another person"]. Where a transitive verb has an object listeners in most contexts assume that an adverb such as knowingly that modifies the verb tells the listener how the subject performed the entire action including the object. The government does not provide a single example of a sentence that when used in typical fashion, would lead the hearer to a contrary understanding, and the courts, ordinarily interpret criminal statutes consistantly with the ordinary English usage." Flores-Figueroa at 855; Also see **Liparota v. U.S. 105 S.Ct 2084, 2087-88 (1985)**; Compare to **U.S. v. X-Citement Video 115 S.Ct 464, 467 (1994).**

Looking only at the construction of the statute in 22.011 like done here, the Flores-Figueroa logic should apply with equal force to 22.011's statutory language. The question in Flores-Figueroa concerning what the CMS modifies in 18 USC 1028 is identical to Morrison's question concerning 22.011's CMS, and they should be answered the same, regardless whether some extratextual factors in the past have concluded that:

> "[In statutory rape cases the actors] personally confronted the underage victim and could have learned her true age, therefore X-Citement Video is distinguishable." As stated in Scott at 242; and **Fleming v. State 376 S.W.3d 854, 860 (2012)**,

to disregard the Supreme Court's holding that the CMS in a statute that criminalizes the knowing transportation, shipping, receiving,or distribution of child pornography was to modify the phrase, "the use of a minor", which the Supreme Court determined much like they did in Flores-Figueroa by the plain language and common usage of the words in the statute. Therefore, the Court of Appeals' decision to side-step the main issue of statutory construction used in X-Citement Video, and rely on the gratis dictum, extratextual factor stated in footnote 2 at 469 to overrule Scott and Fleming's similar argument was err. Morrison will argue this in more detail later at pages 60-66 this ground.

Flores-Figueroa's question is:

> "Does the statute require the government to show that Flores-Figueroa knew that the "means of identification" he unlawfully... used in fact belonged to another person?" At 856.

The Supreme Court's answer:

> "We conclude that it does." Id.

Morrison's question is:

> "Does the statute, 22.011, require the state to show that Morrison knew that the sexual organ he penetrated in fact belonged to a child? Or does the statute require the state to show that Morrison had the intent to penetrate the sexual organ that

was one of a child's?"

Based on the Supreme Court's decision, and only by reading the plain language of 22.011, without going to extratextual factors (I.E. old statutory rape case law prior to the enactment of 22.011, like Vasquez, Morissette n. 8, or any recent cases that are predicated from those like Fleming, Scott, Johnson, X-Citement Video n.2, ect.), the answer should be the same.

The plain language of 22.011 suggests like in Flores-Figueroa that the CMS modifies the transitive verb's object or last three words in the sentence, "of another person" in Flores-Figueroa, and "of a child" in the instant case. Since the statutes are both written syntactically alike, the purview of the CMS must then have the same reach, and any contrary decision that is justified by the special context of the statute, "that a child was involved", or legislative history that was made prior to the enactment of 22.011, or any other factor except by the plain language of the statute is unconstitutional and violates both the Seperation of Powers Doctrine, and the Equal Protection of the Laws which will be argued in ground five.

It might be argued that 22.011 contains a special contextual factor (that a child was involved) and that alone can contradict the logic of the proper statutory construction and interpretation of 22.011 as compared to the majority decision in Flores-Figueroa. See Justice Alito's opinion at 864 where he said:

> "18 USC 2423(a) makes it unlawful to knowingly transport an individual who has not attained the age of 18 years in interstate or foriegn commerce... with intent that the individual engage in prostitution, or in any sexual activity for which a person can be charged with a criminal offense. The Court of Appeals have uniformly held that a defendant need not know the victim's age to be guilty of the crime under this statute."

That very well may be true in regards to 18 USC 2423(a), or even the federal statutory rape statute 18 USC § 2243 because § 2423(f)(2) through its counterpart 18 USC 1591(c), as does 2243(d) both dispense with the knowledge requirement regarding the age of the complaintant, which 22.011 never does. Justice Alito, however, failed to include the fact that 2243(g) includes a mistake of age defense, as does the federal version of statutory rape in 18 USC § 2243 in §(c)(1). And the prescribed intent element in 2423(a) modifies "any sexual activity for which the person can be charged", indicating the defendant must have intent of not only the minor engaging in prostitution, but also that the sexual activity was a crime like an innocent sexual act involved a minor. Also trafficking persons, and prostitution are crimes regardless if the victim was a child or not. See Staples v. U.S. 114 S.Ct 1793, 1799 (1994):

> "Our analysis in Freed likening the act to the public welfare statute in Balint rested entirely on the assumption that the defendant knew that he was dealing with hand grenades- that is, that he knew he possessed a particular dangerous type of weapon, one within the statutory definition of a "firearm", possession which was

not entirely innocent in and of itself."

Also compare to Zubia v. State 998 S.W.2d 226, 229 n.5 (Tex Crim. 1999) (Meyers' dissent); X-Citement Video at 469 n.3 (Discussing the difference between "jurisdictional facts" that enhance an offense otherwise commited with an evil intent and "elemental facts" that seperate legal innocence from wrongful conduct.) Plus, the Texas Penal Codes' equivalent to those crimes, section 20A.02 (Trafficking a person) and section 43.05 (Compelling prostitution) also clearly dispense with the mental element regarding age, giving rise to the fact that if the Texas legislators intended that 22.011's CMS did not modify "of a child", they would have plainly dispensed with the intent or knowingly requirement regarding age like they did in those crimes, and they surely would have never added a CMS in the heading like they did without dispensing with any mental element to add confusion, vagueness, and constitutional doubt to the statute. Therefore, Justice Alito's argument regarding § 2423 is distinguishable from the plain language of 22.011.

IV.

The only thing in 22.011 that makes it criminal is that the sexual organ that was penetrated was one of a child's, which should support that that is the element of the crime that should be modified by the required CMS. See Staples supra at 1799 (Where the Supreme Court held that the presumption in favor of a mens rea requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct.); Also see X-Citement Video at 468-469, and Liparota supra at 2084 for two other Supreme Court cases that held this requirement. Liparota at 2084:

> "We note that '[C]ertainly far more than the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.' And that criminal offenses requiring no mens rea have a 'generally disfavored status'. Similarly, in this case, the failure in Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background assumption of our criminal law. This construction is particularly appropriate where, as here, to interpret the statute otherwise would be to criminalize a broad range of apparently innocent conduct."

Legislators in 22.011 did explicitly indicate a mens rea requirement, granted they did not explicitly indicate whether the mens rea requirement applies to only the act of causing the penetration of the sexual organ, or that it applies to whether the actor knew the sexual organ was a child's. To interpret it as only applying to the act would be criminalizing a broad range of innocent conduct, especially in cases involving precocious 14 to 16 year old teenagers who a lot of times look and act older than their true age.

Staples is another Supreme Court decision that Morrison uses to support his position about how the statutory construction of 22.011 supports the legislative intent that the

CMS/mens rea should modify "of a child". Both the instant case and Staples are very similar in the way that the laws governing the offense that was challenged, regulate a constitutionally protected act, and the government and the courts have said that the mens rea does not modify the facts that make the act illegal. In Staples it was the fundamental right to own or possess a firearm. In Morrison, it is the natural right to copulate and freedom of intimate association. Morrison concedes that both acts being constitutionally protected, for good reason, still have their limits. See **Baker v. Wade** 553 **F.Supp** 1121 (1982):

> "State has, for constitutional purposes, a compelling interest in regulating some types of sexual conduct, e.g. rape, indecent acts in public, sex offenses involving minors, etc."; Also see Staples at 1795: "The National Firearm Act 26 USC §§ 5801-5872 impose strict regulation requirements on statutorily defined firearms."

Therefore, like in Staples the mens rea should be contingent upon the restrictions of the constitutionally protected act, as in all crimes that regulate a constitutionally protected act. Also compare to **State v. Howard** 172 S.W.3d 190, 198-99 (2005).

Staples was in possession of a firearm which he thought by its appearance (a semi-automatic rifle) that it was legal to own without it being required to be registered pursuant to 26 USC § 5861(d). Similarly, Morrison was under the impression and thought the female he copulated with, who looked, acted, and told him she was 21 years was, (an adult), and was legally able to consent to sex. In both situations the intentional acts are protected by the constitution. The statute criminalizing the possession of a "firearm" (machine gun) without being registered did not contain a mens rea requirement that specifically said Staples had to know the firearm he possessed was in fact a machine gun. The Supreme Court, nevertheless, held that to obtain a conviction the government should have been required to prove beyond a reasonable doubt that Staples knew his rifle had the characteristics that brought it within the statutory definition of a machine gun. See Staples at 1804. They based their logic on three factors that parallel with 22.011 and Morrison asserts that if this same logic would be used in his case, it would garner him the same relief as Staples, that being the state should have been required to prove beyond a reasonable doubt that Morrison knew his consentual sex partner had the characteristics that brought her within the statutory definition of her being a child, (a person under the age of 17). These factors are:

(1) Because some indication of congressional intent, express or implied, is required to dispense with mens rea, § 5861(d)'s silence on the element of knowledge required for a conviction does not suggest that congress intended to dispense with a conventual mens rea requirement, which would require that the defendant know the facts making his conduct illegal. Id. at 1796-97.

Both statutes 5861(d) and 22.011 do not dispense with any mens rea, therefore, 22.011 should be decided the same way in this respect. 22.011 should in fact weigh more in

favor of requiring a mens rea than 5861(d) because it is not silent as to a mens rea, the legislature has explicitly prescribed one into the statute, and because of this factor it must modify the facts that make the conduct illegal.

(2) Neither 5861(d), nor 22.011 fit in the line of precedent concerning "public welfare" or "regulatory" offenses in which the Supreme Court has understood Congress to impose criminal liablity, through statutes regulating potentially harmful or injurous items, without requiring an accuseds' knowledge of the facts that made the accused conduct illegal, so long as the accused was aware of dealing with an item placing the accused in responsible relation to a public danger. Id at 1797-1802. 5861(d), nor 22.011 can be considered public welfare, or regulatory offenses to justify criminal liablity without regards to mens rea where a statute is silent and does not dispense with a mens rea. 22.011 is not silent as to a mens rea and is a crime against a person not the public.

(3) The potential harsh penalty of up to 10 years imprisonment for a violation of § 5861(d) and 20 years imprisonment and registering as a sex offender for life for a violation of 22.011 confirmed the Supreme Court's reading of the act as not involving an intent by Congress or legislature to eliminate a mens rea requirement. Id. at 1802-04.

Since 22.011 has a more severe penalty than 5861(d), it gives more reason the court should determine the CMS in 22.011 modifies the element of the crime that makes it criminal, because a sentence over twice as severe as the one in Staples shows the legislature must not have intended to dispense with any mens rea, especially the mens rea that is the only element which makes the statute a crime.

The question discussed in Staples was:

> "Should the government have been required to prove beyond a reasonable doubt that Staples knew the weapon he possessed had the characteristics that brought it within the statutory definition of a machine gun in order to convict him of 5861(d)?"

The Supreme Court held that the government must prove beyond a reasonable doubt that Staples knew his rifle was a machine gun to be guilty of 5861(d). Morrison posits a similar question:

> "Should the state have been required to prove beyond a reasonable doubt that Morrison had intent or knew that the sexual organ he penetrated had the characteristics that brougnt it within the statutory definition of being a child's sexual organ in order to convict him of 22.011?"

Using the same logic relied upon by the Supreme Court in Staples, the answer should be decided the same in Morrison's case as it was decided in Staples:

> "For the forgoing reasons, the judgement... is reversed, and the case is remanded for further proceedings consistent with this opinion." at 1804.

Another similarity between 5861(d) and 22.011 is that the legislators in the first

half of the 20th century, did not intend to require knowledge of all the facts to be guilty of these crimes. See Staples at 1812-13 (Stevens' dissent). (Discussing the legislative history of the National Firearms Act and how mens rea did not apply to all elements of crimes associated with the Act). Compare to Fleming supra at 861-62; Johnson supra; and Morissette supra n.8. (where they discussed the history of statutory rape also being strict liability in the past). Despite the legislative history of 5861(d), the Supreme Court justly decided to go against stare decisis and require a mens rea element in 5861(d) as previously stated, therefore, the same can be done in 22.011, especially since the plain language of the statute suggests that a mens rea is required.

> "Under the doctrine of stare decisis, [the Court of Criminal Appeals will] generally adhere to past precident because doing so 'promotes judicial effeciency and consistancy, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process! But overruling precident is acceptable under certain circumstances. Some factors supporting the overruling of precident are:
> 1) When the original rule is flawed from the outset.
> 2) When the reasons underlying the precident have been undercut by the passage of time.
> 3) When the rule consistently creates unjust results or places unnecessary burdens on the system." Quoted from **Jordan v. State 54 S.W.3d 783, 786 (Tex Crim. 2001).**

Morrison will show why these three factors weigh in favor that the strict liability nature of statutory rape in the past should be overruled by 22.011, and why following stare decisis regarding 22.011's CMS is unjust and no longer a good idea.

The original rule of statutory rape being strict liability, according to **U.S. v. Ransom 942 F.3d 775, 777 n.2 (1991)**, was codified by the year 1275 prohibiting carnal knowledge of any child under ten years in which case the consent or nonconsent was immaterial, as by reasons of her tender years she was incapable of judgement and discretion. The protected age of under ten years was then moved up to children under twelve years, and the legislators rightly determined that strict liability was appropriate because:

> "[N]o credible error of perception could regard a child under the age of twelve as an appropriate object of sexual gratification and that to do so would be nothing less than a 'dramatic departure from social norms'" Ransom at 778.

Since the outset of the original rule of statutory rape's strict liability provision protected children under 12 years, and the protected age group described in 22.011 (14-16) would not have been a crime back then, shows that the original rule of strict liability in statutory rape cases is flawed when compared to cases involving 14 to 16 year old minors that today can be easily mistaken for adults 17 to 21 years, while the original strict liability aspect involved children who could not possibly be mistaken as adults. Morrison's logic is supported by the United States Congress when they implimented a reasonable mistake of age defense into the federal statutory rape provision 18 USC 2243 (c) criminalizing sexual acts with minors 12 to 15, and chose not

to allow a mistake of age defense in 18 USC 2241 which criminalizes engaging in sexual acts with children under 12 years. Therefore, the original rule of strict liablity in statutory rape cases involving children under 12 years can not compare the same when involving minors from 14 to 16 years, and it is flawed from the outset and the precedent that has been used to say 22.011 is strict liability should be overruled and at least allow for a mistake of age defense because it involves minors from 14 to 16 years.

22.011 being perceived as a strict liablility offense is also flawed from its onset because the court's decisions, since its enactment in 1983, to deem the statute a strict liability offense, despite the CMS and the fact the legislature never dispensed with any CMS, gives support to the fact that the stare decisis effect of the strict liability presumption of statutory rape should be overruled by the plain language of 22.011.

The reasons underlying the precedent for statutory rape being strict liability have also been undercut by the passage of time. Like previously mentioned the strict liability crime was originallyimposed upon actors who had sex with children under 12 years. As time went on the age of consent bounced back and forth from 13 to 18, and varied from state to state. As the age of consent rose the courts until the later half of the 20th century carried along the strict liability aspect concerning knowledge as the victim's age and did not allow mistake of age as a defense. The evolution of statutory rape then started to allow for mistake of age as a defense, and today at least 20 states and the United States allow for a mistake of age defense.[2]

> "While a child under the age of thirteen requires the protection of strict liability, the same is not true of victims thirteen to sixteen years of age. We recognize the increases maturity and independance of today's teenagers and, while we do nothold that knowledge of the victim's age is an element of the offense, we do hold that under the facts of this case the defendant should have been allowed to present his defense of mistake of fact." See Fleming supra at 861, quoting **Perez v. State 803 P.2d 249, 250-51 (1990).**

The opinion in Perez hit the nail on the head and briefly sums up Morrison's argument why stare decisis concerning the strict liability aspect of statutory rape involving minors from 14 to 16 years should be overruled, and 22.011 should be interpreted literally like it is written and the CMS modify the whole statute including "of a child", or at least allow a mistake of age defense in cases like Morrison's when

2. Alaska, Arizona, Arkansas, Indiana, Kentucky, Maine, Missouri, Montana, New York, Pennsylvania, Washington, West Virginia, Wyoming. See **http://en.wikipedia.org/wiki/Age_of_consent**. This is not an all inclusive list because this source stated in a disclaimer that they answered in the negative if they did not know if a state did or did not allow for mistake of age. This is accurate because there are at least four other states that do allow for mistake of age that were not on the Wikipedia list. Maryland, New Mexico, and Utah. See **Johnson v. State 967 S.W.2d 848**, 850 **n.1.** Also Illinois See 720 Ill. Comp. Stat. Ann.§§ 5/12-15(b), (c), 5/12-16(d). See U.S. v. Wilson, 66 M.J.39, 43-44 & n.8 (C.A.A.F.2008) for exclusive list which includes four more states totaling 20.

the reasons underlying the precedent from the early 1900s to 1960s have been undercut by the passage of time.

Continuing to imprison young men who mistakenly but reasonably believed their consentual sex partner was above the age of consent serves no criminological purpose, creates unjust results, and places unnecessary burdens on the system because the defendant:

> "evidences no abnormalty, no willingness to take advantage of immaturity, no propensity to the corruption of minors." See Fleming at 861, quoting the Model Penal Code § 213.6, cmt 2 at 415.

The extra amount of resources devoted to prosecute these crimes, police the sex offender registry, or the expense it costs to incarcerate a person for 2 to 20 years for this unintentional crime puts an unwarranted burden on the system, not to mention it destroys the defendant and his family. The results of a possible conviction and stigma associated with such a crime is unjust to these kind of offenders. More and more states, as well as the U.S government have come to this conclusion, therefore, those three factors show that 22.011 should no longer be strict liability and the former precedent should be overruled.

So in light of the Supreme Court's holdings in Staples, Flores-Figueroa, and Liparota along with the Court of Criminal Appeals' holdings in Boykin, the legislative intent in 22.011 should be interpreted by the plain language of the statute, and that being that the required mens rea element should be proved in 22.011 regarding Morrison's reasonable belief that the sexual organ he penetrated belonged to a child, and by the courts ignoring all the factors that support 22.011 having a mens rea by relying on a few extratextual factors that suggested in a distant past that statutory rape is strict liability violates the Seperation of Powers Doctrine as well as the Equal Protection of Laws. See ground five.

V.

The Honorable Justice Scalia said it best in his concurring opinion in Flores-figueroa at 173 L.Ed. 2d 863:

> "I likewise cannot join the court's discussion of the (as usual, inconclusive) legislative history, relying on the statement of a single member of congress or an unvoted-upon (and for all we know unread) committee report to expand a statute beyond the limits its text suggests is always a dubious enterprise. And consulting those incunabula with an eye to making criminal what the text would otherwise permit is even more suspect. See **U.S. v. R.L.C. 112 S.Ct 1329 (1992)** (Scalia concurring in part concurring in judgement.). Indeed it is not unlike the practice of Caligula, who reportedly 'Wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare people.' (citation omitted) The text is clear and I would reverse the judgement of the Court of Appeals on that ground alone."

In 22.011 the statute's text is clear and the courts should not look at the "incunabula" of statutory rape, or any other extratextual factor to negate the CMS that was prescribed in the current statutory rape provision (22.011), nor should they make exceptions to other penal codes like 6.02, 8.02, or 2.01, especially since the early stages of the strict liability statutory rape laws that they commonly refer, were indicative of victims younger than 12 years. For example, Judge Barnard in Byrne supra opined on several issues that Morrison lodges, and she erred in her opinion to the point of being skewed and biased by abscribing to the words and phrases in 22.011 a distorted meaning and definition that is substantially at variance with that abscribed by the legislature or by citizens of average intelligence and common sense, and by far reaching through a convoluted maze of extratextual factors, without ever giving effect to the plain language of the statute, not only in 22.011, but also in 6.02 and 8.02.

> "Appellate judges cannot ignore or misconstrue statutory language on the basis that in a particular case they as individuals might disagree with the outcome dictated by the policy choices made and embodied in legislation." See **In Re Dept. of Family Services 273 S.W.3d 637 (2009).**

In the Byrne court's analysis of 22.011 the court said at 747:

> "To sustain a conviction under the [22.011] statute the state must prove beyond a reasonable doubt that the defendant 'intentionally or knowingly cause[d] the penetration of the anus or sexual organ of a child by any means.' Tx. Penal Code ann. § 22.011(a)(2)(A). A "child" under this section is defined as any person younger than 17 years of age. Id. at § 22.011 (c)(1)."

That statement by itself is in fact correct. As a matter of ordinary English grammer it seems natural to read the statute's words "intentionally" or "knowingly" as applying to all the subsequently listed elements of the crime.

The Byrne court, the state, nor can any other court easily claim that the words "intentionally" or "knowingly" apply to only the statutes first nine words, "cause the penetration of the anus or sexual organ", then skip the next three words, "of a child", and again pick up to modify the last three words, "by any means".(Compare to Flores-Figueroa at 857.), but they do. Judge Barnard's subjective analysis continued at 747:

> "The statute does not require the state to prove a CMS with regard to the victim's age, and does not provide for the related affirmative defense of mistake of fact."

That sentence in that paragrapgh is err and violates the Seperation of Powers Doctrine of the Texas Constitution as well as the U.S. Constitution. No where in the statute of 22.011, nor any other statute voted upon by our lawmakers has it said those things. The Byrne court added that into the statute without constitutional authority. Several other courts have done the same thing since the CMS was prescribed in 22.011. See Jackson supra at 617:

> "These statutes do not require the state to show that appellate knew the victim was younger than seventeen years of age. The state has long denied the defense of ignorance or mistake in relation to sexual offenses involving children,(Vasquez at 865), thus the trial court properly refused to submit an instruction of mistake

of fact in this case."

Also see Johnson at 849, which it may be correct in cases that have no explicit CMS like 21.09 (Vasquez) or 21.11 here...

> "This court has previously held that in cases involving the sexual assault of a child, such as **rape of a child (21.09)** or **indecency with a child (21.11)**, the state is not required to show that the appellant knew the victim to be younger than 17 years of age. In fact this court held in Vasquez... that it follows that to require the state to allege and prove the appellate knew the prosecutrix to have been under the age of 17 would establish ignorance or mistake as a defense in contravention of clear legislative intent." (Emphasis added).

...but applying this to **22.011** is err as done in Hicks 15 SW3d 626 supra at 631 relying on Johnson to say:

> "The state is not required to show that the victim to be under the age of seventeen in sexual assault cases."

Also see Scott at 242:

> "The majority rule in the United States is that the defendant's knowledge of the victim's age is not an essential element of statutory rape and this exclusion does not violate due process."

That may be the majority rule in statutes that dispense with knowledge of age as an element or that do not contain an explicit CMS like 22.011 does. The courts cannot bypass the plain language of the statute and go directly to extratextual factors to obtain these kind of results like they have done in these cases regarding 22.011.

> In statutory construction courts begin with the language of the statute and if the language is clear it is not for the judiciary to add or subtract from the statute. See **Boykin v. State 818S.W.2d 782, 785 (Tex. Crim. 1991)**; Compare to **Coit v. State 808 S.W.2d 473, 475 (Tex Crim. 1991)**; also **Ex parte Davis 412 S.W.2d 46, 52 (1967)**.

These previously stated court decisions, along with the Byrne court's decision to suspend section 6.02 by saying:

> "We find no precedent supporting the claim that section 6.02 of the Penal Code requires a mens rea component in section 22.011(a)(2)(A). We therefore, overrule Byrne's contention." At 752; Also "We further hold section 6.02 does not mandate a mens rea requirement in section 22.011(a)(2)(A)." Id.

That is also a Seperation of Powers violation, and a violation of Article 1 § 28 of the Texas Constitution which says:

> "No power of suspending laws in this state shall be exercised except by the legislature."

The court suspending these laws is a clear constitutional violation. Section 6.02(b) says:

> "If the definition of an offense does not prescribe a CMS, a CMS is nevertheless required **unless the definitionn plainly dispenses with any mental element**." (Emphasis added).

No where in that statute, 22.011, nor in any other statute is there an exception to the plain language of section 6.02(b). 22.011 does, however, prescribe a CMS so it should actually be governed by 6.02(a), which says:

"Except as provided in subsection (b), a person does not commit an offense unless he intetionally, knowingly, recklessly, or with criminal negligence engages in conduct as the definition of the offense requires." (Emphasis added).

Since the plain language of 22.011 describes the definition of the conduct as: To commit an offense a person must intentionally or knowingly penetrate a sexual organ of a child by any means, "of a child" is part of the conduct that the definition of the offense requires, and no where has the legislature promulgated into the law, since 22.011's enactment, any exceptions to 6.02(a) regarding 22.011's CMS not attatching to "of a child". By the Court of Appeals taking it upon themselves to suspend that legislation in regards to 22.011, violated Morrison's constitutional right to present a defense that the legislature offered when they explicitly provided a CMS/mens rea into the statute in 1983. Because Morrison was not offered the defense the legislature provided, he was forced to plead guilty to a crime he was not criminally culpable of commiting and was sentenced to 16 years prison. If the Court of Appeals would not have violated the Seperation of Powers Doctrine and they would have interpreted the plain language of 22.011 as the language suggests then Morrison would have been able to use the fact that he did not know the minor in his case was not an adult and would have not pled guilty then went to trial and been acquitted.

VI.

The Byrne court chose to overrule Byrne's contention, like the one Morrison similarly lodges, which is that 6.02 requires that a mens rea be proven in 22.011 cases where the defendant had a reasonable belief that the child was an adult. They relied on Justice Price's concurring opinion in Johnson at 851-854 (stating that section 6.02 will not require mens rea where a strict liability criminal statute is silent on the matter if the legislature intended otherwise.) 22.011 is not silent on the matter. The legislature prescribed a CMS into the statute, in all reality making 22.011 a nonstrict liability offense, and requiring a CMS to be proved. Even if it was constitutional for the courts to say that the prescribed CMS does not modify "of a child", then 6.02(b) would control, and because 22.011 does not dispense with any mental element, a CMS must, nevertheless, be proved to establish criminal culpability.

In Johnson at 852, Justice Price made his decision based upon 21.11(a) being silent as to a CMS, while 21.11(a)(2) prescribed a CMS, indicating that the legislature meant to dispense with a CMS in 21.11(a). 22.011 is distinguishable. 22.011(a)(1) and § (a)(2) both have the exact same CMS, therefore, the legislature never intended to dispense with any mental element.

Judge Barnard points to Aguirre v. State 22 S.W.3d 463, 473 (Tex Crim. 1999) for the same support to overrule Byrne:

> "First the court noted that when the legislature requires mens rea in one section of a statute but subsequently omits the requirements in another section of the same provision it is likely the legislature intended the omission." Byrne at 752.

It must then be said, if the legislature did include a CMS and mens rea in one section of the statute like they did in 22.011(A)(1), where knowledge of lack of consent by the victim must be proved:

> "A sexual assault is **without consent** if the other person has **not consented** and the actor **knows the other person is unconcious or physically unable to resist**." See **Casey v. State 160 S.W.3d 218 (2005).** (Emphasis added).

Then when an identical CMS is prescribed in the subsequent section as done in 22.011(A)(2) and there is no intended omission, the mens rea must then modify to the same degree: To the element that makes the otherwise innocent act criminal. In 22.011(a)(1) the defendant **intentionally** or **knowingly** caused the penetration of the sexual organ of another person... **without their consent**, and in 22.011(a)(2) the defendant **intentionally** or **knowingly** caused the penetration of the sexual organ of a **child...**, which unlike § (a)(1) consent is not a factor and the only criminal element remaining is that the person was a child from 14 to 16 years and was unable to give effective consent.

The definition of "effective consent" regarding children also supports that the legislature intended an element of mental culpability here. See **Tex. Penal Code 1.07(a)(19)(c):**

> "Effective consent includes consent by a person legally authorized to act for the owner. Consent is not given if:
>
> c) Given by a person who by reason of **youth**, mental disease, or defect, or intoxication is **known by the actor** to be unable to make reasonable decisions."

That definition supports Morrison's argument, granted **children from 14 to 16 years** cannot legally consent to sexual acts, the **actor**, however, **must know** the person was unable to make a reasonable decision by reasons of their **youth.** (Emphasis added).

It must also be said that if the legislature included a mens rea in one section of a statute (22.011(a)(1)) and the mens rea pertains to the whole section, then when an identical CMS/mens rea is prescribed in the subsequent section (22.011(a)(2)) the mens rea should also pertain to the whole section and not awkwardly skip over "of a Child".

The Byrne court also quoted Aguirre at 475:

> "That certain common law prohibitions such as crimes against children are widely known exceptions to the general rule that criminal convictions require proof of mens rea."

Like said before, that exception may have been relied upon in the past, before the legislators expressly prescribed a CMS in 22.011, but the plain language of the 1983 to current 22.011 supersedes that exception and can no longer control 22.011.

Grice lodged the same argument in Grice v. State 162 S.W.3d 641, 646-47 (2003). The 14th Court of Appeals dismissed the argument and affirmed Grice's conviction because:

> "6.02 has remained virtually unchanged since 1974 'and the Court of Criminal Appeals has consistantly upheld strict liability sex crimes not withstanding its existance.'"

That may, however, be true, but it does not make it any less unconstitutional for the Court of Criminal Appeals, or Court of Appeals to make exceptions to, or to suspend laws that were written, voted upon, and passed by our legislators like they have done with 6.02, 8.02, 2.01, and 22.011.

> "Appellate courts are not permitted to engraft exceptions to the clear language in unambiguous statutes, no matter how desirable the exception might seem. See **Offenbach v. Stockton 285 S.W.3d 517, 522 (2009).**

The legislature has not written an exception into the law that says 6.02, 8.02, or, 2.01 does not pertain to 22.011. And by the Court of Criminal Appeals and other appellate courts 'consistantly uph[olding] strict liability, [or nonstrict liability] sex crimes notwithstanding [**their**] existance.', is a violation of the Seperation of Powers Doctrine, Equal Protection of Laws, and Due Process. See **Commissioner v. Lundy 116** S.Ct. 647,656-57 **(1996):**

> "[T]he court is not free to rewrite the statute simply because its effects might be susceptible to improvement."

Also see **Ali v. Federal Bureau of Prisons 169 L.Ed** 2d 680, 692 (2008):

> "[Courts] are not at liberty to rewrite the statute to reflect a meaning [they] deem more desirable. Instead [they] must give effect to the text congress enacted."

Also see **Lamar County Appraisal Dist. v. Campbell Soup** 93 S.W.3d 642 (2002):

> "In interpreting statutes, an appeals court is not free to rewrite statutes to reach a result it might consider more desirable, or write special exceptions into a statute so as to make it applicable under certain circumstances."

The language of 22.011, 2.01, 6.02, and 8.02 are all clear and unambiguous, and by the courts adding exceptions to the mistake of fact defense, and negating the prescribed CMS in 22.011 that never dispenses with any mental element by saying:

> "The statute does not require the state to prove a CMS with regard to the victim's age and does not provide for a related affirmative defense of mistake of fact" See Byrne at 747. Or saying knowledge of age is not essential element of statutory rape. Scott at 242.

That is in complete contradiction to the plain language of 2.01, 6.02, and 8.02 and is unconstitutional. Because the courts have rewritten, added to, or suspended these statutes to reach a result they consider more desirable, they have effectively made law which is a violation of the Seperation of Powers Doctrine, and the result is that Morrison's right to present a defense was inhibited, which is a due process violation.

If the Court of Appeals would not have violated Article 2 § 1; Article 1 § 19; Article 1 § 28 of the Texas Constitution, and Article 3, and Amendments 5,6 and 14 of the

United States Constitution by not giving effect to the plain language in 22.011 and suspending 6.02, 8.02, and 2.01 in regards to 22.011's CMS, Morrison could have used his lack of intentionally or knowingly doing the crime as defined in 22.011 as a defense, and been acquitted of the charge.

VII.

Unlike Byrne and the other cases that have challenged the constitutionality of 22.011 not requiring a mens rea regarding the complaintant being a child, (See **Florence v. State 2013 Tex App Lexis 9381; Branson v. State 2013 Tex App Lexis 7155; Lathan v. State 2013 Tex App Lexis 4779; Duckworth v. State 2013 Tex App Lexis 9062; Fleming supra;** and **Hicks supra.**) Morrison's claim is that 22.011 is constitutional as written and does require a mens rea to be proven in regards to it being a child's sexual organ that the defendant penetrated. It is plainly evident by reading the statute using the common English usage of grammer and syntax that the CMS does in fact modify the entire sentence including the prepositional phrase "of a child". The courts have acted unconstitutionally by going outside of the plain language of the statute since 1983 to deem 22.011 a strict liability offense and never giving any effect to the plain language of 22.011, 6.02, 8.02, or 2.01.

> "Courts must construe statutes as written and, if possible, ascertain its intention from language used therein and not look for extraneous matters to be used as a basis for reading into statutes intention not expressed or intended to be expressed therein." See **Smith v. Brooks 825 S.W.2d 208, 211 (1992).**

If the legislature intended for 22.011 to be a strict liability offense they would not have included a CMS into the statute in 1983 when 21.09 was repealed, and they would have left the statute how it was, which made it clear that if someone had sexual intercourse with a female not his wife and she is younger than 17 years, then they committed an offense, period! No CMS was included into the statute, but that is not the case anymore. The plain language of the statute reads like Judge Barnard said in Byrne at 747:

> "To sustain a conviction under 22.011(a)(2)(A) the state must prove beyond a reasonable doubt that the defendant "intentionally" or "knowingly" caused the penetration of the anus or sexual organ of a child by any means."

If the legislature did not intend for the CMS to modify "of a child" they would have dispensed with the mens rea regarding the age of the child like they did in sections **20A02(b)(1) (Trafficking of a person),** or **43.05(a)(2) (Compelling prostitution)** where they said:

> "The actor commits an offense **regardless of whether the actor knows the age of the child** at the time of the offense," (Emphasis added).

Or they could have dispensed with the knowledge requirement like they did in section **25.06 (Harboring a runaway child):**

> "A person commits an offense if he knowingly harbors a child, and he is criminally negligent about whether the child is younger than 18 years."

Those strict liability crimes are in accordance with 6.02(b), dispensing with a CMS regarding age. 22.011 has not done that, therefore, it is unconstitutional for the courts to disregard the CMS as establishing a mens rea to modify the only element that makes 22.011 a crime "of a child". The legislature has not said anywhere that there is an exception to mistake of fact defense, or that knowledge of age is not an element of the crime pursuant to 2.01. The courts must interpret the language of the statutes as they are written. See Texas Government Code Chapters 311 and 312.

> "In ascertaing legislative intent words and phrases shall be read in context and construed according to the rules of grammer and common usage." Also see **Linick v. Employees Ent. Case Co. 822 S.W.2d 297, 301 (1991).**

VIII.

Morrison now asks the court to look to **Ex parte Weise 23 S.W.3d 449 (2009)** in support of his argument that since the legislature did prescribe a CMS into 22.011 in 1983, that the CMS supersedes the strict liability language of 21.09, and since the reenactment requires a mens rea, which never dispenses with any mental element regarding the complaintant being a child, Morrison respectfully requests that this Honorable Federal Court look only at the plain language of 22.011 and 6.02 to determine that a CMS must be proven, and that statutory rape is according to its revised statute (22.011) not a strict liability offense like the court held in Weise about the illegal dumping statute

Weise alleged that the illegal dumping statute, Tex. Health and Safety Code § 365.012 (A), (C) was unconstitutional as applied to him because it did not require proof of a CMS. Weise argued that even though the statute did not specifically require it, a CMS was nevertheless mandated by 6.02. See Weise at 452. As like in Weise, 6.02 is always made applicable to all statutes including 22.011 in accordance with Tex. Penal Code 1.03(b), and no where has it been promulgated that 6.02 does not apply to all aspects of 22.011.

> It is well established that the mere omission of a CMS cannot be construed to plainly dispense with a CMS. "If the definition of an offense is silent about whether a CMS is an element of the offense, subsection (b) [in 6.02] presumes that one is and §(c) requires that it amount to at least recklessness." See Aguirre supra at 472; also Weise at 452, 455.

Weise gives two examples of other statutes and case law that support Morrison's contention. The Weise court used the revised statutes in those cases as well as the severity of the punishment of one year in jail to determine that section 365.017 requires a CMS of at least recklessness to be proved. Morrison relies on the same logic for his argument, that the CMS in 22.011 should supersede the 21,09 law and negate any past strict liability indicators in which Weise gleaned that logic from **American Plant Food v. State 587 S.W.2d 679 (1979); and Exxon U.S.A. v. State 646 S.W.2d 536 (1982).**

In American Plant Food the Court of Criminal Appeals determined that the water pollution statute was reenacted as section 7.147 of the Texas Water Code and it expressly provided that the offense may be prosecuted without alleging or proving any CMS. This rationale was based on legislative history and since a former version had included a CMS, that was later omitted, they therefore, determined that to be the legislator's intent to dispense with the CMS and make the water pollution statute strict liability. See Weise at 453.

The opposite happened in 22.011 and also an air pollution statute in Exxon U.S.A. supra. They recognized in Weise at 453-54 that the Exxon case dealt with a violation that today bears no criminal or civil penalty. See Exxon U.S.A. at 536-38, Texas Health Code § 382.085 (1992), and Texas Water Code § 7.177, the air pollution offenses that impose criminal responsibility all contain a CMS. See § 7.177, therefore, the former decision upholding strict liability for air and water pollution offenses are no longer persuasive, much less controlling. Compare to **U.S. v. Abod 770 F.2d 1293 (1985); and Slott v. State 148 S.W.3d 624 (2004).** Also see **FDA v. Brown & Williamson Tabacco 146 L.Ed 2d 121, 140-41 (2000):**

> "The classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute." Also see **U.S. v. Fausto 98 L.Ed 2d 830, 844.**

The current 22.011 also contains a CMS that the previous 21.09 omitted, therefore, giving effect to the legislative intent that statutory rape is no longer a strict liability offense, and the justifications by the Court of Appeals to uphold strict liability for 22.011, (i.e. Vasquez, Morissette, etc.) are no longer persuasive much less controlling. The same rationale the Court of Appeals used in Weise to say a mens rea must be proved in the public welfare offense of illegal dumping should be equally applied to Morrison's case, and a mens rea should have to be proven in 22.011 as well, or it is a violation of Equal Protection of Laws. See ground five of this §2254

IX.

In Weise like a lot of other cases dealing with the same issue- whether the legislature intended to dispense with a mens rea-, see **Thompson v. State 44 S.W.3d 293 (2001); Rivera v. State 363 S.W.3d 660 (2011); State v. Walker 195 S.W.3d 293 (2006); Abdallah v. State 64 S.W.3d 175 (2001);** and **Aguirre v. State 22 S.W.3d 471** (Tex Crim. 1999), these and several other courts have used a series of nine guidelines to determine if a statute plainly dispenses with any mental element. The Court of Criminal Appeals created these guidelines in Aguirre supra. In defining strict liability offenses the Aguirre court said on page 475:

> "Another writer observed recently, strict liability offenses include not only those those that are regulatory, public welfare, or mala prohibita in nature but also those that for example protect children."

They then listed several cases in footnote 48 that reflected their decision to impose strict liability as to the element of a child's age in these offenses, Johnson was one of them. Morrison acknowledges that the 14th Court of Appeals shot down a similar argument that he lodges in Grice supra, but Morrison wishes to respectfully ask this Honorable Federal District Court to consider his argument in regards to the nine guidelines that the courts must use while doing a statutory construction analysis to determine if a statute is strict liability or not, and to do a proper statutory construction analysis of 22.011 using these guidelines to determine if the legislature has clearly dispensed with any CMS as tothe status of the sexual organ being one of a child's.

In Grice v. State, Grice's argument focussed on Aguirre's opinion casting doubt on the continuing authority of Johnson, which held a mens rea is not required in 21.11 (indecency with a child), as pertaining to the complaintant being under 17 years. On page 646 footnote 5, they stated that Grice recognized the holding in Johnson was equally applicable to the statutory rape provision, because in Johnson they cited Vasquez as controlling and it was a statutory rape case.

Morrison does not agree. What they failed to mention and acknowledge is that Vasquez was predicated off of 21.09, which never expressly included a knowledge requirement like its reenacted version, 22.011, does. And Johnson was also acquitted from his 22.021 charge because the CMS prescribed did expressly include a knowledge requirement. See Johnson at 858, therefore, the decision in Grice about the indecency of a child provision that does not explicitly provide a knowledge requirement, being equally applicable to a statute that clearly has a knowledge requirement is flawed. And by denying Morrison that same protection provided in Johnson violates the Equal Protection of Laws. See ground five.

The legislature in 1973, for some reason, did not include a knowledge requirement in 21.11 like they did in 22.011 and 22.021 in 1983 (probably the same reason they did not explicitly prescribe one in 21.09), but that is the reason Johnson was acquitted of his 22.021 charge and found guilty of the lesser included offense of Indecency with a child. So the Grice court's reasoning to overrule Grice's argument that Aguirre negates Johnson's authority does not mesh so nicely with Morrison's similar argument regarding how the guidelines found in Aguirre should be used as a statutory construction analysis in 22.011 to determine if the legislature intended to dispense with any CMS. Morrison asserts that the two statutes are distinguishable, and since the plain language of 22.011 does include an "intent" or "knowledge" requirement, and the statute has never been given a proper statutory construction analysis using the guidelines found in Weise, Thompson, Rivera, Walker, Abdallah, and Aguirre, he asks the Court of Criminal Appeals

to apply these guidelines to 22.011 and determine if the legislature clearly dispensed with any mental element. He also asks the court to perform this analysis objectively without relying on past dogmatic views about statutory rape being strict liability in regards to the defndant's reasonable belief that the complaintant was an adult.

X.

It may be construed that it is an absurd result that the legislature intended to make 21.11 (indecency with a child) strict liability, and gave 22.011 a mens rea regarding the minority of the complaintant, but according to Government Code § 311.025, if two statutes enacted at different sessions of the legislature are irreconcilable then the one enacted later prevails. 21.11 was enacted 10 years before 22.011, therefore, if it was to be considered an absurd result, that one was strict liability and the other was not, then 21.11 should be also considered a nonstrict liability offense before it is said that 22,011 should be strict liability based off of the similar statute of 21.11 being strict liability. The two statutes were enacted by two seperate legislatures and:

> "It is the duty of the Court of Appeals to interpret language of statutes as they are written, courts cannot engage in speculation as to what the legislature intended."See **Huckabay v. Irving Hospital 879 S.W.2d 64, 65 (1993).**

> "It is the duty of the court to administer the law as written, and not to make the law: and however harsh a statute may seem to be, 'or whatever may seem to be its omissions", courts cannot on such considerations by construction retrain its operation or make it apply to cases to which it does not apply, without assuming functions that pertain soley to the legislative department of the government." See **Chaney v. State 314 S.W.3d 561 (2010).**

The Supreme Court also agrees that courts should not rewrite statutes and they must interpret statutes from what the legislators intended. See **DePierre** v. U.S 180 L.Ed 2d 114, 125 (2011):

> "It is not for the U.S. Supreme Court to rewrite a statute so that it covers only what the court thinks is necessary to achieve what it thinks Congress really intended."

The Aguirre court determined that crimes that are designed to protect children are strict liability, they ascertained that presumption from a group of writers they cited in footnote 46 at 475. They include **Rollin Perkins & Ronald Boyce Criminal Law 910 (3d ed 1982) n.31 pp. 884-85; Charles Torcia, Whartons Criminal Law 123 (15th ed 1993) n. 39 at 127; Gainsville Williams Criminal Law 264 (2nd ed 1961) n.31 pp 239-44.** These same commentators also:

> "Insist that strict liability has no place, or should have no place in the law of crimes." See Aguirre at 472, n.31 where Perkins and Boyce also said, "Due Process is denied by conviction based on liability without fault." And see note 40 at 473 where they said, [Strict liability should only apply to regulatory measures like [public welfare offenses] where the emphasis of the statute is evidently upon

achievement of some social betterment rather than the punishment of the crimes as malum in se.')

Were Perkins and Boyce right? How can it make society better to lock up a normal hard working young man for 16 years, for him acting on his natural right to copulate, by him having sexual intercourse with a female who told him she was 21, looked 21, acted 21, not only consented to the act but initiated and welcomed the act? But it turned out, unwittingly to him, that she was 15 years. That man does not have any unnormal characteristics that should alert the government, police, or society that he is a danger to children, and belongs in prison like someone who may have intentionally or knowingly broke that law which is designed to protect young teenagers from people who solicit sex from, and prey on that age group. A large part of society, and legislators do not want to see anyone get thrown into prison for making that kind of misjudgement, and they know it serves no social betterment in doing so. That is why there is at least 20 states, along with the United States Government, who have said that is an absurd result and now allow a mistake of age defense.[2] (See page 23 for footnote 2).

The comments that the commentators have written that have been quoted in Aguirre that go against strict liability being associated with crimes, especially crimes that can be punished by prison time, contradicts the Aguirre court's assertion on page 475 that strict liability offenses include crimes that are designed to protect children, and those comments are just as, or even more persuasive that the cited to, yet unquoted footnote 46 at 475.

XI.

The Court of Criminal Appeals stated in footnote 48 at 475 (Aguirre), a list of three cases that reflect the imposition of strict liability concerning age when children are involved. **Zubia v. State 998 S.W.**2d 226 **(Tex Crim. 1999)** (Injury to a child). Zubia shot into a crowd and injured a four year old child. That conduct, much like most of the conduct that constitutes injury to a child where a person can be criminaly responsible for that crime, is illegal whether it was a child victim or not. Zubia would have been criminaly liable if the victim would have been any age. Therefore, injury to a child is not comparable to 22.011, because having consentual-in-fact intercourse is not by itself a crime like the conduct that constitutes a crime in injury to a child. See Zubia at 229 n.5 (Meyers' dissent); also X-Citement Video supra at 469 n.3.

The only thing that makes 22.011 a crime is that the sexual organ that was penetrated was one of a child's. Same with their reference to capital murder of a child younger than six. Murder is a crime regardless of the age of the victim. Like previously mentioned, Johnson is distinguishable also because it was a 21.11 case and that statute does not have an explicit CMS/mens rea as does 22.011. And Johnson was aquitted on his similarly written 22.021 charge because it did have the requirement of a mental state.

(Roof same, 21.11 case.). So these cases cited as support for crimes that are designed to protect children as automatically being deemed strict liability are distinguishable from 22.011. By the plain language of 22.011, 6.02, 2.01; 22.011 cannot be construed as a strict liability offense like the Court of Appeals have unconstitutionally held.

XII.

In **Honeycutt v. State 627 S.W.2d 417, 423-24 (Tex Crim. 1982)** The Court of Criminal Appeals said:

> "The power to define offenses in abrogation of Titles 1,2, and 3 of the Penal Code which include the CMS requirements in 6.02 is reserved to the legislature, therefore, the courts must comply with 6.02 when a statute prescribes or dispenses with a CMS in an offense."

The courts have gone against this holding from Honeycutt and abrogated 6.02, 8.02, 2.01, in regards to 22.011. Simply put, the legislature has plainly written into 22.011(a)(2) an intentionally or knowingly scienter/mens rea element that continues to be ignored, except for it modifying only the act of causing the penetration of the sexual organ. That current Court of Appeals interpretation actually leads to absurd results. Morrison would like to ask the court the following questions:

> If the CMS in 22.011(a)(2) does not modify "of a child", how would someone then penetrate the sexual organ of a child, especially a 14 to 16 year old teenager's sexual organ, without intending to, or knowing they penetrated the sexual organ?

Perhaps the actor slipped and fell and while he was falling his pants also fell down and he accidently landed on top of a 14 to 16 year old teenager, who happened to be naked, and he accidently penetrated her sexual organ, (unintentionally). Or the actor penetrated the sexual organ during his sleep, (unknowingly). In the unlikely event that a scenerio like that did happen, to prevail, the state would then have to prove the actor did not do the offense on accident or was conscious and knowingly commited the prohibited act.

> Under what circumstances would then make a defendant not criminally culpable for unintentionally or unknowingly penetrating the sexual organ of a 14 to 16 year old child?

Because of the rarity of scenerios like the ones listed above, the only logical circumstance would be that the actor did not "intentionally" or "knowingly" penetrate the sexual organ of a child, because he did not **intend** to penentrate "**a child's**" sexual organ or he did not **know** the sexual organ was one "**of a child's**". Every other circumstance would lead to an absurd result while dealing with cases involving 14 to 16 year old teenagers. Morrison has found no cases where anyone has claimed they were not culpable of commiting 22.011 because they caused the penetration of the sexual organ of a 14 to 16 year old minor on accident or without knowing they did it. In every case

where the CMS element has been raised, it was raised because the defendant was unaware the sexual organ was one of a child's. It is absurd to think that the legislature would prescribe the "intentionally" or "knowingly" component of the CMS to only the act of causing the penetration of a sexual organ. This absurdity is another reason that supports Morrison's interpretation of 22.011's CMS as modifying "of a child", especially since there has not been a manifest intent by the legislature to dispense with any mental element.

In fact, quoting from Aguirre at 471:

> "The drafters [of 6.02] said: 'subsection (a), in restating Penal Code Art. 39, preserves for the new code the traditional mens rea requirement of the criminal law. Moreover, subsection (b) imbues this requirement with the force of a presumption because, as the Court of Criminal Appeals aptly phrased it, 'the punishment of one for an offense when he is able to show that the act was done without guilty knowledge or intent is contrary to the general principal of criminal law...' **Vaughn v. State 219 S.W. 206, 208 (1919)**; Despite subsection (b), of course the legislature is free to dispense with the requirement of a CMS- as it has done in creating the so called strict liability offenses. (citation ommited)- but its intent to eliminate mens rea must be manifest."

There is no intent to eliminate mens rea in 22.011. Also see Abdallah supra at 179-80 where the court said:

> "[They] must speculate as to the legislative intent behind section 154.502 where [as the above quote about] 6.02(b) leave[s] little room for surmise: The statement in penal code 6.02(b) that a CMS is required unless the definition plainly dispenses with "any" mental element is typical of several modern codes which have provided that a statute is not to be treated as a strict liability statute unless it 'clearly indicates' or 'plainly appears' that such a result was intended by the legislature."Id. Taken from **1 Wayne R. Lafave & Austin W. Scott Jr., Substantive Criminal law 343 n.10 (2nd ed 1986).**

It is clear that 22.011 does not plainly dispense with any mental element of the actor's knowledge or intent to penetrate the sexual organ "of a child", and, therefore, should not be considered strict liability based off of the above quotes by the Court of Criminal Appeals, and the legislative intent in 6.02(b). The law is so plainly clear that it should not even be an argument. The word "any" in 6.02(b) means no matter how much or many or what sort of mental element exists, and it is a mental element to intend to or to know that the sexual organ was one of a child's.

> "In construing statutes, the word "any" is equivalent to and has the force of 'every' and 'all'". See **Branham v. Minear 199 S.W.2d 841 (1947); Hime v. City of Galveston 268 S.W.2d 543 (Tex Civ. 1954)** Also compare to **Ali v. Federal Bureau of Prisons 169LEd2d 680, 687 (2008)** where they held that "any" was meant to modify "other law enforcement officers" of whatever kind and has an expansive meaning.

So it must then be said that the "any" mental element in 6.02(b) also applies to what the definition of the offense requires that makes it criminal, which is that it was a childs's sexual organ that the actor penetrated. The fact that the title "Sexual Assault of a Child" has the criminal element in the title also gives much support that the CMS

should modify "of a child". All other crimes' CMSs modify the criminal element that the title of the offense names.

A court, therefore, must look for a manifest intent to dispense with the requirements of a CMS. They have not done so regarding the CMS modifying "of a child" in 22.011.

XIII.

Morrison will now use the nine guidelines that were used in Aguirre, Weise, Walker, Thompson, Rivera, and Abdallah to determine if there is a manifest intent by the legislature to dispense with the requirements of a CMS. Using the guidelines objectively, when finished, if the majority of the nine (five or more) tend to support that 22.011 is strict liability, Morrison will concede the issue and agree with the courts' past interpretation, but if the majority supports that 22.011 should not be strict liability then Morrison will respectfully and humbly ask this court to justly consider his argument and find that 22.011 is not strict liability, and also find that Morrison is entitled to at least an affirmative defense of mistake of age/fact and remand for a new jury trial so Morrison can present evidence to a jury that he did not "intentionally" or "knowingly" cause the penetration of the sexual organ "of a child" by any means.

(1) Language of the statute:

> "The courts should first look at the plain language of the statute that the legislature has written and voted on and the Court of Criminal Appeals should give effect to the plain meaning. When attempting to discern collective legislative intent or purpose the Court of Criminal Appeals necessarily focuses on the literal text of the statute, and attempt to discern a fair, objective meaning at the time of enactment." See Boykin supra at 785; Also Chapter 311, and 312 of the Gov't Code.

The courts have never done that regarding 22.011 and have gone against the Court of Criminal Appeals' holdings and canons in Boykin. Like previously argued, the plain language of 22.011 is clear, the legislature prescribed a CMS and no where have they plainly dispensed with any mental element. Because the language of the statute is not silent regarding a CMS, and the statute does not dispense with any mental element including intent or knowledge modifying "of a child", it must be said that this first factor weighs in favor of 22.011 requiring the CMS attatching to of a child.

(2) Examine the nature of the offense:

Is it malum in se or malum prohibitum? The implication is that strict liability offenses must be malum prohibitum. See Walker at 298; Rivera at 668. The nature of 22.011 is considered malum in se because it is immoral to have sexual relations with minors. Therefore, this factor must be said to weigh in favor of 22.011 requiring a CMS that attatches to the fact that it was a minor child's sexual organ that the defendant

penetrated which is the nature of the conduct that makes the offense criminal and malum in se.

(3) **Subject of the statute:**

This third factor which has been considered "the most important factor in recent cases" Walker at 300; Aguirre at 473. Strict liability offenses are traditionally associated with protection of public health, safety, and welfare. The Court of Criminal Appeals has upheld statutes that impose strict liability for offenses including air pollution, water pollution, DWI, sale of horse meat for consumption, adulteration of food, and speeding. Thompson at 179 n.5; Rivera at 668; walker at 298. The class of public safety statutes that appellate courts have found to impose strict liability comprise of statutes that punish dangerous activities which may result in serious physical injury or death to members of the public. Walker Id. Using this analysis, 22.011 cannot be considered as strict liability because the prohibited acts do not affect the public as a whole, nor does it result in serious physical injury or death to members of the public like the traditional public welfare and regulatory crimes do. The prohibited conduct in 22.011 is a crime against an individual and the potential harm that 22.011 may cause is not of this nature. See **U.S. v. Houston 364 F.3d 243, 248 (5th Cir. 2004):**

> "We therefore conclude that sexual intercourse between a 20 year old male and a female a day under 17, free from aggrivating circumstances such as the victim's lack of consent or the offenders use of violence, does not present a serious potential risk of physical injury..."

Therefore, it must be said that this "most important factor" weighs in favor of 22.011 requiring a CMS, and the legislature has not clearly dispensed with any mental element.

(4) **Legislative history:**

The courts have said that the amending of a statute without adding a mental state does not rise to a level of a manifest intent to dispense with the requirements of a CMS. Walker at 299; Aguirre at 476; Abdallah at 179. If that is the case then what happens vise versa, when a statute goes from dispensing with a CMS like suggested in Vasquez 866

> "Prior to the enactment of 21.09 statutory rape was defined in Article 1183 V.A.P.C (1925). Under that provision it had consistantly been held that a female under the age fixed by statute [which was under 15] was deemed in law to be incapable of consenting to an act of sexual intercourse and the one who has commited the act on her was guilty of rape, notwithstanding the fact that he had obtained her actual consent, or was ignorant of her age, or even though she invited or persuaded him to have intercourse with her."

To omitting any CMS like the legislature did in 21.09. To adding a CMS requirement in 22.011 without dispensing with any mental element. Vasquez is the starting point where the recent courts have determined that 22.011's CMS does not modify "of a child", and Vasquez determined its decision based off of the legislative history starting from

analysing Art. 1183 (1925) whos fixed age at that time was younger than the age of the female in the instant case, (fifteen), therefore, back in 1925 and over the first half of the 20th century Morrison would not have even been subjected to this crime, so this foundation of the trail of legislative history used to say 22.011 is strict liability is distinguishable from Morrison's case, but even if it could be argued that it was comparable, the fact of the matter is that the statutory rape crime over the last century has evolved into it requiring a mens rea or at least an affirmative defense to mistake of age when the protected age is over 13 years.

Vasquez mentioned that the 1970 enactment of 21.09 proposed a mistake of age defense, but then chose to reject it, indicating that the legislative intent was to keep statutory rape strict liability. That, however, changed in 1983 when the legislature prescribed the CMS in 22.011 and never dispensed with any mental element, or expressly limited the CMS from not attatching to the entire statute. So since it has been said that amending a statutewithout adding a mental state does not rise to a level of "a manifest" intent to dispense with the requirement of a CMS, then the same logic should apply to 22.011 when the previous laws went from dispensing with a mental element, to just remaining silent about any mental element, but rejecting a proposed defense, to adding a CMS and never dispensing with any mental element. It should then be interpreted that the legislative intent was to require a CMS that attatches to any and all mental elements including that the sexual organ that was penetrated was one of a child's, the element that makes the provision criminal. The legislative history regarding 6.02 maintains that a statute must dispense with any mental elements for it not to require one. The legislature made 6.02 law and applied a mens rea into 22.011 to protect citizens who may have unknowingly or without criminal intent commited a crime. The Court of Appeals have excluded 22.011 from that enactment of law, and that is a denial of Equal Protection of the Laws, and violates the Seperation of Powers Doctrine.

In Johnson at 850 Justice Price relies on the "universally accepted rule" that "prior to 1964" a mistaken belief as to the age of the victim was not a defense to statutory rape. He then mentions:

> "The universal rule was first broken by the California Supreme Court more than 30 years ago but such breakage has been hardly universally accepted. Instead the courts around the country have been split, not only on the results reached, but also as to the reasons relied upon in reaching those results." See n.1 at 850.

Since Justice Price said that in 1998, and since 1986, even the federal equivalent to Texas' statutory rape law allows for a mistake of age defense. See 18 USC § 2243(c)(1). This defense protects defendants in cases involving minors from ages 12 to 15 who reasonably believed that the minor was 16 years. Why if this mistake of age defense was written into the federal statute back then and has been successfully relied upon (See

Arcoren v. U.S. 929 F.2d 1235, 1245-46 (8th Cir.1991); U.S. v. Yazzie 976 F.2d 1252, 1253-56 (9th Cir. 1994))is it then not universally accepted, especially in statutes that require a CMS? This federal defense has been continually ignored by the Texas Court of Appeals, while at the same time adding into their opinions:

> "congress incorporated this principal, [the prosecutor does not have to prove defendant knew age of victim] into the United States Code where it expressly provided 'The government need not prove defendant knew' the age of his victim when prosecuting statutory rape crimes." 2241(d); 2243(d). Byrne at 751.

This blatant attempt to try to justify that mistake of age cannot be used as an affirmative defense is an obvious attempt to circumvent the legislative intent, and the movement in the country that recognizes mistake as to age in statutory rape cases should atleast be an affirmative defense, especially when they involve 14 to 16 year old minors who a lot of times look, act, and portray themselves as being older. Taking that into consideration, with the facts that the courts have relied on statutory rape from the past as being strict liability while it originally was designed to protect children that were under 14 years. (See Johnson at 852; Where Justice Price refers to the 1950s version of indecency with a child statute where it is unlawful for any person with lascivious intent to intentionally place there hand upon the sexual part of a male or female under the age of 14 years). Since the California Supreme Court accepted a mistake of age defense in 1964 (See **People v. Hernandez 61 Cal.2d 529 (1964)**) the United States Congress and legislatures of at least 20 states[2] have enacted laws allowing for the same defense. This trend coupled with Texas' statutory rape laws that evolved from dispensing with a CMS in 1925, to being silent about a CMS in 21.09, to including a mental element in 22.011(a)(2) should suggest the Texas legislators were on board with the same trend. It is unfortunate for Morrison- and the other men who were sent to Texas prisons for mistakenly assuming someone was an adult- that law enforcement and the courts did not get on board with this trend as well. The study of legislative history for statutory rape laws through out the country, coupled with the plain language of 6.02, 8.02, and 2.01 and other mitigating factors discussed in cases that involve consentual-in-fact sex with 14 to 16 year old minors (See **U.S. v. Shaw 154 Fed. Appx. 416 (5th Cir. 2005; U.S. v. Sarmiento-Funes 374 F.3d 336, 341 (5th Cir. 2004); U.S. v. Houston 364 F.3d 243, 246-47 (5th Cir. 2004)**), will show this fourth factor heavily supports that 22.011 should not be a strict liability crime, and should at least allow for an affirmative defense for mistake of age.

(5) **Seriousness of harm to the public:**

Now let us examine the seriousness of harm that is done to the public by an offense of 22.011 as explained in Aguirre, Thompson, Walker, Weise, Rivera, and Abdallah.

> "Generally the more serious the consequenses to the public, the more likely the

legislature intended to impose liability without regard to fault." Walker 299; Thompson at 180.
"In most strict liability offenses the statutes protect unwitting and unwilling members of the public from noxious and harmful behavior of others in situations in which it would be difficult for members of the public to protect themselves." Thompson at 180; Rivera at 669.
"These statutes involve serious risk to the public, including serious injury or death. Examples include speeding, DWI, adulteration of food, air and water pollution etc." Id.

In Rivera at 669 the court said:

"Here as recognized by the 5th Ciruit Court of Appeals the ordnance of NO 97-75 § 28-258(a) and 25-256(a) is designed to protect the public from criminal activity such as prostitution, lewd conduct, indecent exposure, and narcotics violations which are the secondary effects of operating a sexually oriented business. See N W Enters at 176 n.7. While they are significant, such concerns are not the same nature as recognized strict liability offenses that involve the risk and serious bodily injury or death."

Accordingly, this fifth factor weighs in favor that 22.011 requires a CMS. Compared to Aguirre at 476 and Thompson at 180, 22.011 should be looked at, regarding this factor, under the same light as Rivera, Thompson, and Aguirre. Statutory rape is not a serious danger to the public in general. It is a crime against an individual, or possible harm to one victim, which the potential harm is severely mitigated when the complaintant is from 14 to 16 years and the act was consentual-in-fact. See Shaw supra at 417.

The crimes stated in Rivera, Thompson, and Aguirre (prostitution, lewd conduct, indecent exposure, etc.) are all crimes along the same lines of 22.011 in the sense that they have been considered by the majority to be morally wrong, but they are not strict liability crimes.

It might be argued that if 22.011 did require a mens rea regarding age to be proved, or allowed an affirmative defense to mistake of age that it would do harm to the public by making it open season on 14 to 16 year old minors for everyone who wanted to could take advantage of the mens rea requirement and have sex with the minor then claim they did not know he or she was a minor, potentially decreasing the effectiveness of the legitimate state's interest in protecting the health, safety, and welfare of minors, or preventing sexual exploitation among the protected age group. But there is no evidence that supports that argument, in fact the only evidence that there would be regarding that argument would be to compare states that do not allow a mens rea or mistake of age defense with states that do. Or compare the statistics of states that now allow for it, to statistics of harm done before they changed it from being strict liability, and determine by the data if the states that do now allow a mens rea or mistake of age defense have resulted in more harm to the 14 to 16 year age group's health, safety, and welfare than states that do not allow a mens rea or mistake of age defense. If the harm in the states that are not strict liability has increased since they changed the law it can be said that the change was not a good idea, but it can be safely inferred that

there is no additional harm done to the protected age group in states that do allow for the defense of mistake of age or requires a mens rea regarding age because if there was more harm done then the people and the legislators of those states, and the U.S. Government would have strickened the defense from the statutes and went back to affirmatively and explicitly dispensing with the mens rea regarding the age element. The movement since 1964, that a lot of states and commentators who support mistake of age as a defense in statutory rape cases has grown tremendously, therefore proving wrong any arguments that presupposes that an additional harm to the 14 to 16 year age group would be increased if 22.011 required a mens rea or mistake of age defense. All things considered this factor weighs in favor of 22.011 requiring a CMS and not being strict liability.

(6) **Defendant's opportunity to ascertain the true facts that constitute the offense:**

> "When ordinary citizens are not in a position to know about a statute or conduct constituting a violation of the statute, it is unlikely the legislatures intended to forgo a CMS. Abdallah at 180; Aguirre 476-77.

22.011 applies to all ordinary citizens 20 years or older and not the soouse of the child In todays world most of these citizens know it is a crime to have sexual relations with a minor. Except for the strict liability interpretation, the facts that make up the offense which make it illegal are easily obtainable and well known. This sixth factor according to past case law, deals with laws that are established to be regulatory offense associated with a business to protect the public from someone who should be apprised or already know of the potential dangers that their business may pose to the community. See Staples at 1798:

> "In such situations, we have reasoned that as long as the defendant knows that he is dealing with a dangerous device of character that places him 'in responsible relatio to a public danger' (Dotterwich supra at 136), he should be alerted to the probability of strict regulation, and we have assumed in such cases congress intende to place the burden on the defendant to 'ascertain at his peril whether [his conduct] comes within the inhibitions of the statute.'"

This factor does not compare with the crime of statutory rape because 22.011 is not a regulatory offense that effects a business or only a small portion of the public who should be alerted to the probability of strict regulation. It effects all people except those who are married to the minor or with in three years of their age. The main issue is that Morrison was not ignorant of the law, he is not claiming that. He knew it was a crim to have sex with minors. His issue was that he was mistaken about the facts that constituted the offense, in which he did obtain, but later found out those facts were not true.

It may be argued that since Morrison confronted the "underage victim" personally that he could have ascertained the true facts that constitute the offense, (her age). Several

other mistake of age cases have unsuccessfully tried to use the Supreme Court's statutory construction analysis of 18 USC § 2252 in U.S. v. X-Citement Video supra, (Which held that the term knowingly in the statute modified the phrase "the use of a minor", and required not only a knowing distribution of the pornographic materials, but also knowledge of the performer's age.). See **Fleming v. State 376 S.W.3d 854 (2012)**; and also Scott supra 36 S.W.3d 240. In these two cases the Court of Appeals have side-stepped the whole issue challenged by Fleming and Scott, which is that the statutory construction of the plain language of 22.011 (Scott) and 22.021 (Fleming) should be analyzed using the same logic as in X-Citement Video. (Compare similar logic to Staples, Liparota, and Flores-Figueroa supra.) The Fleming and Scott courts pointed to extratextual factors- that were mentioned in passing- in X-Citment Video at 469 n.2 to overrule all of the other holdings in X-Citement Video that the Supreme Court used to ascertain its opinion that the prescribed CMS of knowingly modified "the use of a minor". Those same holdings and guidelines use in X-Citement Video should also be used to do a proper statutory construction analysis of 22.011, and should bring the same result that the Supreme Court ruled on about the statutory construction analysis of § 2252. Scott said at 242:

> "X-Citement Video involves situations in which people usually would not confront the performer depicted in the material."Id. Appellant, however, personally confronted the underage victim and could have learned her true age. Therefore, X-Citement Video is distinguishable." Fleming at 860 (same).

Morrison respectfully suggests that those two courts erred in their decisions because they relied on dicta from a footnote to arrive at their decision and allowed that dicta footnote to negate the holdings of the X-citement Video opinion which was about the purview of the knowingly CMS requirement. X-Citement Video was a case strictly about the correct statutory analysis of § 2252 and the question was:

> "Whether the term "knowingly" in subsection (1) and (2) modifies the phrase "the use of a minor" in subsection (1)(A) and (2)(A). X-Citement Video at 467.

To find the answer they first looked into the plain language of the statute and said:

> "The most natural grammatical reading... suggests that the term "knowingly" modifies only the surrounding verbs: transports, ships, receives... Under this construction the word knowingly would not modify the elements of the minority of the performers, or sexually explicit nature of the material because they are set forth in independant clauses seperated by interruptive punctuation. But we do not think this is the end of the matter, both because of anomalies which resulted from this construction, and because of the respective presumptions **that some form of scienter is to be construed where fairly** possible so to avoid **substantial constitutional** questions." Id. (Emphasis added).

The statutory language in 22.011 is even more suggestive that a CMS applies to "of a child" because there are no "interruptive punctuations" between "penetration of the sexual organ" and "of a child". The Supreme Court also made it clear that they applied the principals from Morissette and Staples:

"Concern with harsh penalties looms equally large respecting 2252: violations are punishable by up to ten years in prison. [22.011 is punishable up to 20 years in prison] and rather the statute [2252] is more akin to the common law offense against the state, the person, property, or public morals, (citation omitted) that presume **a scienter requirement in the absence of expressed contrary intent.**"

They then refer to footnote 2 saying:

"Morissette's treatment of the common law presumptions of mens rea recognized that the presumption expressly excepted 'sex offenses, such as rape, in which the victim's actual age was determinitive despite defendant's reasonable belief that the girl had reached the age of consent.' Morissette supra at 244 n.8. But as in the criminalization of prnography production at 18 USC § 2251, See infra at 471 n.5, the perpetrator confronts the underage victim personally and may be reasonably required to ascertain the victim's age. The opportunity for reasonable mistake as to age increases significantly once the victim is reduced to a visual depiction, unavailable for questioning by the distributor or receiver. Thus we do not think the common law treatment of sex offenses militates against our construction of the present statute."

22.011 is also a statute that is more akin to the common law offenses against the state, the person, property, or public morals, namely against the person and public morals which presume a scienter requirement in the absence of expressed contrary intent. 22.011's scienter requirement like 2252's is not absent and there is no expressed contrary intent regarding any scienter requirement, therefore, Morissette's treatment of the mens rea in sex offenses involving rape in which the victim's actual age was determinitive despite defendant's reasonable belief that the girl had reached the age of consent can no longer control a statute that has a prescribed CMS and never clearly dispenses with any mental element regarding age. 22.011 has superseded Morissette's outlook about statutory rape being an exception to the presumption of a mens rea requirement in absense of one, therefore, Morissette n.8 should not be a factor in determining that 22.011 is strict liability.

Where the courts erred in Scott and Fleming was that they failed to mention that X-Citement Video was actually about a proper statutory construction analysis of 18 USC § 2252's prescribed CMS "knowingly", and how the Supreme Court used the analysis to determine the reach of the CMS. While determining the proper interpretation of § 2252, the Supreme Court in n.2 at 469 were not (like the opinions in Scott and Fleming suggested) comparing statutory rape offenses that do have a prescribed CMS to say:

"The perpetrator confronts the underage victim personally and may reasonably be **required** to ascertain the victim's age."

They were comparing § 2252 with § 2251 and referred to footnote 5 at 471. 18 USC § 2251 is an offense that does not have any prescribed CMS that can be interpreted to modify "any minor". See 18 USC § 2251 (a),(b),(c)(1), as does § 2252 and 22.011. In that footnote, the Supreme Court was referring to people who produce pornography by saying:

"The difference in congressional intent with respect to 2251 versus 2252 reflects the reality that producers are more convieniently able to ascertain the age of

performers. U.S. v. U.S. District Court for Central District of California 858 F.2d 534, 543 n.6 (9th Cir 1988). Although producers may be convicted under § 2251 (a) without proof they had knowledge of age, congress has **independently required** both primary and secondary producers to record the ages of performers with independant penalties for failure to comply. See 18 USC § § 2257(a) and (i)" (citation omitted). (Emphasis added).

Therefore, since 22.011 is distinguishable from § 2251 in the sense that:

(1) 22.011 does have a required CMS that can be argued to modify "of a child" and § 2251 does not.

(2) § 2251 deals with the production of pornography which is a business that puts the owners of the business on a higher notice of requirement to ascertain the true age of the performers. See 18 USC 2257 and U.S. Dist. Court for the Cent. Dist. of California supra at 543 n.6. That same requirement does not exist to the normal citizen who may want to exercise his natural, constitutionally protected right to copulate, or express his freedom of intimate association with a woman who looks, acts, and portrays herself to be an adult, but unwitting to him is really not.

To require a man to card or check birth records of every female he wishes to exercise this natural right with, would undoubtedly inhibit this constitutionally protect right. Having 22.011 as strict liability in fact puts this burden on every citizen 20 years or older who may want to exercise their right to copulate with anyone from 17 to 25 years, or risk going to prison for 20 years and registering as a sex offender for life. So therefore, they may be persuaded to only associate with the age group from 25 years or older, where the likelyhood of mistake would be miminal. Or it could make them not want to exercise this right at all in order to not take the chance that a potential sex partner that they thought was an adult ended up being a minor where they had no defense against conviction. Therefore, strict liability for 22.011 puts a burden on all citizens' right to have sexual relations, and when the government burdens a constitutionally protected right it is unconstitutionally overbroad. See ground six of this 2254 where Morrison proves 22.011 is unconstitutionally overbroad in this respect.

Allowing defendants to prove their reasonable belief that a minor from 14 to 16 was an adult in situations like Morrison's case would not disrupt nor hinder the effective operations of 22.011, nor would it materially hamper the vital effort to protect minors from sexual abuse. Another reason that 22.011 is distinguishable from § 2251, and the Scott and Fleming courts convieniently failed to mention is:

(3) The case law that the Supreme Court used to say "The perpetrator confronts the underage victim personally and may be reasonably **required** to ascertain that victim's age." was U.S. v. U.S. Dist. Court for the Central Dist. of California supra and in that case the 9th Circuit Court of Appeals did require a mistake of age defense for 2251, even though one was not explicitly prescribed in the offnese.

A thorough look at both cases: U.S. v. U.S. Dist. Court for the Dist. Court of Cal. and X-Citement Video will show that the Scott and Fleming cases were decided in error and that 22.011 like 2252, should require the prescribed CMS to modify "of a child" as 2252's CMS was said to modify "the use of a minor", or 22.011 like 2251 should at least be reqired to have a mistake of age defense that would:

> "[S]ave it from fatal collision with the first [and 14th] amendment... We are convinced that if put to a choice between a statute that punishes severely the use of minors in sexually explicit material [or statutory rape cases], subject to a reasonable mistake of age defense, and no statute at all, congress [legislators] would choose the former." See Central Dist. of California at 543.(Material in brakets is mine to show emphasis to case at issue.)

Therefore, relying on footnote 2 in X-Citement Video to overrule Scott and Flemings same argument was err and in fact actually proves that 22.011 should at least have a mistake of age defense requirement.

The state and Court of Appeals rely heavily on this footnote as well as footnote 8 in Morissette to discount Morrison, Scott, and other mistake of age cases. But Morrison has shown that the footnotes are not dispositive in his case. The discussion in both Morissette footnote 8 and X-Citement Video footnote 2 were dictum and unnecessary to the decisions in those cases, therefore, they are not controlling in Morrison's case and should not have controlled Scott, Fleming, or any other mistake of age case regarding 22.011, in which the impact of the plain language of 22.011 is directly placed in issue next to the holdings of the Supreme Court on proper statutory construction when the purview of a prescribed CMS is in question as in X-Citement Video, Morissette, Staples, Liporota, Flores-Figueroa supra. Compare to **Wainwright v. Witt 83 L.Ed 841, 851 (1985); McDaniel v. Sanchez 101 S.Ct 2224, 2232 (1981):**

> "[The Supreme Court]has on other occasions similarly rejected language from a footnote as 'not controlling'." (Quoting Wainwright referring to McDaniel.)

It could be argued that Morrison should have used more diligence to ascertain the "true age" of the minor by demanding she provide a document that proved her age before he had sex with her, rather than merely discussing it with her and relying on what he thought was an honest answer, her maturity, the fact she brought alcohol, was smoking cigarettes, and driving, but there was no reason to believe she was a minor because of the way she looked, acted, and portrayed herself. It is unfeasable and unconstitutional to hinder and inhibit a person in his inalienable right to copulate and in any way curtail his freedom of intimate association by expecting him to card every potential sex partner who appears and portrays themselves to be over 17 years, and if he does not do that then his decision could subject him to 20 years in prison. In all reality, even if he does card her and she presents him with a fake I.D., the way 22.011 is interpreted he would still be held criminally liable. That form of strict liability does absolutely

nothing to help protect the health, safety, and welfare of children as the state and courts proclaim. That kind of strict liability is in fact damaging to the welfare of some children. Like in Morrison's case where he was originally given probation for the offense and required to not have any contact with his three year old daughter, or other children that were part of his life that loved and looked up to him, and as a result he has lost contact with his daughter since he was forced by his probation officer Paul Reed to not have ANY contact with her in 2005. But after having another child in 2008, and thanks to the graciousness of Morrison's then probation officer, Kim Rogers, he was able to raise his son until his incarceration for the revocation of probation, which was at no fault to her. But because of the strict liability interpretation of 22.011, Morrison's son will now also have to grow up without his father, and he will be 18 years old when Morrison gets out of prison, unless this Honorable Federal Court does the right thing and interprets 22.011 as requiring a mens rea like the plain language suggests, or at least requires an affirmative defense to mistake of age, and gives Morrison a chance at a new jury trial, or relief in some other way they see necessary.

There is a common rule of respect in Texas, and the Honorable Judges at this Fine Federal Court can probably vouch for this, that is:that there are two questions a man does not ask a lady. One is her weight, and the other is her age. This common rule of respect is now a dangerous ground to play, especially in this day in age with how a large number of precocious minors from 14 to 16 will intentionally make themselves look even older, and act older, so they can fit in with an older crowd. Then entice young men who are in their 20's into a sexual relationship with them, and if one or two of those men were raised with that common rule of respect and they failed to ask who he thought was a lady or woman her age, and she never volunteered it, or if she did and she lied and told him she was an adult, then what is a man suppose to do, if her age never came up in conversation and he was raised not to ask, or if he did ascertain what he thought was her true age and found out to late from a detective that she lied? That situation as is Morrison's case would be distinguishable from Scott and Fleming because Morrison did try to ascertain her true age.

Since the majority of cases this guideline refers to deals with regulatory offenses that deal with businesses like mentioned in X-Citement Video talking about § 2251 (Production of pornography) who they said:

> "Because the perpetrators confront the underage victims personally and may reasonably be **required** to ascertain that victim's age [under 18 USC § 2257 (a),(i)] the opportunity for reasonable mistake of age increases significantly once the victim is reduced to a visual depiction unable for questioning..." Id. at 479 n.2

It is unreasonable, arbitrary, and overbroad for the government to expect that a normal citizen not in this business to be subject to the same stringent **requirements** when

engaging in their constitutionally protected right of natural law that precedes even the Bill of Rights. Considering all that has been said this sixth factor weighs in favor of 22.011 requiring a CMS, or at least allowing a mistake of age defense, and it proves that if 22.011 remains strict liability it will be unconstitutional.

(7) **Difficulty in proving a mental state:**

"The greater the difficulty in proving a mental state, the more likely the legislators intended to make the offense strict liability to ensure a more effective law enforcement" Aguirre at 476.Thompson at 181.

"Intent is a matter of fact to be determined by all the circumstances." See **Smith v. State 965 S.W.2d 509, 518 (1998).**

"A Defendant's intentions or mental state can be inferred from circumstantial evidence such as his words, acts, and conduct." **Guevara v. State 152 S.W.3d 45, 50 (2004);** Also Walker at 299.

Because intent may be inferred from a defendant's words, actions, and conduct, proving a mental state in 22.011 is no more difficult than proving a mental state in other offenses such as murder or robbery. Compare to Abdallah at 181. Therefore, this factor weighs in favor of 22.011 requiring a CMS to be proved.

XV.

(8) **Number of prosecutions expected:**

Strict liability is attatched to crimes that are expected to have a lot of prosecutions like speeding, DWI, and other traffic violations. What amount of prosecutions constitutes "a lot"? Does 22.011 have a larger amount of prosecutions than other crimes against a person or state to deem it strict liability? It probably has fewer prosecutions than DWI,and speeding, but more than murder and kidnapping. Morrison will assess this factor as a nuetral in regards to it weighing for or against 22.011 requiring a CMS.

(9) **Severity of punishment:**

Morrison has already shown that it is well established that the greater the possible punishment the more likely some fault is required. See Aguirre at 476. Strict liability is generally associated with civil violations that are punishable by a fine only. See Thompson at 180. Conversely, if the offense is punishable by confinement the presumption against strict liability strengthens. In Walker a violation of Section 12.002(f) of the property code was punishable up to 90 days in jail. That court held:

"Possible confinement for up to 90 days for violation of this statute is a strong indication that a CMS is required." Walker at 300. Thompson at 180-81 same but one year in jail. Rivera same as Thompson 670-71.

22.011 has a max sentence of 20 years confinement. That is 80 times more severe than the max sentence in Walker above. Considering that alone, this factor should weigh heavily

against 22.011 being strict liability and it should require a CMS to be proved regarding age. Also see R. Perkins **Criminal Law** pp. 793-798 (2d ed. 1969) (Suggesting that the penalty should be the starting point in determining whether a statute describes a public welfare or strict liability offense.) Also Staples at 1803.

It is also commonly known, while dealing with strict liability offenses that not only are the "penalties commonly are relatively small" but also the "conviction does no grave danger to an offender's reputation." See Staples at 511 U.S. 617-18; Morissette at 342 U.S. 256. That is also in opposition with 22.011 being strict liability. A conviction of 22.011 for statutory rape, without force or violence, and without knowledge of the complaintant being a child, damages the offenders reputation the same as someone who raped a seven year old child. Being branded as a sex offender is the worse stigma a person can have on them in todays society, and without relief from the Court of Criminal Appeals, or Federal Courts, Morrison's reputation will have been branded with this stigma for life. The legislators prescribed the CMS in 22.011 to protect injustices like this from happening.

Morrison respectfully and humbly asks the Honorable Court of Criminal Appeals to use these nine guidelines, and the other guidelines from Boykin,Staples, Flores-Figueroa, X-Citement Video, and Liparota to interpret that the prescribes CMS in 22.011 modifies "of a child" and that that element must be proved. Considering all nine guidelines, using the same logic in Walker, Aguirre, Rivera, Thompson, Weise, and Abdallah, it should be determined that 22.011 is not a strict liability offense. Eight of the factors weighed heavily in favor of a mens rea being proved regarding age, one was nuetral. The other statutes that were compared had more factors depicting them in favor of strict liability or nuetral assessments and the Courts still concluded those statutes as requiring a CMS to be proved and not to be strict liability.

Morrison's question to The Court is: Should the Court of Criminal Appeals apply these guidelines to all statutes equally, or can they make an exception for the statutory rape statute because of the subject of the statute, or based off of one or two dictum comments made in the distant past that leaned toward statutory rape being strict liability. Morrison respectfully requests this Honorable Federal Court to apply these guidelines to 22.011 fairly and without bias or partiality, and use them to determine if the legislatur has clearly dispensed with any CMS including whether the actor had intent or knowledge that the sexual organ he penetrated was one of a child's.

B. SUMMARY AND REQUEST FOR RELIEF

The iconic symbol of the law is the blindfolded Lady Justicia holding a scale in one hand and a sword in the other, indicating equality of the law and justice for all. If we put all the factors that support 22.011 not being a strict liability crime in the right

hand side of the scale, all the factors that support 22.011 being a strict liability crime in the left hand side, it can be safe to say that the right hand side would crash down to the ground under its weight, therefore, pointing to the fact that 22.011 should require a mens rea to be proved and should not have been interpreted as being strict liability.

Morrison respectfully requests that this Wise and Judicious Court correct the previously mentioned Separation of Powers violation that has caused much Disorder in the Court® Specifically it prevented Morrison from presenting his only defense causing him to involuntarily plead guilty to the crime and ultimately being sentenced to 16 years in prison, and being required to register as a sex offender for the rest of his life. Morrison further requests that this court analyse 22.011 using the guidelines as held in Supreme Court cases like Staples, Liparota, Flores-Figueroa, X-Citement Video etc, etc, etc, and the other factors mentioned in this ground and find that Morrison was not criminally culpable of commiting 22.011, and reverse his conviction since he lacked the intent and knowledge requirement that is mandated in the statute and order suspension of the prosecution and grant acquittal. Orreverse his conviction and remand for new trial so he can use this court's holding as to the purview of the Required CMS at trial so he can show a jury that he was not criminally culpable of commiting all the elements of 22.011 as the plain language and legislative intent mandate in conjunction with 6.02, 2.01. and 8.02.

C. Clearly Established Federal Law as Determined by the Supreme Court, Summarized.

1) **Flores-Figueroa v. U.S. 173 LED2d 853(2009)** (Proper statutory construction analysis decision that held: As a matter of ordinary English grammer, the CMS prescribed in 18 USC § 1028(A)(a) is naturally read as applying to all the subsequently listed elements of the crime. Where a transitive verb has an object, listeners in most contexts assume that an adverb such as knowingly that modifies the verb tells the listener how the subject performed the entire action, including the object. Courts ordinarily interpret criminal statutes consistantly with the ordinary English usage.) at 855.

2) **U.S v. Williams 170 LED2d 650, 663 (2008)** (Held that the first word of 2252A(a)(3)(B) -"Knowingly"- applies to both the immediately following subdivisions, both the previously existing § 2252A(a)(3)(A) and the new § 2252A(a)(3)(B). The best reading of the term in context is that it applies to every element of the two provisions. This is not a case where grammer or structure enables the challenged provisions or some of its parts to be read apart from the knowingly requirement. Here knowingly introduces the challenged provision itself, making clear that it applies to that provision in its entirety; and there is no grammatical barrier to reading it the other way.)

3) **U.S. v. X-Citement Video 115 S.Ct 464 (1994)** (Proper statutory construction analysis/mens rea issues decision that held: Knowingly in 2252(a)(1),(2) modifies the phrase the "use of a minor" in subsections (1)(A) and (2)(A). Also the standard presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct, and the minority status of the performers is the crucial element separating legal innocence from wrongful conduct under § 2252. As a matter of Grammer, it is difficult to conclude that the word knowingly modifies one element in subsection (1)(A) and (2)(A), but not the other. This interpretation is supported by the canon that a statute is to be construed where fairly possible as to avoid substantial constitutional questions.) at 467-472.

4) **Staples v. U.S. 114 S.Ct 1793 (1994)** (Proper mens rea application and strict liability decision that held: Some indication of congressional intent, expressed or implied, is required to dispense with mens rea, § 5861(d)'s silence on the element of knowledge required for a conviction does not suggest that congress intended to dispense with a conventional mens rea requirement, which would require that the defendant know the facts making his conduct illegal. 5861(d) does not fit in line of precedent concerning public welfare or regulatory offenses.
The potential harsh penalty of up to 10 years imprisonment for a violation of

5861(d) confirmed the Supreme Court's reading of the act as not involving an intent by Congress to eliminate a mens rea requirement.

5) **Liparota v. U.S. 105 S.Ct 2084 (1985)** (Proper statutory construction analysis/ mens rea application decision that held: The presumption in favor of a mens rea requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct. The failure of Congress explicitly and unambiguously to indicate whether mens rea is required does not signal a departure from this background presumption of our criminal law. To interpret the statute to dispense with mens rea would be to criminalize a broad range of apparantly innocent conduct. Requiring mens rea in this case is in keeping with the established principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.)

6) **In Re Winship 397 U.S. 358 (1970)** (Held that lest there remain any doubt about the constitutional stature of the reasonable doubt standard... the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of **every fact necessary to constitute the crime** with which he is charged.)

7) **Commisioner v. Lundy 116 S.Ct 647, 656-57 (1996)** (Proper statutory construction analysis/Separation of Powers Doctrine decision that held: This Court is bound by § 6512(b)(3)(B)'s language as it is written, and even if the Court were persuaded by Lundy's policy-based arguments for applying a 3-year look back period, the Court is not free to rewrite the statute simply because its effects might be susceptible of improvement.)

8) **Ali v. Federal Bureau of Prisons 169 LED2d 680, 692 (2008)** (Proper statutory construction analysis/Separation of Powers Doctrine decision that held: [Courts] are not at liberty to rewrite the statute to reflect a meaning [they] deem more desirable, instead [they] must give effect to the text Congress enacted.)

9) **Depierre v. U.S. 180 LED2d 114, 125 (2011)** (Proper statutory construction analysis/Separation of Powers Doctrine decision that held: It is not for the U.S. Supreme Court to rewrite a statute so that it covers only what the Court thinks is necessary to achieve what it thinks Congress really intended.)

10) **McDaniel v. Sanchez 101 S.Ct 2224, 2232 (1981)** (Proper statutory construction analysis/Dictum comments decision that held: Petitioners rely heavily upon [a] footnote, while there reliance is understandable, the footnote is not dispositive in this case. The discussion of § 5 in East Carrol Parrish School Board v. Marshall 424 U.S. 636 (1976) was dictum unnecessary to the decision in that case, it is therefore not controlling in this case, in which the impact

of § 5 is directly placed in issue.)

11) **U.S. v. Menashe 348 U.S. 528, 538(1955)** (Held that it is the cardinal principle of statutory constuction that courts must give effect to every word of statute.)

D. State Court's Disposition for Ground Two/2254(d)(1),(2)

The trial court's decision to recommend Morrison's 11.07 to be denied was based on an unreasonable determination of the facts in light of the evidence that Morrison presented during the State-11.07 proceedings because that decision overlooked the clear and convincing evidence that Morriosn presented them in his 11.07 Memorandum of Law Pp.14-51 that showed Ground Two does have merit. The evidence that Morrison presented is all congruent with clearly established federal law as determined by the Supreme Court, as shown in the cases above. On pages 14-16, and 45 of the trial cout findings, the trial court discussed "The law applicable to sexual offenses against children", and used those laws to deny Morrison relief, even though those laws are contrary to clearly established federal law, as Morrison has proved by citing the Supreme Court case that clearly oppose their outlook about 22.011 being strict liability.

On page 45 of the trial court's findings, the trial court stated:

1) The law is clear, sexual assault of a child under section 22.011 Penal Code is a strict liability offense. (Suspending 6.02).
2) The actors knowledge that the child was under the age of 17 is not an element of the offense. (Suspending 2.01).
3) The statute does not require that the state allege or prove that the actor knew the child was under 17. (Negating the required CMS in 22.011)
4) The defense of Mistake of Fact under 8.02 Penal Code that the actor formed a reasonable but mistaken belief that the child was 17 or older does not apply to sexual offense against children. (Suspending 8.02). Also see page 14-16.

The decision of the trial court to recommend denying Morrison relief by suspending 2.01, 6.02, and 8.02, and negating the required intentionally or knowingly mens rea in 22.011, despite Morrison's clear and convincing evidence that showed them the clearly established federal law as determined by the U.S. Supreme Court dealing with proper statutory construction, Separation of Powers, and mens rea holdings, was entirely erroneous and contrary to the aforementioned Supreme Court holdings.

See pages 18-20 of the trial court's findings where they erroneously relied on pre-1983 case law (**Vasquez v. State 622 S.W.2d 864 (Tex Crim 1981)**) to justify their conclusion of 22.011 being strict liability and going against the plain language of the current 22.011, contrary to all the clearly established federal law that Morrison presented to them that says they cannot do that.

To be more specific to Ground Two, the trial court, on page 58 of its findings, merely stated regarding Ground Two: "The Applicant's complaints as stated above are without merit." That comment is also an unreasonable determination of the facts in light of the evidence that Morrison presented to them. The trial court, nor has any other Texas Court including the Court of Criminal Appeals and Courts of Appeals have not shown any support or cited any Supreme Court holdings that supports their view about Ground Two being without merit, therefore, their decision to deny relief to Morrison is also contrary to the clearly established federal law as determined by the Supreme Court's holdings that Morrison did present to them which do show that Ground Two does have merit. And relief should have been given.

Also see Morrison's Motion to object to the trial court's findings/Fleming brief to see how the Court of Criminal Appeals decision to base its denial on the trial court's findings was also an unreasonable determination of the facts, in light of the evidence that Morrison presented to them, and contrary to the clearly established federal law as determined by the Supreme Court. Since the trial court relied so heavily on a recent decision from the Court of Criminal Appeals to deny Morrison relief, (see **Fleming v. State 441 S.W.3d 253 (Tex Crim. 2014)**), in a similar mistake of age case, but yet different (Fleming's complainant was 13 years (22.021), Morrison's was 15 years (22.011)), Morrison drafted the supplimental Fleming Brief and included it with the Motion to Object to the Trial Court's Findings, where he argued and proved that he should be granted relief. In the Fleming opinion, 5 out of the 9 Justices said that in situations like Morrison's where the complainant was from 14 to 16 years, and the defendant reasonably thought the minor was an adult, a mistake of age defense should be allowed. See the Fleming dissent opinion by Chief Justice Keller, Price, and Johnson, and two concurring opinions by J.J. Cochran and Alcala. Despite the fact that Morrison presented to them these ripe issues for review, and their decision to unreasonably deny relief was opposite to that reached by the Supreme Court cases Morrison cited to which were about his violation of Separation of Powers and statutory construction questions of law, and because they decided the case differently from the aforementioned Supreme Court holdings, on a set of materially indistinguishable facts, 2254(d)(1) has been satisfied. Morrison has also shown the requirements under 2254(d)(2) have been satisfied as well. Morrison has shown with clear and convincing evidence that the state court's findings are erroneous.

E. Conclusion

These Supreme Court holdings are only 11 out of the many others that clearly warn against courts being able to do what the Texas courts have done to the

statutes of 22.011, 6.02, 8.02, and 2.01 by suspending the laws and changing them to their own liking, through improper statutory interpretation. The Supreme Court has over the years, rightly, established priciples and guidelines, in accordance with the Constitution, on how all courts are to properly interpret the statutes and laws. The Texas Courts have failed to do that in regards to 22.011(a)(2). The above Supreme Court holdings show that as of September 1, 1983, the date 22.011 went in to effect, and because 22.011 (a felony with a severe sentence of 20 years prison) was prescribed a CMS requirement by the legislature, and no intent was made in dispensing with any mental element, the required CMS must apply to all elements of the crime, especially the element that makes otherwise innocent conduct criminal: "of a child". The Texas courts cannot go against all of these Supreme Court holdings by citing pre-1983 law or a 1952 dictum footnote in one Supreme Court case: Morissette Supra, or n.2 in X-citement Video supra which was predicated on Morissette, to change law that was created by the Legislature. Because the Texas courts have unconstitutionally negated the required intentionally or knowingly CMS from modifying "of a child", and they have disregarded, suspended, and made exceptions to 2.01, 6.02, and 8.02 in violation of Article 1 § 19, 28, and Article 2 § 1 of the Texas Constitution by saying those statutes do not apply to 22.011, they have violated the Separation of Powers Doctrine, resulting in Morrison's Fifth and Fourteenth Amendment constitutional right to Due Process being violated, as well as his Sixth Amendment right to fair trial being violated because he was robbed of the opportunity of the prosecutor having to prove to a jury that he did not fulfill every element off 22.011 as the plain language and legislative intent of 22.011 mandate. Therefore, he was forced into having to plead guilty to the charge, where he ultimately received a sentence of 16 years prison, and having to register as a sex offender for the rest of his life. This is unconstitutional and Morrison prays for relief.

VII. CONSTITUTIONAL VIOLATION AND SUPPORTING FACTS FOR GROUND THREE

GROUND THREE: 22.011 is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

SUPPORTING FACTS FOR GROUND THREE:

22.011(a)(2)(A) of the Texas Penal Code is unconstitutional on its face and as-applied to Morrison because it violates the Equal Protection Clause by subjecting unmarried adults who engage in the prohibited acts with a 14 to 16 year old minor to 20 years in prison (along with registering as a sex offender for life), while allowing the same exact acts to be legal to adults who are married to the 14 to 16 year old minor.

This disparity of treatment does not wholly relate to the objectives of the statute, nor does being married mitigate any of the state's interest in protecting the health, safety, and welfare of that age group, nor does marriage protect that age group from the improper sexual advances of adults, nor sexual assault as reasoned by the Texas Court of Appeals and state as the legitimate state's interests for the statute. This equal protection violation causes 22.011 to be underinclusive in its reach.

The right to marry or not to marry, the right to procreate, the right to copulate, and the freedom of intimate association are all fundamental rights that are protected by the First Amendment and are involved in 22.011, therefore, this equal protection claim is subject to the strict scrutiny analysis.

A. ARGUMENT FOR GROUND THREE

22.011 offers an affirmative defense to the spouse of a minor who is 14 to 16 years who engages in the prohibited acts defined in the statute, but subjects to 20 years in prison someone who engages in the exact same acts to a person who is not married to the 14 to 16 year old minor. See 22.011(e)(1); and at the time of the offense the definition of a "child" 22.011(c)(1) (V.T.P.A. 2003 ed.).

"A person younger than 17 years who is not the spouse of the actor."

The Equal Protection Clause demands that similarly situated persons be treated similarly under the law. See **Plyler v. Doe 457 U.S. 202, 216 (1982)**; also **Sonnier v. Quarterman 476 F.3d 349, 367 (5th Cir. 2007)**. By providing dissimilar treatment to married and unmarried persons who are similarly situated, the statute violates the Equal Protection Clause by putting more of a burden on the unmarried adult, and allowing the married adult to perform the prohibited acts in spite of the state's interests in creating the statute.

> "The Equal Protection Clause does not deny the states the power to treat different classes of persons in different ways. (Citation omnited), but it does, however, deny the states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest on some ground of difference having a fair and substantial relation to the objective of the legislation, so that all persons similarly circumstanced shall be treated alike'". See **Reed v. Reed 404 U.S. 71, 75-76 (1971)**; **Royster Guano Co. v. Virginia 253 U.S. 412, 415 (1920)**; Compare to **Eisenstadt v. Baird 405 U.S. 438, 447 (1972)** (Where the Supreme Court held that the classifications that treated married and unmarried persons differently in a Massachsett's statute violated the Equal Protection Clause.)

II.

The question Morrison presents to the court is whether there is some ground of difference that can rationally explain the severly different treatment accorded to unmarried and married adults who have a consentual-in-fact sexual relationship with the 14 to 16 year protected age group under 22.011, that can satisfy the equal protection violation?

To answer this question, the court must first look at the question in the context of the equal protection analysis and decide the appropriate standard of review. If the classification infringes upon a fundamental right or burdens a suspect class it is then subject to the strict scrutiny analysis, meaning the state must show the classificatior promotes a compelling states interest. See **Shapiro v. Thompson 89 S.Ct 1322, 1331 (1969)**, and it will be strictly scrutinized upon the equal protection challenged and upheld only if the statute is precisely tailored to futher a compelling governmental interest. See Sonnier supra at 368; Plyler supra at 217-218.

If the classification does not infringe upon a fundamental right or burden a suspect class, then the rational basis review is used and the challenged classification in the statute need only be rationally related to a legitimate governmental purpose. See **Kiss v. State** 316 S.W.3d 665, 669 (2009); **Tigner** v. **Cockrell** 264 F.3d 521 (5th Cir. 2001); and **San Antonio Ind. School Dist. v. Rodriguez** 411 U.S. 1 (1973).

The classification of persons who are treated differently are the married and unmarried, and because the right to marry or to remain unmarried, and all the intimate choices relating to the personal relationship are fundamental rights that are protected by the Constitution, the different treatment to this classification requires that the strict scrutiny analysis be used in determining the constitutionality of the statute in regards to all equal protection violations challenged in grounds three through five. Compare to Eiesenstadt Supra at 447 n.7 and 453; **Griswold v. Connecticut** 381 U.S. 479, 483-485 (1965); and **Lawrence v. Texas** 123 S.Ct 2472, 2476-77 (2003).

> "Decisions by married persons concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form a 'liberty' protected by the due process clause of the 14th Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons." See Lawrence at 2483, quoting the Honorable Justice Stevens' dissent in **Bowers v. Hardwick** 478 U.S. 186 at 216 (1986), which the Lawrence Court used to overrule Bowers. Also look to Lawrence at 2477:
> "Both Eisenstadt and **Carey** [v. Population Services Int'l 97 S.Ct 2010 (1977)] as well as the rationale in **Roe v. Wade** confirm that the reasoning of Griswold could not be confined to the protection of rights of married persons."

These Supreme Court cases involving intimate relationships all support the fact that this equal protection violation challenged by Morrison must be subjected to the strict scrutiny analysis.

Because Morrison will show that the classification's disparity is not precisely tailored to further a compelling governmental interst, it fails under the strict scrutiny analysis, and therefore, is unconstitutional on its face and as-applied to Morrison.

Since it has been ruled that decisions concerning married couples' intimate choices are protected by the First Amendment and the Due Process Clause and that same protection extends to unmarried couples' intimate choices, then if it is the decision of a 27 year old male and a 15 year old female, along with her parental consent to marry and have a sexual relationship, and that decision is constitutionally protected, then another 27 year old male and 15 year old female who have the exact same relationship, but choose not to get married should also be protected in their intimate choices. If the same logic applies in Eisenstadt, Lawrence, and Carey then it should apply to 22.011. The different treatment is unconstitutional by meaning of the Equal Protection Clause.

III.

The Constitution also protects peoples' natural right to copulate. Morrison acknowledges that some courts have said that there is no constitutional right to copulate

with minors. See Byrne supra at 751:

> "The statute does not violate a fundamental right because the Federal Constitution grants neither a fundamental right to have sex with minors, nor an absolute prohibition on strict liability statutes."

There likewise is no explicit fundamental right to marry 14 to 16 year old minors, nor is there an absolute prohibition against marrying or having consentual-in-fact sex with 14 to 16 year old minors.

> "The association of people is not mentioned in the Constitution, nor in the Bill of Rights. The right to educate a child in a school of a parents' choice- whether public or private or parochial- is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been considered to include certain of those rights." Griswold at 482; Also: "The language and history of the Ninth Amendment reveals that the framers of the Constitution believed that there are additional fundamental rights not specifically mentioned in the first eight amendments. The Ninth Amendment reads: 'The enumeration in the Constitution, of certain rights, should not be construed to deny or disparage others retained by the people."... It was proferred to quiet expressed fears that a bill of specifically enumerated rights could not be sufficiently broad to cover all essential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected." Griswold at 488-489.

Therefore, the rationale in Byrne and other courts that have said, "There is no constitutional right to copulate with minors" has no base and is error in this context of equal protection, because at the time of the offense of the instant case it was legal for adults to marry and then have sexual intercourse with minors from 14 to 17 years, therefore, it must be constitutionally protected. Since there is no constitutional bar on marrying and having sex with the protected age group then there can be no constitutional bar on having a consentual sexual relationship outside of marriage with the same age group. Therefore, if it is constitutionally permissible for an adult to marry a 14 to 16 year old minor and have consentual-in-fact sex with them, then it likewise must be constitutionally permissible for adults to have consentual-in-fact sex with the same age group without being married.

Morrison wants to be clear that he is not advocating that it is okay for adults to have sexual relations with children. His argument is simple and pertains only to the 14 to 16 year age group who the legislature at the time of the offense said it was okay for them to get married to adults then have sex with them. Morrison's argument is that the Equal Protection Clause prohibits the state from putting an unmarried 27 year old male in prison for 16 years for doing the same acts as a married 27 year old who was protected from going to prison. And since 22.011 allows that disparity of treatment and there is no compelling govermental interest that justifies the different treatment, then 22.011 is unconstitutional.

The Supreme Court's decision in **Planned Parenthood of Central Missouri v. Danforth** 428 U.S. 52, 74 (1976) supports that the right to privacy in the intimate choices also

extends to minors. They held that the right to privacy in connection to decisions affecting procreation extends to minors as well as adults:

> "Since a state may not impose a blanket prohibition, or even a blanket requirement of parental consent, on the choice of a minor to terminate her pregnancey the constitutionality of a blanket prohibition of the distribution of contraceptives to minors is a fortiori foreclosed."

Since at the time of the Constitution there were no laws that regulated consentual sex or marriage to minors from 14 to 16 years, and the Constitution has never barred sexual relations with 14 to 16 year old minors outside of marriage, and it is well established that the right to privacy regarding marriage, procreation, and copulating is all protected by the Constitution, and because 22.011 restricts the natural fundamental right to copulate to unmarried persons, but allows married persons to exercise the same natural fundamental right also supports that this equal protection claim and the other equal protection claims asserted in this Writ of Habeas Corpus and also the overbroad, and vagueness claim also challenged must be analyzed using the strict scrutiny analysis by showing that the classifications promote a compelling state interest, and the statute will only be upheld if it is precisely tailored to further the compelling governmental interests.

IV.

The appellate courts through several different cases have mentioned what objectives and state's interests pertain to 22.011. They are:

(1) To protect the health and safety of children. (See Scott 36 S.W.3d 240, 242).
(2) To protect children from the reprehensible conduct of adults. (Medina 986 S.W2d at 73
(3) To protect children from the improper sexual advances of adults. (Byrne at 752).
(4) To protect children from sexual assault. (Byrne at 751).

The disparity of the treatment to a person who may be 24 years old, in love, and living with a 15 year old sex partner, with their parent's consent, but unmarried, compared to another 24 year old, in love, and living with a 15 year old sex partner, but married, is wholly unrelated to the objectives of the statute since a marriage license would not diminish any of the state's objectives as defined by the state in protecting the minor.

If an adult is married to a 14 to 16 year old minor, and engages in sexual relations with the minor, that minor's health and safety would in fact be in the same jeopardy that the state seeks to protect, as when an adult who is not married to the minor engages in the same conduct. It is hard to conceive of any compelling reasons that would justify the disparity of treatment by using this legitimate state interest to uphold its constitutionality through this challenged equal protection violation.

See U.S. v. Houston 364 F.3d 243, 248 (5th Cir. 2004):

> "Marriage is an affirmative defense to statutory rape. 22.011(c)(1) (2003). Because Texas law permits a female to marry, with parental consent at age 14, Tex. Family Code 2.102(a) (Vernon's 2003). We find it unlikely that the age of consent in Texas' statutory rape law was enacted to protect females under the age of 17 from physical injury as a consequense of consentual sexual intercourse."

Nor can the statute be sustained simply on the deterance of the reprehensible conduct of adults, or by protecting 14 to 16 year old minors from the improper sexual advances of adults, since in both situations, married or unmarried the actor is an adult. For whatever the rights of the married adult (who does the prohibited acts that the state has sought to criminalize) are, those rights must be the same for the unmarried adult as well. Under the Constitution, if the state's compelling interests to protect this age group cannot be a reason to ban the prohibited acts of the statute to adults who marry minors, then the state cannot logically use the same compelling interest to overrule the equal protection violation.

The reasonable state's interest in protecting children from 14 to 16 years from sexual assault as mentioned in Byrne at 751 (discussing a consentual-in-fact sexual act as defined in 22.011) is even less compelling as a justification for the disparity of treatment concerning this equal protection claim, because the term "sexual assault" connotes behavior that is more associated in the realm of conduct proscribed in 22.021, not 22.011 which pertains to criminalizing only consentual-in-fact sex with minors from 14 to 16 years, and a sex partner who is more than three years older than the minor, and not the spouse of the minor. But even if the consentual-in-fact sex is, nevertheless, defined by the state as "sexual assault", then it must be a "sexual assault" by the married adult as well, showing also that the disparity of treatment cannot be rationally related to this governmental interest.

V.

The common sensical and actual legislative intent, and state's compelling interest in creating 22.011, for good reason is to protect minors that are from 14 to 16 years old from being targeted and taken advantage of by adults who's intent is to engage in the prohibited conduct with a member of the protected age group. Whether the conduct is consentual is not a factor because the legislature has drawn the line and decided that a minor who is from 14 to 16 years is not mature enough to make that decision, and they are a lot of times impressionable and without the protection could be easily solicited into sex by an older more mature person. And anyone who intentionally or knowingly engages in the conduct as the offense requires can be subjected to 20 years in prison and made to register as a sex offender for life, which acts as a deterrant from doing it.

This legitimate state's interest is the main purpose 22.011 was enacted, and an adult

marrying a minor, by no means can negate nor lessen this compelling state's interest to justify the disparity of treatment because a sexual predator who has the propensity to target that age group for sex could in fact be excluded from the punishment of the statute by marrying the minor, and having sex with her, divorcing her six months later, marrying another minor six months later, and continuing along that path doing exactly what the statute was created to protect, but being shielded from the consequenses because of the affirmative defense of being the spouse of the child, making 22.011 underinclusive in its reach in penalizing people who target members of the protected age group for sex. On the other hand, the way the statute has been interpreted by the Court of Appeals, an adult who has been misrepresented by the true age of a minor, and believes the minor who is in the protected age group is an adult, and the minor welcomes or even initiates the sexual encounter, that adult is still subject to 20 years in prison, even though he had no intentions of targeting a minor for sex and he would have absolutely no defense in protecting him from conviction, making 22.011 overinclusive in its reach in that area as well.

For these reasons a statute that criminalizes consentual sexual acts with 14 to 16 year old minors by unmarried actors who are three years older than the minor, and allowing the same consentual sexual acts with 14 to 16 year old minors by married actors cannot be sustained simply as a prohibition on the consentual sexual acts. Whatever the rights of some individuals to engage in consentual sex acts with the protected age group may be, the rights must under the Equal Protection Clause be the same for unmarried persons as to married persons. If the act of having consentual sex with 14 to 16 year old minors by married persons cannot constitutionally be prohibited, a ban on the exact same act by an unmarried person would be equally impermissible, and since there is no constitutional bar to a prohibition on, or against having consentual sex with 14 to 16 year old minors, (Because it can be constitutionally done through marriage, or at the time of the offense in the instant case in 2003, it could have been constitutionally done in a number of states without being married, because the age of consent in those states were 15 years or younger. Also at the time the Constitution was written there were no laws regulating nor prohibiting consentual sex with 14 to 16 year olds. Statutory rape laws up until the later half of the 20th century normally protected children younger than 14 years.) A state, therefore, may not consistantly with the Equal Protection Clause, outlaw the consentual sex acts in the 14 to 16 year age group to unmarried partners, but not to married partners, since in each case the evil perceived by the state would be identical, and the underinclusion would be inviduous. Compare to Eisenstadt at 454; also see **Avery v. Midland Co, Tex. 88 S.Ct 1114 (1968):**

"The Equal Protection Clause does not require that the state never distinguish

between citizens, but only that distinctions that are made are not to be arbitrary or inviduous." Also see **Graves v. Barnes 343 F.Supp 704; 93 S.Ct 752 (1972):** "The 14th Amendment does not prohibit all unequal treatment of individuals or groups, but it does prohibit inviduous discrimination."

VI.

Morrison has shown that the disparity in 22.011 between married and unmarried actors is wholly unrelated to the objectives of the statute and it is not precisely tailored to further a compelling governmental interest to satisfy the strict scrutiny analysis concerning the state objectives that were previously stated, but as in Eisenstadt, Lawrence, and Reed v. Reed 404 U.S. 71 supra, the Court of Criminal Appeals should not even have to address the statute's valitity under this test because the law fails to satisfy even the more lenient rational basis test. Because Morrison has shown that he was convicted under 22.011, a statute that violates the equal protection clause, and the statute is thereby unconstitutional, a reversal of his conviction is required.

Morrison does not want the state or courts to construe that by him challenging this ground that he condones adults having sex with 14 to 16 year old minors, nor that he is trying to degrade the sanctity of marriage. Morrison just feels it is not right that a statute criminalizes and put him in prison for 16 years and makes him register as a sex offender for life for unwittingly having sex with a 15 year old female, and that same statute allows the same act to other adults who can in fact knowingly target the protected age group and have sex with them without fear of prosecution by marrying them. In that regard Morrison wishes to assert the equal protection violation as an as-applied to his situation claim.

There can be no compelling states interest that justifies this disparity of treatment in this classification, therefore, 22.011 is unconstitutional on its face and as-applied to Morrison because it violates the Equal Protection Clause.

B. REQUEST FOR RELIEF

Since Morrison has proven that 22.011 is unconstitutional by being in violation of his rights under the Equal Protection Clause, Morrison respectfull asks the Honorable and Wise Federal District Court to reverse his conviction and order an aquittal or give him relief as they see necessary to fix this unconstitutional violation.

C. **Clearly Established Federal Law as Determined by the Supreme Court, Summarized**

1) **Eisenstadt v. Baird 405 U.S. 438 (1972)** (Held: Massachusetts statute could not be upheld as a deterrant to fornication, or a health measure, or as a prohibition on contraception, and the statute, by providing dissimilar treatment for married and unmarried persons who were similarly situated, violated the Equal Protection Clause of the Fourteenth Amendment. The Equal Protection Clause denies the states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on a basis of criteria wholly unrelated to the objectives of that statute. If a statute impinges upon fundamental freedoms protected by the Constitution, the statutory classification must under the Equal Protection Clause, be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest.)

2) **Plyler v. Doe 457 U.S. 202 (1982)** (Held that the discrimination contained in the Texas statute cannot be considered rational unless it furthers some substantial goal of the state.)

3) **Planned Parenthood of Southern Pa. v. Casey 112 S.Ct 2791, 2804-08 (1992)** (Held the reaffirmance of the Supreme Court's decisions about affording constitutional protections to personal decisions relating to marriage, procreation, family relationships, child rearing, education, and contraception, and having the right of individuals to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person's decision whether to bear or beget a child.) (Inside citations omitted).

4) **Lawrence v. Texas 123 S.Ct 2472 (2003)** (Held that individual decisions by married persons, concerning the intimacies of there physical relationship, even when not intending to produce offspring, are forms of liberty protected by the Due Process Clause of the Fourteenth Amendment. This protection extends to intimate choices by unmarried as well as married persons.)

5) **Griswold v. Connecticut 381 U.S. 479 (1965)** (Held statute was unconstitutional as an invasion of the privacy of married persons.)

6) **Shapiro v. Thompson 89 S.Ct 1322, 1331 (1969)** (Held that if a classification infringes on a fundamental right it is subject to strict scrutiny and upheld only if the statute is precisely tailored to further a compelling governmental interest.)

D. **State Court's Disposition for Ground Three/2254(d)(1),(2)**

Because the trial court's findings regarding Ground Three were inconclusive and

unsupported, and only claimed: "The Applicant's complaints as stated above are without merit." (See p.59 trial court findings), that comment is an unreasonable determination of the facts in light of the evidence that Morrison has presented to the courts in his 11.07 state-court proceedings, and is erroneous. Morrison's state Memorandum of Law,Pp.52-58, proved that Ground Three has merit, because according to the above Supreme Court law, 22.011(a)(2) is unconstitutional because it violates the Equal Protection Clause by legislating different treatment to be accorded to persons placed by a statute into different classes on the basis of criteria that is wholly unrelated to the objectives of that statute: the married and unmarried. Since 22.011 deals with the constitutionally protected-fundamental right to marry or remain unmarried, the natural-fundamental right to copulate, procreate, and freedom to form intimate relationships, all fundamental rights that are protected by the First Amendment, the strict scrutiny analysis must be used in determining the constitutionality of Morrison's Equal Protection claims, aswell as his overbreadth and void for vaguness claims. (See ground 3-7).

The district court, state, nor did the Court of Criminal Appeals raise any compelling governmental interests to sustain the constitutionality of any of Morrison's facial and as-applied equal protection, overbreadth, or void for vagueness claims, as required by strict scrutiny standards, therefore, their inconclusive, one sentence decision to recommend the denial of this ground was also contrary to clearly established federal law as determined by the Supreme Court that says; when strict scrutiny is required the state must show the classification promotes a compelling state's interest, and it will be strictly scrutinized upon the equal protection challenged and upheld only if the statute is precisely tailored to further a compelling governmental interest. See **Plyler v Doe** Supra at 217-218.

Because the state court's decision was opposite to that reached by the Supreme Court cases that Morrison cited to in his Equal Protection question of law relating to the disparity of treatment accorded to the married and unmarried in 22.011(a)(2), and because the state courts decided the case differently than the aforementioned Supreme Court holdings, on a set of materially indistinguishable facts, 2254(d)(1) has been satisfied. Morrison has also shown that the requirements under 2254(d)(2) have been met as well. Morrison has proved with clear and convincing evidence that the state court's findings are clearly erroneous.

E. Conclusion

22.011 unlawfully discriminates between adults who marry and then have sex with the 14 to 16 year age group, and adults who choose not to get married, buthave a

sexual relationship with the 14 to 16 year age group, or choose to have a sexual relationship with the protected age group before they get married. What is the compelling state's interest that justifies this severe disparity of treatment that imprisons and forces to register as a sex offender for life, an adult who chooses not to marry, but allows (and actually encourages) an adult to get married and do the same exact conduct without repercussion? This disparity of treatment may have been rationalized fairly easily before the Supreme Court decision in **Lawrence v. Texas** supra came out, by stating that there was no constitutional right to fornicate, but there is a right to have sex with the age group while being married. Granted, the Court in Lawrence did specifically state that Lawrence does not apply to cases where minors are involved, and Morrison suspects that will be the main topic of rebuttal from the Assistant Attorney General for this Ground. But it is Morrison's assertion that since marriage is a deciding factor on who goes to prison and must register as a sex offender, and who does not, and the decision to marry or not to marry is a constitutionally protected right that is afforded to the 14 to 16 year old minor and adult, the distinction in Lawrence in this situation is distinguishable under **Griswold** and **Eisenstadt** supra. Morrison cannot fathom any compelling state interest or legitimate state's interest that suffices enough to sustain 22.011 from this constitutional Equal Protection challenge, therefore, unless the state comes up with a compelling governmental interest that promotes why adults should be allowed to marry and have sex with 14 to 16 year old minors, but the unmarried are imprisoned for the same conduct, and they show how 22.011 is precisely tailored to further that compelling governmental interest, 22.011 is unconstitutional by violating the Equal Protection Clause as determined by the clearly established federal law holdings above, and Morrison prays for relief as this Fine Federal Court sees necessary.

VIII. CONSTITUTIONAL VIOLATION AND SUPPORTING FACTS FOR GROUND FOUR

GROUND FOUR: 22.011 is unconstitutional because it violated Morrison's equal protection rights under the Fourteenth Amendment of the United Stated Constitution.

SUPPORTING FACTS FOR GROUND FOUR:

22.011 is unconstitutional as-applied to Morrison's specific situation because it violated Morrison's equal protection rights by sentencing him to a 16 year prison term for engaging in the prohibited acts of 22.011, while Morrison's 18 year old cousin Tyler White ("White") who brought the minor to Morrison's house with alcohol, and told Morrison and Morrison's co-defendant Jason Morrison ("Jason") that she was 21 years old, and partook in the exact same prohibited acts as the Morrisons, but was not charged with the crime, because White fell into the three year defense the statute offers under 22.011(E)(2).

In this particular case the disparity of treatment between the Morrisons and White does not wholly relate to the objectives of the statute, or the defense the statute offers because White's actions and involvement in the offense were the same as the Morrisons, and in the particular situation his age did not mitigate any of the evil as perceived by the state in order for him not to be charged with the offense, while the Morrisons were charged and imprisoned for doing the same conduct to the same minor at the same time. This violation is underinclusive in its reach, and it is inconceivable that the state can show any governmental interest that could rationally justify this disparity of treatment between White and the Morrisons in this as-applied equal protection violation.

A. ARGUMENT FOR GROUND FOUR

Morrison postulates this ground as a novel argument and because of his limited resources, he has found no case law that directly correlates with his situation relating to this as-applied equal protection challenge, therefore, he has found no support, nor has he found anything that rebuts this argument. So Morrison respectfully requests that this fine court hear this argument as a novel argument and decide on it objectively.

Morrison admits that he cannot realistically claim a facial equal protection challenge to the defense provided under 22.011(e)(2) like done in **Medina v. State 986 S.W.2d 733 (1999)**, and that is not his intention. Morrison understands the reasonings and compelling state's interest for providing the defense, and he agrees with its operation as the legislature intended, which is to protect minors who engage in the prohibited acts with each other from prosecution.

The legislature intended not to prosecute the 18 year old senior in high school who has a consentual-in-fact sexual relationship with a 15 or 16 year old sophmore or junior, or a 19 year old adult who has a 16 year old sex partner whom he may have been dating since he was 17 and her 14. If the defense was not available the Texas prisons would be full of 17 to 19 year old young men and women for exercising their natural right to copulate. Therefore, Morrison understands its logic and cannot challenge it facially.

However, Morrison's situation is distingushable from these normal situations in which the legislature established 22.011(e)(2) to protect the older actor within three years of age of the minor from prosecution. In Morrison's situation there were three men involved: Morrison, Jason Morrison, and Tyler White. At the time of the offense the Morrisons were both 27 years, and White was 18 years. White brought the minor Mary, who was 15 years over to their house and went along with Mary as her being an adult. They also brought in a bottle of tequilla and a 12 pack of beer. After a few drinks Mary asked the men if they wanted to some body shots on her. All three men did body shots on her, then subsequently all went into the bedroom where they all three did consentual-in-fact sex acts with Mary. (See statement of facts page 1).

Morrison asserts that in this situation the legislature did not intend to protect White from prosecution, and only prosecute the Morrison's, because White in all actuality was criminally responsible for the offense under 22.011(a)(2)(C):

> "Cause the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of **another person** including the actor." (Emphasis added).

Since White compelled the offense to happen by bringing Mary over and telling the Morrisons she was 21, that in fact caused the minor's sexual organ to come in contact with or be penetrated by **another person's** (an adult older than three years') sexual organ and mouth bringing White into the elements of the offense defined under

22.011(a)(2)(C).

Because White and Morrison were in the same situation and did the same acts, and Morrison was charged and eventually sentenced to 16 years prison, and Jason was charged and sentenced to seven years prison, while White was never even charged, that violates Morrison's equal protection rights. There can be no possible scenerio, nor governmental interest that the state can show to justify this disparity of treatment that protected an 18 year old man who brought a 15 year old female to his 27 year old cousin's house, introduced her to them as an adult (intending on showing his older cousins a good time so he could look cool and be in their good graces, or even set them up for some sinister reasoning), and after doing that all three of them partook in one or more of the acts that are prohibited under 22.011. Morrison 22.011(a)(2)(A); Jason 22.011(a)(2)(A); and White 22.011(a)(2)(A),(B),(C), then only prosecute two out of the three, making 22.011's reach underinclusive and violating Morrison's equal protection rights.

B. REQUEST FOR RELIEF

Morrison asks this Honorable Court to analyze this equal protection violation also using the strict scrutiny analysis because Morrison thought he was engaging in a constitutionally protected, fundamental right to copulate with an adult, as well as the other reasons he has shown that support 22.011 being analyzed using strict scrutiny. If the Court finds that Morrison's equal protection rights were violated under this ground, or they determine this disparity of treatment falls under another law doctrine like for instance, selective prosecution or is underinclusive, then reverse his conviction and grant an acquittal or remand for new trial. According to the Equal Protection Clause, Morrison has shown this to be a violation as-applied to his situation.

C. Clearly Established Federal Law as Determined by the Supreme Court, Summarized

1) Eisenstadt v. Baird 404 U.S. 438 (1972) (Same holding as Ground Three).
2) Plyler v. Doe 457 U.S. 202 (1982) (Same holding as Ground Three).
3) Planned Parenthood of Southern Pa v. Casey (Same holding as Ground Three).
4) Lawrence V. Texas 123 S.Ct 2472 (2003) (Same holding as Ground Three).
5) Shapiro v. Thompson 89 S.Ct 1322 (1969))Same holding as Ground Three).

D. State Court's Disposition for Ground Four/2254(d)(1)(2)

Because the trial court's findings regarding this Ground Four, also were unsupported and inconclusive by only stating: "The Applicant's complaints as shown above are without merit." (See page 60 Trial Court's Findings). That comment is an unreasonable determination of the facts in light of the evidence that Morrison has presented in

his state-court 11.07 proceeding. Morrison has shown in his state Memorandum of Law, that simalarly to Ground Three, this Ground Four has merit according to the logic described in the above clearly established federal law. 22.011 is unconstitutional as-applied to Morrison because it VIOLATED the Equal Protection Clause by allowing different treatment to be accorded to White (him not being charged), while Morrison was sentenced to 16 years prison on the basis of criteriathat is wholly unrelated to the objectives of 22.011. This ground is also subject to strict scrutiny analysis, and because the trial court, state, nor did the Court of Criminal Appeals raise any compelling governmental interests to sustain the constitutionality of Morrison's as-applied Equal Protection claim as required by strict scrutiny standards, as stated in Ground Three, their decision in denying Morrison relief is also contrary to the clearly established federal law as determined by the Supreme Court as Morrison showed to them in his state Memorandum of Law Pp.52-60. Because the state court's decision was opposite to that reached by the Supreme Court precident that Morrison cited to in his Equal Protection question of law relating to the disparity of treatment accorded to White and him, and because the state court decided the case differently than the aforementioned Supreme Court holdings, on a set of materially indistinguishable facts, 2254(d)(1) has been satisfied. Morrison has also shown that the requirements under 2254(d)(2) have been met aswell. Morrison has proven with clear and convincing evidence that the trial court's findings are erroneous.

E. Conclusion

In creating the defense in 22.011(E)(2), it is mind boggling to think that the Legislature established that defense for the purposes of absolving from prosecution an 18 year old man who brought a 15 year old minor to his 27 year old cousins' house so they could have a place to party, then to make sure it was okay, they lied to his cousins and said she was 21 years old. Then after several drinks and an invitation to do body shots on the fully developed, attractive, 21 year old-looking female, all three men had sexual relations with her, two are charged and sent to prison, and required to register as sex offenders for life, but the 18 year old who compelled the offense to happen does not have to go to prison, nor register as a sex offender. Morrison asserts that there is no possiblity that any reasonable law-maker would draft 22.011(E)(2) with the mindset of allowing the disparity of treatment that happened in Morrison's situation between him and White.

Scenerios like this may not have even been contemplated while drafting 22.011(E)(2). And like this Wise Court already knows, every possible scenerio cannot be taken into consideration while drafting policy or laws, but that is why there are as-applied constitutional questions of law that address issues like this that may have not been

thought of or confronted at the time of legislation. So Morrison would like to ask this question of law while closing this ground:

> "Is it in line with the Equal Protection Clause to sentence an adult to 16 Years prison and requiring him to register as a sex offender for life for having consensual sex with a 15 year old minor who he reasonably thought was 21 years, but absolving from prosecution an 18 year old man (who knew her true age and lied to and told the other adult she was 21 years), and who also had consensual sex with the same 15 year old minor?"

This is a novel issue that has probably occured before, but, as far as Morrison knows, has not been challenged as an Equal Protection question of law. Morrison hopes and prays that, though Morrison has not shown much support for this issue, that this Court will look at this question of law objectively, and give Morrison any relief that they see necessary to resolve this as-applied constitutional question of law.

IX. CONSTITUTIONAL VIOLATION AND SUPPORTING FACTS FOR GROUND FIVE

GROUND FIVE: 22.011 is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

SUPPORTING FACTS FOR GROUND FIVE:

22.011 is unconstitutional on its face and as-applied to Morrison's situation because (by the way it has been interpreted by the Texas Court of Appeals) it treats violators of 22.011 differently from violators of all other felonies, obsenity laws, and common laws by subjecting people to a felony statute that imposes a severe sentence of incarceration, while not requiring the presumption of a mens rea to the facts that make the statute a crime.

22.011 is the only felony that has a prescribed CMS and does not dispense with any mental element, yet is nevertheless, considered by the Texas courts and prosecutors as being a strict liability offense, despite Supreme Court, and 5th Circuit holdings of proper statutory construction that say otherwise. The courts have violated the Equal Protection of Laws because all other felonies, obsenity laws, and common laws that do have a prescribed CMS that does not dispense with any mental element do have the presumption of a mens rea and are not strict liability.

22.011 is the only statute that Penal Code section 6.02 does not apply to, according to the Court of Appeals. That is also a violation of Equal Protection of Laws.

A. ARGUMENT FOR GROUND FIVE

22.011 has been deemed strict liability, despite the legislature's intent to prescribe a CMS in the heading of the offense, without clearly dispensing with any mental elements. It is a fact that people, including Morrison, are going to prison for unwittingly engaging in a sexual relationship with a minor from 14 to 16 years who intentionally represented themselves as an adult to the unsuspecting older sexual partner, and they encouraged or even initiated the sexual acts with the older person, leaving that older person subjected to 20 years prison without any kind of defense or proof of the intent or knowledge requirement that made their conduct criminal.

Except for 22.011, to be found guilty of all other felonies, the state must prove a mens rea that the defendant knew his conduct was illegal, especially when a CMS is prescribed and the statute does not dispense with any mental element. (See section 6.02). The Supreme Court has supported this contention in numerous cases[3] and held that the presumption of a mens rea must be required in conviction of all crimes except "public welfare" or "regulatory" offenses which have been created by congress and recognized by the Supreme Court in "limited circumstances." See U.S. Gypsum Co. v. U.S. 438 U.S. 422, 437-38 (1978). Those cases involve statutes that regulate potentially harmful or injurous items, devises, or products, or obnoxious waste materials where the "defendant knows he is dealing with a dangerous devise of character that places him in relation to a public danger." See U.S. v. Dotterweich 64 S.Ct 134, 136 (1943); U.S v. Balint 42 S.Ct 301 (1922); U.S. v. Behrman 42 S.Ct 303 (1922); U.S. v. Freed 91 S.Ct 1112 (1971); U.S. v. International Minerals & Chemical Corp. 91 S.Ct 1697, 1701-02 (1971), and in such cases congress intended to place the burden on the defendant to "ascertain at his peril whether his conduct comes within the inhibitions of the statute." See Balint at 303. The Supreme Court has relied upon the nature of the statute and the particular character of the item regulated to determine whether **"congressional silence"** concerning the mental element of the offense should be interpreted as dispensing with the conventional mens rea requirement. Compare to Staples at 1798. (Emphasis added). Law makers did not make 22.011 **"silent"** concerning the mental element and it is not a crime of this nature, therefore, 22.011 cannot be a strict liability type offense classified with the public welfare or regulatory offenses that do fit into the definition of strict liability offenses, nor can it be treated like them regarding their strict liability status. (See Ground 2 section XIII p. 55 - XV. p. 67) Also see Staples at 1804:

> "Absent a clear statement from congress that mens rea is not required we should not apply the public welfare rationale to interpret **any statute defining a felony offense** as dispensing with a mens rea."

3. Staples v. U.S. 114 S.Ct 1793 (1994); Liparota v. U.S. 105 S.Ct 2084 (1985); U.S. v. U.S. Gypsum Co. 98 S.CT 2864 (1978); Smith v. California 80 S.Ct 215 (1959); U.S. v. X-Citement Video 115 S.Ct 464 (1994); Morissette v. U.S. 72 S.Ct 240 (1952; New York v Ferber 102 S.Ct 3348 (1982)

The Texas legislature has not expressed any statement saying the CMS of intentionally or knowingly does not modify "of a child", therefore, according to the Supreme Court's holding in Staples, 22.011 cannot be strict liability, and to say that it is strict liability violates the Equal Protection of the Laws Clause of the Constitution. Also see U.S. v. U.S. Gypsum Co. supra at 2878:

> "Far morethan the simple omission of the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement."

22.011 never omits any intent requirement, infact the legislators implemented one into the heading of the statute which has been interpreted in error to only modify one of the two mental elements, and that mental element can criminalize a broad range of innocent conduct. Compare to Liparota v. U.S. supra at 2087-88, n.6 , where the statute's use of knowingly in 7 USC § 2024(b)(1), like the intentionally or knowingly element in 22.011, could be read to modify all or either elements of the offense. In Liparota the CMS could be read to modify only the verbs: "uses, transfers, acquires, alters, or possesses". Or it could be read to also modify the element that makes the conduct criminal, "in a manner not autorized by statute". And in 22.011 the CMS could be read, like the courts suggest, to only modify "causing the penetration of the sexual organ by any means". Or it could also modify the only section of the statute that makes the act criminal, "of a child", like the plain language and past Supreme Court holdings say that it should. The Supreme Court held that the mens rea requirement applied to both elements because they were concerned that the broader reading would "criminalize a broad range of apparantly innocent conduct." Id. 2088. Since only interpreting the mens rea requirement to only modify the sexual act in 22.011 would also only "criminalize a broad range of apparantly innocent conduct", the Liparota rationale must also apply to 22.011, making the prescribed CMS also apply to the element that criminalizes the otherwise innocent conduct. Also see U.S. v. Williams 170 L. Ed 2d 650 (2008) at 663, where the Supreme Court again shares Morrison's rationale that the prescribed CMS in the heading of 22.011, or in any statute that precedes with a CMS should modify the entire provision:

> "The first word of § 2252A(a)(3)-"knowingly"-applies to both the immediately following subdivisions, both the previously existing § 2252A(a)(3)(A) and the new § 2252A(a)(3)(B) at issue here. We think that the best reading of the term in context is that it applies to every element of the two provisions. This is not a case where grammer or structure enables the challenged provision or some of its parts to be read apart from the "knowingly" requirement. Here "knowingly" introduces the challenged provision itself, making clear that it applies to that provision in its entirety; and there is no grammatical barrier to reading it that way."

Morrison has no doubt, because of the way 22.011 is written, that the Supreme Court would interpret the CMS to modify the entire provision including "of a child" like they interpreted the statutes in Williams, Liparota, and also X-Citement Video.

> "Some form of scienter is to be implied in a criminal statute even if not expressed, and a statute is to be construed where fairly possible so as [like in Liparota and Staples], to avoid substantial constitutional questions." (Emphasis added in brackets). See X-Citement Video at 467.

The constitutionality of 22.011's lack of mens rea or mistake of age defense has been questioned many times since its enactment, and it has also been a hot topic of debate throughout the country over the last 50 years regarding similar statutory rape offenses, therefore, it is a substantial constitutional question that has been frequently argued. More and more courts, law makers, and commentators are saying that statutory rape being strict liability is unconstitutional and have eliminated the strict liability aspect, especially when it involves 14 to 16 year old teenagers that are in the protected age group that 22.011 covers. Also see Staples at 1797:

> "[W]e must construe the statute in light of the background rules of the common law, See U.S. Gypsum Co. at 2873, in which the requirement of some mens rea for a crime is firmly imbedded. As we have observed, '[T]he existance of a mens rea is the rule of, rather than the exception to, the principals of Anglo-American criminal jurisprudence.'"

It goes against everything American, and is more akin to being Communist and tyrranical, and surely does not fit into an egalitarian society to convict and imprison someone without the traditional requirement of mens rea when the statute does not explicitly allow for it, especially when that person thought his acts were legal and protected by the Constitution. Also see Staples 1796-1804 for more Supreme Court law and logic that must apply to 22.011. See X-Citement Video at 469:

> "Morissette, reinforced by Staples instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct... age of minority in § 2252 indisputably possesses the same status as [the] elemental fact [in Staples] because non obscene, sexually explicit materials involving persons over tne age of 17 are protected by the First Amendment. (Citations omitted), in light of these decisions one would reasonably expect to be free from regulation when trafficking in sexual explicit, though not obscene materials involving adults. Therefore, the age of the performers is the crucial element seperating legal innocence from wrongful conduct."

The same thing can be said about the mens rea requirement in 22.011:

> ...age of minority in 22.011 (14 to 16 years) indisputably possesses the same status as the elemental facts in Staples and X-Citement Video because consentual sex involving persons older than 16 are protected by the First Amendment, therefore, in light of these Supreme Court holdings one would reasonably expect to be free from regulation when exercising their natural right to copulate with adults (See ground six), therefore, the age of the consentual-in-fact sex partner is the crucial element that seperates legal innocence from wrongful conduct.

The CMS in 22.011 must also modify the crucial element that seperates legal innocence from wrongful conduct, especially since the statute does not dispense with any mental element, or it is a violation of the Equal Protection Clause.

It is also a well known fact that strict liability only applies to statutes that do not impose a severe penalty. See Staples at 1804:

> "Historically, the penalty imposed under a statute has been a significant consideration in determining whether 'the statute should be construed as dispensing with a mens rea'. Certainly the cases that first defined the concept of the public welfare offense almost uniformily involved statutes that provided for only light penalties such as fines or short jail sentences, **not imprisonment in the state penetentiary.**"(Citation omitted. Emphasis added).

X-Citement Video at 469 agrees and used § 5861(d)'s 10 year prison sentence from Staples as reason to find that § 2252 must be interpreted as requiring a mens rea:

> The fact that Staples' 10 year prison sentence 'looms equally large with §2252' where violators are punishable by up to 10 years in prison as well as substantial fines and forfeitures, shows §2252 was not intended to be strict liability.

22.011 is punishable by up to 20 years in prison and requires the offender to register as a sex offender for life, which is a sentence that is over twice as severe as the sentences in cases dealing with § 2252 in X-Citement Video or § 5861(d) in Staples. Also see X-Citement Video at 472:

> "A final canon of statutory construction supports the reading that the term "knowingly" applies to both elements, cases such as **New York v. Ferber** 102 S.Ct 3348, 3358-59 (1982) ('As with obsenity laws, criminal responsibility may not be imposed without some element of scienter on the part of the defendant')(Citations omitted). Suggests that a statute completely bereft of a scienter requirement as to the age of the performers, [or minor], would raise serious constitutional doubts so long as such reading is not plainly contrary to the intent of congress." (Citations omitted. Emphasis added in brackets).

These holdings that the Supreme Court has made regarding a scienter requirement, show that a scienter requirement must be interpreted in all felony statutes that do not dispense with one. All the logic in these holdings far out weigh the 1952 dictum comment made in footnote 8 in Morissette supra about the exception to the general rule of a mens rea in 'rape cases involving children', which in all actuality, back then pertained to statutory rape laws that were designed to protect children under 14 years. Therefore, Morissette is distinguishable and that note 8 comment, which is nothing more than dictum taken from a 1944 case and it cannot be used as justification to disprove all the other holdings discussed in all the Supreme Court decisions that weigh in favor of the requirement of a mens rea in **all felony offenses** that do not clearly dispense with any mental element, including 22.011. And by making an exception to those Supreme Court rulings is a violation of Equal Protection of the Laws.

II.

The U.S. Court of Appeals Fifth Circuit also agrees with the Supreme Court and Morrison's argument that strict liability crimes do not fit in line with a statute like 22.011, that has a prescribed CMS which never dispenses with any mental element, and that the CMS must modify the element that makes the accused conduct illegal, and where that statute subjects the accused who reasonably believed they were doing an innocent act to a severe term in prison. See **U.S. v. Nguyen** 916 F.2d 1016, 1019 (5th Cir. 1990):

"When the legislature provides a mental requirement for a statutory crime, the Court of Appeals must follow that direction."

Also see **U.S. v. Hernandez-Landaverde** 65 F.Supp 2d 567, 572 (5th Cir 1999):

"A statute should only be construed a strict liability offense when it is clearly intended as such. See generally Staples v. U.S. (supra) 'The Congress is fully capable of creating strict liability crimes when it is there intent to do so.' **U.S. v. Garrett** 984 F.2d 1402, 1409 (5th Cir. 1993). Congress did not include any strict liability language in § 1326. Consequently, in the absence of such specific statutory language, a criminal statute should be construed as a general intent crime."

Also see **Rent v. U.S.** 209 F.2d 893 (5th Cir. 1954):

"Criminal intent is a sine qua non of criminal responsibility."

U.S. v. Kay 513 F.3d 432, 451 (5th Cir. 2007) uses the synonym of criminal intent, "criminal willfulness" to say:

"Criminal willfulness requires only that criminal defendants have knowledge that they are acting unlawful or knowledge of the facts that constitute the offense, depending on the definition followed for the particular offense, unless the statutory text provides an alternative definition of this element."

Intentionally and willfuly are synonomous in meaning, so this statement should apply equally to the intentionally element in 22.011 and require that the defendant have knowledge that they are acting unlawful, or knowledge of the facts that constitute the offense, and those facts prescribed in 22.011 are: To commit an offense one must **intentionally** or **knowingly** cause the penetration of the sexual organ of a child by any means. (Emphasis added). Also see Id. 447-51, and nn. 52, 53, 67, 68 for definition for willfully that supports Morrison's argument.

Also see **U.S. v. Anderson** 885 F.2d 1248, 1254 (5th Cir. 1989):

"We think it far to severe for our community to bear- and plainly not intended by Congress- to subject to ten years imprisonment [or 20 years for 22,011] one who possesses what appears to be, and what he innocently and reasonably believes to be, a wholly ordinary and legal pistol merely because it has been unknown to him modified to be fully automatic. Certainly we have not done this for other offenses. (Emphasis added in brackets).

Yes, Justices Gee and Garwood, it has been done in another offense. 22.011 has been treated with that same kind of absolute strict liability for over 30 years, but it subjects people to 20 years in prison, and has imprisoned people who innocently and reasonably believed that a consentual sex partner was a legal aged adult because she looked, acted, and portrayed herself to be an adult. This same rationale, here in Anderson, as in Staples and X-Citement Video must under the equal protection clause, equally apply to Morrison, and 22.011.

III.

Except for 22.011, the Court of Criminal Appeals and Court of Appeals have also supported these arguments in all felonies that prescribe a CMS and never dispense with any mental element. See Aguirre v. State 22 S.W.3d 463 and its line of cases that use

the nine guidelines talked about in ground two of this memorandum of law. They have concluded in Aguirre at 470-71:

> "Section 6.02 which is in title 2 of the Penal Code, is made applicable to municipal ordinances by Section 1.03(b): [It is also made applicable to all other titles of the Penal Code including title 5 where 22.011 is located.] The provision of title 1,2, and 3 apply to offenses defined by other laws unless the statute defining the offense provides otherwise." See Honeycutt v. State 627 S.W.2d 417 at 422. Therefore, a CMS is required for the El Paso ordinance, even though it does not prescribe one, unless the definition of the offense plainly dispenses with any mental element." See Section 6.02(b).

Also see Honeycutt at 424:

> "One of four CMSs defined in Penal Code 6.02 is an essential element of every crime **unless the definition clearly dispenses with any mental element**, so that no CMS is required." (Emphasis added).

It is well known that there is a presumption in favor of a scienter requirement when the statute criminalizes otherwise innocent conduct, patricularly when the prohibited conduct involves speech or expression protected by the First Amendment. It has already been shown that intimate sexual relationships with consenting adults is an expression protected by the First Amendment and in 22.011 the only criminal element that makes the statute a crime is that it was a child from 14 to 16 years, therefore, the mens rea requirement must modify that element that criminalizes otherwise innocent conduct. Also see Ex parte Weise 23 S.W.3d 449 at 471-472:

> "An affirmative statement in the statute that the crime is done without fault would be conclusive [to determine if the statute plainly dispensed with a mental element], in this case as in Aguirre [and also 22.011] there is no such statement. The Court of Criminal Appeals noted that 'the typical strict liability statute is empty'-it simply says nothing about a mental state.' Aguirre at 471, but then they observed that under legislative history of 6.02, tne mere omission of a mental element cannot be construed to plainly dispense with a mental element and thus leaves the presumption that one is required." (Emphasis added in brackets).

See Slott v. State 148 S.W.3d 624, 632-633 (2004):

> "The knowledge requisite to a knowing violation of a statute is factual knowledge as opposed to knowledge of the law. See Bryan v. U.S. 524 U.S. 184, 192 (1998). Consequently, 'knowingly' means only that the defendant knows factually what he is doing. U.S. v. Baytank 934 F.2d 599, 613 (5th Cir. 1991).

Does that mean that defendants in Slott, to be criminally liable, had to know they were only disposing of waste, or that they knew the waste was hazardous as defined in the regulation? No, to be criminally liable "the state had to prove appellants knew they were storing or disposing of waste that was hazardous, that it had the potential to do harm to others or the enviroment". Id. 633. So in 22.011 does the CMS require that the defendants only have to know factually that they penetrated a sexual organ? No, that means that the defendants, to be criminally liable, have to know factually that the sexual organ they penetrated was one of a child's. These Texas appellate cases show that it must be proved that Morrison knew the facts that make 22.011 illegal.

IV.

In light of these cases , Morrison has shown that:

(1) Mens rea is a requirement that is to be proved in all felonies that prescribe a CMS and where they do not clearly dispense with any mental element.

(2) Strict liability is reserved for limited circumstances such as public welfare offenses or regulatory offense which are either silent about or dispense with a mens rea element, and the defendant must or should know that he is dealing with a dangerous devise that places him in relation to a public danger.

(3) A statute's CMS must modify the element that makes the statute criminal in order to prevent the statute from criminalizing a broad range of otherwise innocent conduct.

(4) Some form of scienter is to be implied in a criminal statute even if not expressed, and a statute is to be construed where fairly possible so as to avoid substantial constitutional questions, and strict liability offenses do not carry long prison term

Morrison has shown that 22.011 cannot be construed as a strict liability offense because:

(1) 22.011 is not silent as to a mens rea/CMS requirement. One is prescribed.

(2) 22.011 does not clearly dispense with any mental element.

(3) 22.011 is a statutory crime, therefore, a traditional element of scienter is necessary.

(4) 22.011 does not regulate potentially harmful items that pose a danger to the public as a whole, as does the traditional public welfare or regulatory offenses that are strict liability do. Therefore, the defendant cannot be expected to know he is dealing with such dangerous items that places him in responsible relation to a public danger which alerts him to the probability of strict liability (as interpreted by the courts) while he is exercising a fundamental right that is governed by natural law.

(5) The strict liability aspect of 22.011 (as defined by the courts) criminalizes innocent conduct because the mens rea attatches only to the act which by its self is innocent conduct, and that is in opposition with numerous Supreme Court holdings that say mens rea must attatch to the element that makes the accused conduct criminal

(6) 22.011 is a felony that subjects the offender to 20 years prison which is incompatable with the theory of public welfare/strict liability offenses, and the holdings that distinguish strict liability crimes from crimes that subject the accused for long prison sentences.

V.

The Court of Appeals as shown in ground two, have continually ignored these factors, holdings, and laws that relate to 22.011's mens rea, and despite the plain language of

the statute, they have deemend 22.011 strict liability. By doing that they have violated Morrison's right to equal protection of the laws that are discussed above and in ground two, causing him to involuntary plead guilty to the offense, and ultimately being sentenced to 16 years in prison, and having to register as a sex offender for the rest of his life. If the courts would have treated 22.011 like they have done in all felonies that prescribe a CMS that do not dispense with any mental element, Morrison would have used these aforementioned rulings and laws at trial and proved he was actually innocent of the crime as the plain language of the statute suggests, and he would have been acquitted.

VI.

The exception to the general rule of a mens rea requirement regarding age in statutory rape cases has been upheld by the Court of Appeals because the state has a legitimate interest in protecting the health and safety of its children. It is also important to protect them from the improper sexual advances from adults, and from sexual assault. See Scott supra at 242, and Byrne at 751, 752; and ground three section IV. pp. 55-56.

Morrison suspects that the state will attempt to use the same justifications to say 22.011 passes constitutional muster so to satisfy the rational basis test for this equal protection challenge as well. Morrison wishes to again assert that the strict scrutiny analysis must be used because the strict liability interpretation of the statute (which Morrison is challenging as unconstitutional) inhibits peoples' constitutionally protected fundamental, natural right to copulate with adults from 17 to 25 by giving them a choice: Either to make sure the person who may be 17 to 25 years is not a minor by checking birth records or identification, or go to prison for 20 years, which may chill or even freeze peoples' will to exercise that natural right. Therefore, 22.011's strict liability interpretation can only be upheld if it is precisely tailored to further a compelling governmental interest, which it cannot be because, first the plain language of the statute as Morrison has shown, is not precisely tailored to be strict liability because there is a mens rea/CMS prescribed in the statute and the legislature did not dispense with any mental element, and second 22.011 can operate just as effectively to satisfy the governmental interests if it was not strict liability. The strict liability interpretation, absolutely, does nothing to increase the effectiveness of 22.011 in cases like Morrison's to justify the disparity of treatment to Morrison and other offenders of 22.011, and the offenders of all other felonies who do have the right to equal protection of the laws and require a mens rea to be proved to be found guilty of the offense.

Even if the rational basis test was used to test the constitutionality of the strict

liability interpretation of 22.011 it would still fail to sustain the constitutionality of the statute because the same governmental interests the state uses regarding 22.011 were used in the creation of 18 USC § 2252 in X-Citement Video, yet in that case it was held that § 2252 require a mens rea, therefore, any rationally related governmental interest used to justify the Equal Protection of the Laws violations that Morrison lodges, standing next to X-Citement Video, will not suffice.

B. SUMMARY AND REQUEST FOR RELIEF

Morrison agrees with the state and the courts that minors should be protected to a greater extent than adults, because of their vulnerabilities and propensity to make immature and bad decisions. Morrison also agrees with the operation of the plain language of 22.011, which is to penalize adults who "intentionally" or "knowingly" have sexual relations with a child who is from 14 to 16 years by taking advantage of their vulnerabilities and immature ways. However, in an attempt to regulate this behavior, and despite the prescribed CMS that never dispenses with any mental element, the courts have made an exception to the general rule of the mens rea requirement and have decided to penalize adults even though they did not know the person they had consentual sex with was under 17. Because 14 to 16 year old teenagers, these days, can easily be mistaken for adults, an exception to the requirement of mens rea permits the state to convict good-hard working young men of the very serious and life ruining felony entitled "Sexual Assault of a Child" while engaging in what they thought to be a legal, constitutionally protected natural act, leaving them without any defense regarding their CMS. That rule like the Anderson court said at 888 F.2d 1249:

> "Is aberrational in our jurisprudence- a jurisprudence largely based on the Anglo-Saxon common law- and should be discarded."...

...Much like the Court of Criminal Appeals discarded the exception to the general rule of nonadmissability of extraneous offense involving sex offenses with other children in **Boutwell v. State 719 S.W.2d 164 (1986).** Any exception to "The Rule", as does the exception to the rule requiring a mens rea in statutory rape cases, violates the Equal Protection of the Laws, which makes the strict liability interpretation of 22.011 unconstitutional on its face and as-applied to Morrison.

Morrison respectfully and humbly asks this Fine Federal District Court to reverse his conviction and remand for new trial so he can use the previously discussed laws and holdings to prove his actual innocence to 22.011. Or to reverse his conviction and grant him an acquittal and order his release from prison like done in other cases where a statute was deemed unconstitutional on its face or as-applied to the applicant.

C. **Clearly Established Federal Law as Determined by the Supreme Court, Summarized**

1) **U.S. Gypsum Co. v. U.S. 438 U.S. 422, 437-38 (1978)** (Held that a presumption of a mens rea must be required in convictions of all crimes except "public welfare offense" or "regulatory offenses", which have been created by Congress and recognized by the Supreme Court in "limitedd circumstances". Far more than a simple omission of the appropriate phrase from the statutory defintition is necessary to justify dispensing with an intent requirement.)

2) **Staples v. U,S, 114 S.Ct 1793 (1994)** (Held that absent a clear statement from Congress that mens rea is not required, we should not apply the public welfare rationale to interpret **any statute defining a felony offense** as dispensing with a mens rea. Strict liability crimes like public welfare offenses almost uniformily involve statutes that provide for only light penalties, not imprisonment in the state penitentiary. See additional holdings in Ground Two.)

3) Liparota v. U.S. 105 S.Ct 2084 (1985) (Same holdings as Ground Two).

4) **U.S. v. X-Citement Video 115 S.Ct 464 (1994)** (Some form of scienter is to be implied in a criminal statute even if not expressed, and a statute is to be construed where fairly possible so as to avoid substantial constitutional questions. A statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts, so long as the reading is not plainly contrary to the intent of Congress. See additional holdings stated in Ground Two.)

5) **New York v. Ferber 102 S.Ct 3348, 3358-59 (1982)** (Held that as with obsenity laws, criminal resposibility may not be imposed without some element of scienter on the part of the defendant.)

6) **Bryan v. U.S. 524 U.S. 184, 192 (1998)** (Held that the knowledge requisite to a knowing violation of a statute is factual knowledge as opposed to knowledge of the law.

7) In Re Winship 397 U.S. 358 (1970) (See Ground Two for holding.)

8) (Also see Equal Protection holdings stated in Ground Three.)

D. **State Court's Disposition for Ground** Five/2254(d)(1),(2)

Because the trial court's findings regarding Ground Five, are inconclusive and unsupported by only the one sentence: "The Applicant's complaints as stated above are without merit." (See Trial Court's Findings p.61). That comment is an unreasonable determination of the facts in light of the evidence that Morrison has presented in his 11.07 memorandum of law pp.61-69. Morrison invoked the above Supreme Court holdings, which are clear and convincing evidence that proves 22.011 cannot be strict liability and Morrison's Equal protection of Laws rights were violated

because of the Courts of Appeals' interpretation that caused him not to have the presumption of a mens rea that is required in all felonies, and actually mandated in the plain language of 22.011. The strict liability interpretation makes 22.011 unconstitutional because it violates the Equal Protection of the Laws by how the Texas courts treats the defendants of 22.011(a)(2) differently from the defendants of all other felonies that have a prescribed CMS requirement, that do not dispense with any mental element, and subjects the defendant to the harsh punishment of prison.

It is commonly known through clearly established federal law as determined by the Supreme Court that strict liability statutes must dispense with any mental element, they must not carry long prison sentences, nor do grave damage to the offender's reputation, and they are reserved for public welfare or regulatory offenses. Morrison has proven that 22.011 does not dispense with any mental element including the required mens rea of intentionally or knowingly from modifying "of a child", it carries a punishment of 20 years prison, and requires the offender to register as a sex offender for life, and it is not a public welfare offense nor a regulatory offense. Therefore, according to the aforementioned Supreme Court Holdings 22.011 cannot be a strict liability offense as determined by the Texas courts. Because the district court, appellate courts, and the Court of Criminal Appeals have concluded that 22.011 is strict liability, despite the fact the Legislature prescribed the requirement of a CMS and did not dispense with any mental element, while subjecting the offender to a severe sentence, and they did not raise any compelling governmental interests to justify the constitutionality of this equal protection claim as required by strict scrutiny, their decision to deny Morrison relief was opposite to that reached by the Supreme Court Cases that Morrison cited to in his Equal Protection question of law relating to the disparity of treatment accorded to all other offenders of all other felonies, obsenity laws, and common laws, and the offenders of 22.011. And Because they decided the case differently from the aforementioned Supreme Court holdings, on a set of materially indistinguishable facts 2254(d)(1) has been satisfied. Morrison has also shown that the requirements under 2254(d)(2) have also been satisfied. Morrison has proved with clear and convincing evidence that the state court's findings are erroneous.

E. Conclusion

All persons born or naturalized in the United States, and subject to the jursidiction thereof, are citizens of the United States and the state where they reside, no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States: nor shall any state deprive any person of life,liberty, or property, without due process

of law; nor deny any person within its jurisdiction the Equal Protection of the Laws.

— The Fourteenth Amendment—

"No state shall deny any person within its jurisdiction the Equal Protection of the Laws."That demands that all people should be given the same protection of the laws as other people subjected under the state's jurisdiction. It is a constitutional right under the Fifth and Fourteenth Amendment, clearly established federal law as determined by the Supreme Court, and a substantive law under Texas Penal Code section 2.01 that a person cannot be convicted of an offense unless he is found guilty beyond a reasonable doubt, of every element of the crime charged.

22.011 has an intentionally or knowingly mens rea requirement that can be, has been, and will continue to be interpreted by people of ordinary intelligence, as modifying the entire statute including "of a child", and because the legislature did not clearly dispense with any mental element, that mens rea requirement, pursuant to 6.02(b), should have been interpreted by the Texas courts as modifying "of a child", like the law suggests, and does for all other felonies that require it, making the criminal elemental fact of the offense a required element of the offense that must be proven regarding the defendant's mens rea. By the Texas courts misinterpreting the purview of the mens rea requirement, they in effect have also said section 8.02 (the mistake of fact defense) does not apply to 22.011, making 22.011 a strict liabiltiy offense, despite the protection of laws that are contrary to that interpretation.

All other felonies thathave an explicit reqirement of mens rea, or are even silent about a mens rea, have the presumption of a mens rea to be proved beyond a reasonable doubt before the defendant can be found guilty and convicted of the crime. All other felonies, unless specifically stated otherwise, are controlled by 6.02, and 2.01, and those laws protect the citizens of this Fine State from being convicted of an offense without the required mental state.

Morrison is sitting in prison, missing his son and daughter grow up, because the state and courts did not allow him the protection of the laws under 2.01, 6.02, or 8.02 that are offered to all other persons who are charged with any other felony that the Legislature, Supreme Court, and Constitution say that these laws protect. It is a violation of the Equal Protection of the Laws to deny Morrison, and any other defendant, the presumption of a mens rea to be proved, especially when the presumption is not even a presumption, it is a requirement that the legislature explicitly prescribed into the statute and did not clearly dispense with any mental element. Morrison asks this court to honor his constitutional right to the Equal Protection of these Laws and to Due Process of Law and vacate his conviction and sentence and give the relief they see appropriate.

X. CONSTITUTIONAL VIOLATION AND SUPPORTING FACTS FOR GROUND SIX

GROUND SIX: 22.011 is unconstitutional because it violates the First, Fifth, Ninth, and Fourteenth Amendments of the Unites States Constitution by being overbroad in its strict liability interpretation.

SUPPORTING FACTS FOR GROUND SIX:

It is a constitutionally protected First Amendment right for adults to copulate and to form intimate personal relationships with each other without interference from the government, and the government may not inhibit nor make laws that chill or curtail First Amendment protected fundamental rights. They may regulate some protected conduct like sexual conduct, but the regulation must be justified only by a compelling state interest, and the statute must be narrowly drawn to express only the legitimate state's interest at stake. 22.011 has been interpreted by the Texas courts as being a strict liability offense regarding the defendant's reasonable belief that the minor was an adult. And it does not matter if the 14 to 16 year old minor looked, acted, and portrayed herself as an adult, or even had a fake identification that showed she was an adult, as long as it could be proved that she was a minor and the defendant had sex with her, the defendant is subject to 20 years in prison, without any kind of defense regarding his mens rea/scienter.

This strict liability interpretation of 22.011 is not narrowly drawn or even expressly written into the statute, and does nothing to help the legitimate state's interest from accomplishing what the legislature intended the statute for, which is to protect 14 to 16 year old minors from adults who intentionally target them and solicit them for sex. Or know they are having sex with the minor in the protected age group. In fact, 22.011 is unconstitutional on its face and as-applied to Morrison because it is overbroad and has and will continue to inhibit his and others' First Amendment right to copulate. It has also chilled their freedom of intimate association, by forcing them to scrutinize age documents of every 17 to 25 year old female they may be interested in exercising this natural, fundamental protected right with, or face going to prison for 20 years. Since 22.011 is considered absolute strict liability regarding the defendant's knowledge of the status of the minor's age, even a fake identification card presented to them would not save them from a conviction and prison sentence. The strict liability interpretation has chilled and even froze Morrison's and others' right to copulate and form an intimate personal relationship with the 17 to 25 year age group in fear that one could in fact be a minor who duped them into thinking she was an adult. This chilling effect on constitutionally protected rights, makes the strict liability interpretation overbroad by causing any person 20 years or older, who knows about its effects, choose only sex partners who are older that 25

years to alleviate the possibility they may end up in prison for 20 years for making a mistake in judgement of someone's age, without any kind of defense. The strict liability interpretation also makes people subject to extortion, blackmail, entrapment, and other sinister motives by someone who is looking to gain at the others expense.

22.011 would not be overbroad nor unconstitutional on its face, nor as-applied to Morrison if the ~~mens rea~~ was interpreted like the plain language of the statute suggests, to modify "of a child", or if the courts at least allowed for a reasonable mistake of age defense like the federal laws offer for their statutory rape law. The statute would then be specifically tailored to support the compelling state's interest and would pass constitutional muster; and it would not impair nor hamper the operation of the statute's compelling or legitimate state's interests, and it would not inhibit nor chill these First Amendment protected rights.

A. ARGUMENT FOR GROUND SIX

Morrison has standing to challenge the constitutionality of the overbroad, and vague strict liability interpretation of 22.011, as-applied to him, since he has been directly effected and imprisoned by the strict liability effects that have and will continue to inhibit his First Amendment protected rights of freedom of intimate association and right to copulate. Since the inhibited conduct involves a First Amendment protected fundamental right, governed by natural law, Morrison also has standing to challenge the statute facially as being unconstitutional to others not before the court. See **Broadwick v. Oklahoma** 93 S.Ct 2908, 2916 (1973), where they held that:

> "When attacks on overly broad statutes are in the area of the First Amendment a litigant can challenge a statute, 'not because their own rights of free expression are violated, but because of a judicial predication or assumption that the statute's very existance may cause others not before the court to refrain from constitutionally protected speech or expression.'"

Also see **Bigelow v. Virginia** 421 U.S. 809, 95 S.Ct 2222(1975); **Dombrowski v. Pfister** 380 U.S. 479, 85 S.Ct 1116 (1965):

> "The courts have consistantly recognized an individual's standing to attack an allegedly overbroad statute which inhibits or chills conduct protected by the First Amendment, without regard to whether the plaintiff's own conduct could be regulated or prohibited by a more narrowly drawn statute." (Emphasis added).

II.

The Overbreadth Doctrine is the constitutional doctrine holding that if a statute is so broadly written that it deters freedoms protected by the First Amendment then the statute can be struck down on its face because of its chilling effect on the constitutionally protected rights- even if it prohibits acts that may legitimately be forbidden. See Blacks Law Dictionary (2009 ed). In other words, if a statute causes people to refrain or not want to exercise a protected fundamental right then it is unconstitutionally overbroad. However, in order to establish standing, a person must present more than just allegations of a "subjective chill", and must present a claim of specific present objective harm, or a threat of specific future harm from the prohibitions of the statute under attack. See Bigelow at 816-817.

The way 22.011 has been interpreted by the Court of Appeals as being a strict liability offense causes it to convict anyone who has had consentual-in-fact sex with a minor from 14 to 16 years of age who is not their spouse and is more than three years older than the minor, regardless if the older person thought their sex partner was an adult, and it leaves them with absolutely no defense to prove their CMS.

The strict liability interpretation has inhibited and chilled Morrison's and others' constitutionally protected natural right to copulate and to exercise in their freedom of intimate association with the 17 to 25 year age group. Therefore, the strict liability

interpretation is constitutionally overbroad as-applied to Morrison and on its face.

Morrison has already shown that consentual sexual relations between adults are a right that is protected by the Constitution, therefore, his conduct relating to the offense would be protected by the First Amendment had it not been that a minor was involved. The age of the minor, thus, defines the boundry between conduct that is protected by the Constitution and conduct that is not.

The question Morrison presents to the Honorable Judge of this said court is whether the Court of Appeals, and other courts can overbroadly construe 22.011 as being strict liability regarding the age of the minor, and subject people to prison for 20 years and require them to register as sex offenders for life, for misjudging the precise location of that boundry, when a lot of times that boundry is indistinguishable?

To answer the question, Morrison points to several Supreme Court holdings in support of his argument where they have struck down statutes that were overbroad and inhibited and chilled rights and freedoms that are protected by the First Amendment. See **Smith v. California 361 U.S. 147 (1959)**, where the highest court in the land struck down an ordinance that imposed liability on a book seller for possession of an obscene book. The Supreme Court noted that legal doctrines such as strict liability, although generally constitutional, "cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." Id. at 151. The Supreme Court feared that a bookseller, faced with strict criminal liability, would:

> "Tend to restrict the books he sells to those he has inspected: and thus, the state will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature...The bookseller's limitation in the amount of reading material with which he could familiarize himself, and his timidity in the face of his absolute criminal liability, thus would tend to restrict the public's access to forms of the printed word which the state could not constitutionally suppress directly. The bookseller's self-censorship compelled by the state, would be a censorship affecting the whole public, hardly less virulent for being privately administered. Through it, the distribution of all books, both obscene and not obscene, would be impeded. Id. at 153-154. The court, therefore, concluded that a distributor could not be punished if he did not have some 'knowledge of the contents' of the allegedly obscene material.Id. at 153.

Also see **Miskin v. New York 383 U.S. 502, 511 (1966):**

> "The Constitution requires the proof of a scienter to avoid the hazard of self-censorship of constitutionally protected material."

In **New York v. Ferber 458 U.S. 747, 765 (1982)**, the Supreme Court noted that the same principle applied to laws banning sexually explicit depictions of minors:

> "As with obscenity laws criminal responsiblity may not be imposed without some element of scienter on the part of the defendant."

The Supreme Court has held that a speaker may not be put at complete peril in distinguishing between protected and unprotected speech. Otherwise, he could only be

certain of avoiding liability by holding his tongue, causing him "to make only statements which 'steer far wide [] of the unlawful zone. See **New York Times Co. v. Sullivan** 376 U.S. 254, 279 (1964); quoting **Speiser v. Randal** 357 U.S. 513, 526 (1958).

Also look to **Hustler Magazine v. Fallwell** 108 S.Ct 870, 880 (1988):

> "A rule that would impose strict liability on a publisher for [unprotected speech] would have undoubted 'chilling'effects on speech...that does have constitutional value."

II.

The strict liability interpretation of 22.011 has precisely the same effect on conduct that is protected by the First Amendment. Because a lot of 14 to 16 year old minors do look and act older and more mature than some of their peers and can easily be mistaken as someone who is from 17 to 25 years old, especially if that is there [illegible] intention, and they apply make-up and wear clothing that makes them look like an adult. Granted their age may be confirmed and ascertained by birth certificates, state identification cards, driver's licenses, statement from friends and family who know the minor, but all these sources are fallible. Documents can be, and frequently are forged, people can be mistaken or lie.

This scenerio, like in Morrison's situation presents a serious dilemma facing those who are in a situation where they think they are constitutionally protected and are doing an innocent act by exercising in their freedom of intimate association and their natural right to copulate with a consentual sex partner who has presented themselves as an adult. There is no way to be absolutely, 100 percent sure, that a potential sex partner who is mature in appearance and demeanor is not a minor. Because of the strict liability interpretation of 22.011, even if the defendant took the most elaborate steps to determine how old the minor was, who lied and told him she was 21, and he could not ascertain her true age and had sex with her, he would still be subject to 20 years in prison without being allowed any kind of defense to prove he had no ill intentions nor did he think he was doing anything illegal. Take for instance several scenerios that have happened and will continue to happen unless the unconstitutionally-overbroad, strict liability interpretation of 22.011 is struck down:

> A 25 year old man enters an 18+ night club like he does every Friday night, he has several drinks, mingles around, and has the intention of hooking up with one of the female patrons who are at the same club, who he knows must be 18 years or older to get into the club. He approaches a group of three attractive females and asks one to dance. They dance, flirt, and get to know each other. She is not drinking because the I.D. she got into the club with is her 20 year old sister's, who looks similar to her. She tells him she is 20 years old, which he believes because he has no reason not to. He exercises this right several times a month and it has never crossed his mind that a minor would be in the club. During the night they continue to have a good time dancing, kissing, and groping each other. He has quite a bit to drink so he asks her if she could drive him home in his truck when they leave. She says yes, they leave, and go to his house where they end up having consentual sex.

At some point during the night the girl's parents find out she was not at the friend's house she was suppose to be at, and they investigated by calling her other friends' parents. Allthree friends' parents thought their daughter was spending the night at another friend's house. After a couple of phone calls, they find out that she was at the night club. They go their, ask around, and find out that she left with the 25 year old man. The parents call the police, they find out where he lives and find her over at his house. The police question him about their relationship, and he tells them the truth: He met her at the club, he got drunk, she drove him home, and they had sex. He is then arrested for sexual assault of a child. He only then finds out she is really 15 years old. He goes to court and he finds out he cannot use his mistake of her true age as a defense, and the prosecutor does not have to prove he knew she was a minor. The prosecutor offers him a plea bargin of five years prison, and requires that he will have to register as a sex offender for life. His attorney vehemently tells him to accept the plea. He is very reluctant to accept the offer because he feels that he did nothing wrong to end up in prison. He was doing the same thing he does every weekend and what the majority of single men in their 20's do. His attorney assures him that if he goes to trial he will go to prison for 15 to 20 years because he had sex with a minor and it does not matter that he thought she was 20 years old. He has no choice but to accept the five year prison sentence, and the sex offender registration requirements. He goes to prison.

Five years later because of the strict liability of the charge he was in prison for he chooses not to even associate with anyone who looks under 25 years just to be absolutely safe that he will not be prosecuted again. He knows that if that happened again they would probably enhance his sentence and give him a life sentence, and he would again have absolutely no defense to protect him, therefore, the only way in defending himself now is to associate with people who look 25 or older and could not possibly be a precocious minor pretending to be an adult. He learned his lesson!

He goes to another club and is drinking a beer by the bar when a very attractive female who appears to be 21 to 25 years old approaches him and asks him to dance. Part of him really wants to, so he asks how old she is. She tells him 21 years old. He puts all his heartache from prison, along with all the things that come with being labeled as a sex offender in the forefront of his mind and does not take the chance that she could be illegally in the club and only 15 or 16 years old, so he chooses not to exercise his First Amendment protected freedom of intimate association with her and he refuses the offer. Both his and her freedom of intimate association and natural right to have a sexual relationship were infact burdened because of the strict liability interpretation of 22.011, making it substantially overbroad as to the definition of the Overbreadth Doctrine and Supreme Court precident.

III.

The same thing happened to Morrison and his brother Jason, since they were led to believe the minor in their case was 21 years old. After they were pressured into pleading guilty, labeled as sex offenders, put on probation, and required to go to an extensive sex offender treatment program, both Morrison and Jason were very reluctant in exercising their First Amendment protected freedom of intimate association and right to copulate with anyone who fell into the catagory of being from 17 to 25 years, and because of the strict liability interpretation of 22.011, they were forced to either go through an elaborate method of assuring their potential sex partner was of legal age by checking two forms of photo I.D., making sure the female signed a written consent contract that

said she was legal and not lying about her age, and asking her friends to confirm her age. Historically, this proved to be very offensive to the girl in question, so at times Morrison would altogether choose not to even exercise in that First Amendment right so not to offend anyone, and also because he was scared he would be prosecuted again for mistaken the age of someone who he thought looked, acted, and told him she was an adult, but was not.

The fact that Morrison has now gone to prison because of the strict liability interpretation of 22.011, and he has experianced the unpleasantries of that life, only makes this burden on his freedon of intimate association and right to copulate more severe because once he is out, he must continue to curtail this right, and act with this mentality and precaution, or else chance the risk of subjecting himself to life in prison

Morrison has shown that the overbroad, strict liability interpretation of22.011 is real and has and will continue to substantially inhibit his and other peoples' First Amendment protected rights and it has therefore, made 22.011 unconstitutional on its face, and as-applied to him.

> "An overbreadth statute is one that is designed to burden or punish activities which are not constitutionally protected, but [that] includes with in its scope activities which are protected by the First Amendment.(Citation omitted). An overbroad statute is invalid on its face, not merely as applied, and cannot be enforced until it is either redrafted or construed more narrowly by the properly authorized court. This in effect, removes the speech-limiting 'Sword of Damocles' from over the heads of those who might wish to engage in expression [or intimate association] protected by the First Amendment, but who are deterred in their inclination to speak [or to act] when they learn that what they seek to say [or do] is rendered unlawful by the overbroad provisions of the statute." See **Hill v. City of Houston, Tex 764 F.2d 1156, 1161 (5th Cir. 1985)**.(Emphasis in brackets is mine).

22.011 on its surface prohibits clear and precise conduct (See 22.011(a)(2)(A-E)) that has been interpreted not to be protected by the First Amendment, but the strict liability interpretation pulls with in the statute's scope, conduct that is protected by the First Amendment and has made it extremely risky for men to exercise in their First Amendment protected right to copulate. Morrison has shown how the strict liability aspect has and will continue to burden these rights.

> "A statutory enactment, though it be clear and precise as to the conduct prescribed, nonetheless must be struck down on overbreadth grounds if in its reach it forbids [or inhibits] expression [or conduct] which is protected by the constitution. See **Grayned v. City of Rockford 408 U.S. 104 (1972)**. The crucial question in an overbreadth case is whether the legislation under attack sweeps with in its ambit speech or conduct which is not subject to suppression. Id. If so, then the statute must be declared unconstitutional on its face, regardless of the fact that the conduct of the particular person presenting the challenge could be regulated by a more narrow statute. See **Doran v. Salem Inn Inc. 422 U.S. 922, 933 (1975)**.

In order to remove this "Sword of Domacles" from over our heads, and to save this important statute from the fate discussed above, all that would need to be done is for the Court of Criminal Appeals (who is the proper court to do so) to construe the statute

more narrowly, and interpret the plain language of the statute's CMS to modify "of a child", or at the minimum allow for an affirmative defense of mistake of age like at least 21 other jurisdictions in the United States of America allow for. In doing so it would properly narrow the statute and make it constitutionally sound, and 22.011 would infact remain just as effective in protecting minors from 14 to 16 years from the improper sexual advances of adults, and it would continue protecting their health and safety, while at the same time keeping the provision from sweeping to far and deterring protected First Amendment freedoms. It would also prevent men from going to prison for engaging in conduct they thought was a right .. and destroying their's and their family's lives. The strict liability interpretation like already argued does nothing to improve the statute's effectiveness, it infact is more harmful to society because it subjects people to extortion, blackmail, and entrapment.

IV.

Take for instance a hateful wife who divorced her husband and wanted absolute custody of their children, wanted the house, both cars, and all the wealth and possessions they aquired during their marriage. All she would have to do is convince or pay a mature looking, attractive 14 to 16 year old female to approach her husband, come on to him, and entice him into having sex with her. If he took the bait and she lied to him about her true age, and presented him with a fake I.D.,if he asked, he would still be criminally responsible and subject to prison for 20 years, and the wife would have easily, through the unconstitutionally overbroad, strict liability interpretation of 22.011, gotten everything she wanted and there would be nothing he could do about it.

Or an over-zealous police officer trying to make a name for himself could in fact do something similar, he could make a precocious minor a fake I.D., pay her and buy her clothes to wear to make her look even older, and get her to have sex with men that he either wants to put in prison or to blackmail for information about other criminal activities, and his chances of success because of the strict liability interpretation of 22.011 would be 100 percent.

Or take an 18 year old male who is planning to move out of his parents house, but instead of moving into an apartment he sets his heart on living in the nice three bedroom house his successful 26 year old cousins own. As a way to influence their decision to allow him to move in, he makes it a point to bring attractive women over so they can all party. One night he brings an attractive mature looking 15 year old female over to their home and tells them she is 21 years. They all end up having sex with her in one form or another and the 26 year old men go to prison. The 18 year old never gets charged.

Another probability that could have happened in the above scenerio that hits close to

home for Morrison is, take an 18 year old male who wants nothing more than to become a firefighter for the local fire department, but he cannot because his 27 year old cousin already works there and the city has a strict nepotism policy. The 18 year old cousin brings an attractive mature looking 15 year old female, all dolled up like she just left the club, to the firefighters house and tells him and his other cousin she is 21 years old. They bring alcohol and all start to drink and have a good time. She out of the blue suggests they perform body shots off of various parts of her body. One thing leads to another and all three men have sex with her and the 27 year old brothers are arrested and sent to prison. The firefighter loses his job and the cousin is now free to work at the fire department.

In all of these scenerios the persons charged all acted on their natural, inherent protected right to copulate with someone they reasonably thought to be an adult, but the strict liability interpretation of 22.011 swung to far and captured them into its grasp, ruining their lives while all they intended to do was act on this natural right.

The last two scenerios mentioned could apply to Morrison and Jason, while the other scenerios discussed, except for the hypothetical policeman scenerio, are real stories told to Morrison by people he has been imprisoned with.

Morrison has no doubt that the state's interest regarding 22.011 can be served more adequately by a more narrowly drawn statute, tailored more precisely toward the conduct that the state seeks to protect, which is to protect 14 to 16 year old minors from adults who "intentionally" or "knowingly" have sex with minors. Morrison has shown that the overbroad strict liability interpretation of 22.011 is real, and a specific present and future objective harm,which has and will continue to compromise a substantial range of constitutionally protected conduct that is deterred by the present interpretation of the statute, which makes 22.011 overbroad on its face and as-applied to Morrison.

B. REQUEST FOR RELIEF

Because Morrison has shown that the strict liability interpretation of 22.011 is overbroad,Morrison asks this Honorable Court to reverse his conviction and render an acquittal, or to interpret the statute more narrowly like the plain language suggests and apply the CMS of intentionally or knowingly to "of a child", or allow a mistake of age defense and give him a new trial.

C. **Clearly Established Federal Law as Determined by the Supreme Court, Summarized**

1) **Broadwick v. Oklahoma 93 S.Ct 2908 (1973)** (Overbreadth decision that held: In the area of First Amendment protectedconduct, one may attack an overbroad statute on behalf of someone not before the court, not because his own rights of free expression are violated, but because of the judicial prediction or assumption that the statute's very existance may cause others not before the court to refrain from constitutionally protected speech or expression. Particularly where conduct and not merely speech is involved, the facial overbreadth of a statute must be both real and substantial, judged in relation to the statute's plaily legitimate sweep.)

2) **Bigelow v. Virginia 421 U.S. 809 (1975)** (Recognized standing to attack overbroad statute which chills or inhibits conduct protected by the First Amendment, without regard to whether the plaintiffs own conduct could be regulated or prohibited by a more narrowly drawn statute.)

3) **Smith v. California 361 U.S. 147, 151 (1959)** (Held that legal doctrines such as strict liability, although generally constitutional, cannot be applied in settings where they have a collateral effect of inhibiting the Freedom of Expression, by making the individual the more reluctant to exercise it.)

4) **Miskin v. New York 383 U.S. 502, 511 (1966)** (Held that the Constitution requires proof of scienter to avoid the hazard of self-censorship of constitutionally protected material.)

5) **Grayned v. City of Rockford 408 U.S. 104 (1972)** (Held that a statutory enactment, though it be clear and precise as to the conduct prescribed, nonetheless, mastbe struck down on overbreadth grounds if in its reach it forbids expression which is protected by the Constitution.)

6) **U.S. v. Williams 170 LED2d 650** (Held that 2252A(a)(3)(B) was not overbroad because as construed, the statute does not criminalize a substantial amount of protected activity because it contains a scienter requirement, among other reasons.) 22.011 has been construed to not contain a scienter so it is overbroad.

7) **Lawrence v. Texas 123 S.Ct 2472 (2003)** (Held individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of liberty protected by the Due Process Clause of the Fourteenth Amenment. This protection extends to intimate choices by unmarried as well as married persons.)

D. **State Court's Disposition for Ground Six/2254(d)(1),(2)**

Because the trial court's findings regarding this ground were inconclusive and unsupported by only stating: "The Applicant's complaints as stated above are without merit." (See P.63 of trial court's findings). That comment is an unreasonable determination of the facts in light of the evidence that Morrison has

presented in his 11.07's Memorandum of Law (Pp.70-76) that proves 22.011, interpreted as being a strict liability crime has caused that provision to be unconstitutionally overbroad, as-applied to Morrison, and on its face, as determined by the Supreme Court in the above holdings and the others cited in his 11.07. Morrison has also shown with clear and convincing evidence, that 22.011 has chilled and inhibited Morrison's and others' fundamental-protected by the First Amendment right to copulate and freedom of intimate association with the 17-25 year age group, and he has shown that if 22.011 was interpreted like the plain language suggests: To commit an offense a person must **intentionally** or **knowingly** cause the penetration of the sexual organ **of a child** by any means, or if it allowed a reasonable mistake of age defense like the federal statutory rape law offers in 2243(C)(1), then 22.011 would not be unconstitutionally overbroad, and the statute would be narrowly tailored to support the compelling or legitimate state interst and it would pass constitutional muster.

Since this ground should also be evaluated using the strict scrutiny analysis, and the state courts, nor the state raised any compelling governmental interests to sustain the constitutionality of Morrison's facial and as-applied unconstitutional overbreadth claim as required by strict scrutiny standards, and their decision to deny relief was opposite to that reached by the Supreme Court cases that discuss overbreadth claims, which Morrison cited to while arguing and showing how the strict liability interpretation has and will continue to cause 22.011 to be unconstitutionally overbroad. And because the state courts decided the case differently from the aforementioned Supreme Court holdings, on a set of materially indistinguishable facts, 2254(d)(1) has been satisfied. Morrison has also shown that the requirements under 2254(d)(2) have also been met. Morrison has also proved with clear and convincing evidence that the state court's findings are erroneous.

E. Conclusion

22.011 is an essential and important statute that was created to protect our 14 to 16 year old kids from being targeted by people whos intent is to have sex with them or to protect that immature age group from making rash decisions about sex with an older more mature person and that older more mature person knows and takes advantage of their rash decision and has sex with them regardless of the minority of the person who made that rash and immature decision. The effects of 22.011 protecting a minor who lied to an adult about their true age, and then engaged in consensual sex with that adult, while pretending to be one as well, has and will continue to have a detrimental effect on society. 22.011 deals only with consensual-in-fact sex, any force threat, coercion by drugging ect, along with

consensual-in-fact sex with children under 14 years is covered under the more serious; 22.021 statute. Therefore the only criminal element in 22.011 is that a person had consensual-in-fact sex with a 14 to 16 year old child. Having sexual intercourse by itself is not criminal, it is actually conduct that is protected by the First and Fourteenth Amenments, therefore, it is innocent conduct that is a fundamental right, criminalized only under the circumstances if the person is 14 to 16 years old.

There are a lot of men in prison, who have been in prison, or are on probation that have had consensual sex with someone in the 14 to 16 year protected age group, that have reasonably thought the minor was an adult, and they reasonably thought they were engaging in innocent, constitutionally protected sexual conduct with another adult. But that, however, did not matter, they still went to prison because the courts have unconstitutionally interpreted the statute to be strict liability.

Morrison knows this as being a sobering thought for every individual in his shoes who has either been put on probation, gone to prison, and made to register as a sex offender for seemingly having sex with an adult, but it turning out to be that the adult was a 14 to 16 year old female who fit all the descriptions of an adult so they had no reason to believe she was not. Under circumstances like this, Morrison is confident that this judicious and wise court can see how these individuals, and the people who know about the strict liability effects of 22.011 have had to chill, inhibit, or even freeze their right to copulate and freedom of intimate association with the 17 to 25 year age group because it is a lot of times difficult and sometimes impossible to distinguish the difference between the two age groups. This fear that they will go to prison for up to life as a second time offender for making that same mistake in judgement about someones age without any defense, is a fear that is real and will continue to chill, inhibit, and freeze Morrison's constitutionally protected rights. The strict liability interpretation of 22.011 must be struck down or these First Amendment protected fundamental rights will continue to be chilled and these people will refrain from engaging in their right to copulate and freedom of intimate association with the 17-25 year age group which would not only affect that persons right of intimate association, but also their potential partner's rights as well. Morrison has proven that the strict liabiltiy interpretation of 22.011 has caused and will continue to cause a chill on constitutionally protected conduct and that that chill is a real and substantial chill that affects him personally, along with anyone else who knows about 22.011 being absolute strict liability. Morrison prays for relief as this court sees fit so to fix this unconstitutional overbreadth challenge.

XI. CONSTITUTIONAL VIOLATION AND SUPPORTING FACTS FOR GROUND SEVEN

GROUND SEVEN: 22.011 is unconstitutional on its face and as-applied to Morrison because it violates due process under the First and Fourteenth Amendments of the United States Constitution by being unconstitutionally vague and ambiguous.

SUPPORTING FACTS FOR GROUND SEVEN:

22.011 has a prescribed CMS that can be and has been interpreted in different ways:

(1) The intentionally or knowingly mens rea requirement has been interpreted by the Texas appellate courts as applying to the act of causing the penetration of the sexual organ, that happens to be one of a child's. The CMS does not modify "of a child", making 22.011 strict liability in regards to the actors mens rea of whether he knew the 14 to 16 year old complaintant was an adult. Or;

(2) The intentionally or knowingly mens rea requirement has been interpreted by Morrison, as well as other people of ordinary intelligence, as applying to the act that makes the statute criminal: To commit an offense a person **must intentionally or knowingly** cause the penetration of the sexual organ **of a child** by any means. The CMS in this interpretation is more naturally read to modify the entire sentence including "of a child", making the actor criminally culpable only if he knew the sexual organ he penetrated was one of a 14 to 16 year old child's. This is how the plain language of the statute is literally read using correct rules of English grammer and syntax.

Having two interpretations, one that is interpreted by the plain language of the statute that the legislators prescribed, which have no indication of strict liability, and the other being interpreted with a subjective view by the Texas appellate courts, making it strict liability even when the legislature did not explicitly dispense with any mental element, makes 22.011 unconstitutionally vague because people of ordinary intelligence, Morrison included, cannot read into the statute any strict liability indicators, therefore, they have no fair warning and have not been properly notified of the forbidden "Strict liability" conduct of the statute, which is only mentioned in some case law, that is actually all predicated from pre-22.011 law.

The vagueness of 22.011 has also not established determinate guidelines for law enforcement and can and has impermissibly deligated basic policy matters to policemen, judges, and juries on a subjective basis, and has and will continue to cause arbitrary and discriminatory applications by causing selective enforcement of 22.011.

The strict liability interpretation implicates First Amendment protected freedoms and has and will continue to chill protected sexual conduct and intimate association, and therefore, must be more narrowly drawn because it demands a greater degree of specificity.

A. ARGUMENT FOR GROUND SEVEN

A criminal statute must be sufficiently clear in at least three respects:

(1) A person of ordinary intelligence must be given a reasonable opportunity to know what is prohibited. See **Grayned v. City of Rockford 408 U.S. 104, 108 (1972).** The rationale for this is obvious: Crimes must be defined in advance so individuals have fair warning of what is forbidden. A lack of notice poses a trap for the innocent and violates the first essentials of due process. Id.

(2) The criminal law must establish determinate guidelines for law enforcement.

> "A vague law impermissibly deligates basic policy matters to policeman, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory applications." Grayned at 108-09.

(3) Where First Amendment freedoms are implicated, the laws must be sufficiently definate not to abridge the right of free speech or to chill protected expression, association, or conduct.

> "When a statute is capable of reaching First Amendment freedoms, the doctrine of vagueness demands a greater degree of specifity than in other contents." See **Kramer v. Price 712 F.2d 174, 177 (5th Cir. 1983).** Compare to **Sanchez v. State 974 S.W.2d 307 (1998).**

Morrison will show that 22.011 is impermissibly vague in all three of these factors, and unconstitutional on its face and as-applied to him.

II.

In a facial challenge for vagueness, like in the overbreadth facial challenge, a courts first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. See **Villiage of Hoffman Estates v. Flipside Hoffman Estates Inc. 102 S,Ct 1186, 1191 (1982).** In other words:

> "A statute is considered impermissibly overbroad if in addition to proscribing activities which may constitutionally be forbidden, it sweeps with in its coverage speech or conduct which is protected by the First Amendment." See **Clark v. State 665 S.W.2d 476 (Tex Crim. 1984).**

In making that determination a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of the law affects overbreadth analysis. The Supreme Court has long recognized that ambiguous meanings cause citizens to "steer far wider than the unlawful zone... than if the boundries of the forbidden area were clearly marked." Hoffman at 1191 n.6.

Morrison has shown already that his intentional conduct (having sexual intercourse with an adult of 21 years) is conduct that is protected by the First Amendment, and the vagueness and ambiguity of 22.011 has caused the Court of Appeals to subjectively

interpret the statute as strict liability, causing it to be overbroad and has cause Morrison and others to 'steer far wide from the unlawful zone' and has chilled their First Amendment protected conduct as explained in ground six.

22.011 has been interpreted in two different ways. One is like the Court of Appeals suggests: To commit an offense a person must **intentionally or knowingly: Cause the penetration of the sexual organ** of a child by **any means.** (Emphasis added). They interpret the CMS as only modifying the act of penetrating the sexual organ that happens to be one of a child's, and despite 6.02(b) the CMS does not modify "of a child". So if someone reasonably believed their sex partner was a consenting adult, but they really were not, then "Sorry 'bout your bad luck, your still going to prison!"

The other way 22.011 has been interpreted is like Morrison, the Johnson jury (See Johnson v. State 967 S.W.2d 848, 858 (1998)), Scott in (Scott v. State 36 S.W.3d 240 (2000)), and other people of ordinary intelligence have interpreted it: To commit an offense a person must **intentionally or knowingly: Cause the penetration of the sexual organ of a child by any means.** They interpret it much like the Supreme Court has interpreted similar constructed statutes,[4] like the plain language suggests, which is that the CMS modifies any and all elements following the prescribed CMS, and since the legislature did not dispense with any mental element including the actor's intent or knowledge that he penetrated the sexual organ "of a child", then the CMS must modify "of a child".

Morrison's interpretation of 22.011, as stated in ground two, is in all actuality not vague, nor ambiguous. To him the legislative intent is clear, and a proper statutory construction analysis, as suggested in ground two, would bring the same interpretation that he has, (that the CMS must modify "of a child"). Morrison, therefore, challenges the vagueness and ambiguous nature of the statute, only because it has been interpreted two different ways, and the Court of Appeals' strict liability interpretation has made 22.011 unconstitutionally vague and overbroad, and the result is that he was denied his right to present a defense which forced him into pleading guilty, ultimately ending in a 16 year prison sentence.

III.

22.011 is unconstitutionally vague on its face in the first guideline of Grayned supra because Morrison and other people of ordinary intelligence cannot ascertain any strict liability denotations in the offense by the plain language of the statute,

4. Liparota; X-Citement Video; Flores-Figueroa Supra; and U.S. v. Williams 170 L.Ed2d 650, 663 (2008).

because the statute does have a CMS that can be and has been interpreted to modify all elements of the provision, and no where has the legislature said in the statute that the CMS does not modify "of a child".

While it is a requirement that all criminal statutes give the persons of ordinary intelligence a reasonable opportunity to know what is forbidden, 22.011's strict liability interpretation does not do so because that interpretation is only found in a few Court of Appeal decisions that are apart from the Texas Penal Code where the legislature posted the 22.011 provision to give people fair notice of what is forbidden, and that provision does provide a CMS, and therefore, is not strict liability. The strict liability interpretation is not fair notice of the conduct proscribed by the statute. It has in fact trapped Morrison and others who thought they were doing an innocent, constitutionally protected act, but unfortunately were duped for one reason or another by the age of their sex partner, and unwittingly commited the offense, and then they were sent to prison, or put on probation and required to register as a sex offender for life, all because of the subjective strict liability interpretation which is not present any where in the statute.

Scott, in Scott v. State supra also interpreted the statute as modifying not only the act, but also requires knowledge of the victim's age because the statute's plain language, as interpreted under U.S. v. X-Citement Video supra (See Scott at 241). It can be safely inferred that Scott and his attorney, Ken J. McClean are people of ordinary intelligence.

The majority of people, including Morrison know it is a crime to have sex with minors, and most people steer away from that illegal conduct. So to post a statute that has a clear scienter requirement that can be easily, and has been interpreted to modify that the sexual organ that is penetrated is one of a child's, then once someone exercises their right to copulate and then are unexpectantly charged with the crime of 22.011, but they cannot use the prescribed CMS that is plainly written into the law as a defense is not fair notice of the conduct that constitutes the crime. If it was prescribed into the statute that 22.011 was strict liability, or if the statute dispensed with the intent or knowledge mental element regarding the age, then people of ordinary intelligence would have fair notice that statutory rape is strict liability, and they would know to take extra precautions when engaging in sexual conduct with anyone who could possibly be in the protected age group. Then they would not be trapped by the Court of Appeals'interpretation of strict liability (which does not exist in the language of 22.011), then be blindsided about having no defense when they reasonably thought their sex partner was a legal adult. That is a lot like what Justice Scalia was talking about when he wrote:

"Indeed it is not unlike the practice of Caligula, who reportedly 'Wrote his laws

> in a very small character, and hung them upon high pillars, the more effectually to ensnare people." See Flores-Figueroa at 863.

IV.

The ambiguity and vagueness of 22.011 has affected Morrison in two ways that were detrimental to his situation. This is his as-applied challenge. Like stated above, it is commonly known that having sex with minors is prohibited and a person will go to prison for doing it. Morrison has steered clear of the conduct as stated in the provisions, commonly known to the masses as statutory rape. Up until his arrest, Morrison has never heard of, nor read in any statute notifying him that statutory rape is strict liability. That is not a common known fact to the general public. The commonly known fact regarding statutory rape is that if someone has sex with a minor, whether it is consentual or not, they will be subject to the charge and go to prison. Indicating that the actor targeted or knew they were having sex with a minor. The colloquialism: "Sixteen will get you twenty!" supports that fact, and unlike what Judge Meier said in Fleming v. State 323 S.W.3d at 859 when attempting to justify the similarly written statute 22.021 as giving sufficient notice of strict liability by saying:

> "And it is widely recognized that adults are well aware of the strict liability aspect of statutory rape laws. See Jadowski...680 N.W. 2d 810, 821 n.42 (Wis.2004). (Discussing the colloquial phrase '**Sixteen** will get you twenty!' as a common explanation expressing the widespread awareness of statutory rape laws **and the strict liability aspect of the offense.**)" (Emphasis added).

Like in 22.011, there is absolutely no indication in that phrase that tells people that statutory rape is strict liability. The fact that the age of sixteen is mentioned, notifies the listener of the protected age, so they know where the boundries are to steer clear from. If the phrase was going to promote statutory rape as being strict liability like, Judge Meier said, then it would need to say something like:

> "Sixteen will get you twenty, even if she told you, or you thought she was seventeen or older. Ignorance of her age is no defense."

That comment by Judge Meier just shows one of the many subjective views that the Court of Appeals has had in justifying the unconstitutional strict liability interpretation of 22.011.

Because the legislature has not written any strict liability indicators into 22.011, and strict liability is not a commonly known aspect of statutory rape, Morrison was not properly alerted, nor given fair notice of the Court of Appeals' subjective interpretation of 22.011 being strict liability. Therefore, he was less vigilant in whom he had sex with. This ultimately trapped Morrison, because he was completely unaware he could end up in prison while exercising his right to have sex with someone who he thought was a consenting legal adult. The strict liability statute (which is

not mentioned in the statute) left Morrison without any defense and forced him into pleading guilty to the charge. If 22.011 would have clearly dispensed with the mens rea regarding the CMS modifying "of a child", it would then be commonly known and Morrison would have also known to be more vigilant in whom he had sex with, and he would have made sure his sexual partner was not a minor. Or he would have steered well clear of the protected age by only associating with women who looked over 25, to make absolutely sure they were not minors, like he will have to continue to do. But as Morrison explained in ground six, strict liability makes 22.011 unconstitutionally overbroad because it curtails First Amendment protected conduct, and that is probably why the law makers did not make 22.011 strict liability to begin with when they enacted it into law. The only way to fix this constitutional problem is to narrowly construe the CMS to modify "of a child", or to allow a mistake of age defense.

V.

The vagueness of 22.011 also affected Morrison because after he was told by his attorney, Cantacuzine, at his pre-trial in 2004, that he would not be able to use a defense about his ignorance of her age, and it would not matter that she told him she was an adult, he pled guilty and took what his attorney told him as truth for six years while on probation. After his arrest in 2010, and while being incarcerated, Morrison read the plain language of 22.011 which does not suggest any strict liability connotations and has a CMS that plainly reads to modify the entire provision. The plain language of 22.011 coupled with 6.02, 8.02, and 2.01 caused him to reject a seven year plea bargain, because he thought he would get a new jury trial, and explain the plain language of the statute to a jury and be acquitted. That ambiguity and vagueness in 22.011, and the Court of Appeals' strict liability interpretation which conflicts with the plain language of the legislature is what caused Morrison to end up with a 16 year prison sentence instead of seven. If 22.011 would have been more clear and dispensed with the mental element "of a child" as required by 6.02(b) to be strict liability, then Morrison would have been given a reasonable opportunity to know what was prohibited and accepted the seven year plea offer, and he would have been sentenced to seven years instead of 16 years. Or if the Court of Appeals would have done a proper statutory construction analysis of 22.011 and interpreted it as the plain language suggest, Morrison would have then been allowed to be able to use his lack of fulfilling all the elements of 22.011 and been acquitted. Because of that ambiguity the Rule of Lenity must be invoked in Morrison's favor and he should be acquitted or at the least have his sentence changed to seven years.

"Under the Rule of Lenity when there is a grievious ambiguity or uncertainty in

a criminal statute, it must be resolved in favor of the defendant." See Liparota v. U.S. 105 S.Ct 2084, 2089 (1985); **U.S. v. Phipps** 319 F.3d 177, 187 (5th Cir. 2003). Also **U.S. v. Santos** 170 LEd2d 912, 920 (2008).

But also see Kramer v. Price 712 F.2d 174, 178 (5th Cir. 1983):

Whatever an accused's intent may be, if he is unable to determine the underlying conduct proscribed by a statute then the statute fails on vagueness grounds.

Morrison has shown that he has been unable to determine that 22.011 is strict liability by the plain language of the statute, because "intentionally" or "knowingly" is part of the conduct proscribed, therefore, according to Kramer 22.011 is unconstitutionally vague.

VI.

"A requirement of scienter may mitigate a law's vagueness, especially with regard to adequacy of notice to an individual that his conduct is proscribed." See Hoffman at 1193, and n. 14 (for line of cases cited within). Also see **Meisner** 907 S.W.2d at 668; **Wisenbaker v. State** 860 S.W.2d 681, 689 (1993). (Specifying an intent element, however does not save a criminal statute from vagueness where the conduct which must be motivated by intent, as well as the standard by which the conduct is to be assessed, remain vague. Compare to Kramer at 178.)

Morrison has shown that the "intentionally" or "knowingly" requirement has been interpreted two different ways, and the Court of Appeals' interpretation of it modifying only the act is unconstitutionally overbroad, it is not narrowly construed, it is a violation of seperation of powers and equal protection of the laws, it criminalizes a broad range of innocent conduct, and the CMS does not mitigate the vagueness regarding adequacy of notice. These intermediate appeal courts, as does the Court of Criminal Appeals, all have a general duty to employ reasonable narrowing constructions to avoid constitutional violations. See **Morehead v. State** 807 S.W.2d 577, 581 (Tex Crim 1991); **Olvera v. State** 806 S.W.2d 546, 552 (Tex Crim. 1991); **U.S. v. Emerson** 270 F.3d 203, 213 (5th Cir. 2001):

"Where a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions are avoided, our duty is to adopt the latter." Quoting **Jones v. U.S.** 119 S.Ct 1215, 1222 (1999).

Also see X-Citement Video supra at 472:

"A final canon of statutory construction supports the reading that the term 'knowingly' applies to both elements...[and] suggests that a statute completely bereft of a scienter requirement as to the age of the performers would raise serious constitutional doubts. It is therefore incumbent upon us to read the statute to eliminate those doubts so long as such a reading is not plainly contrary to the intent of congress."

The Court of Criminal Appeals should, therefore, employ the more narrow construction of 22.011 to resolve the serious constitutional questions that the strict liability interpretation has generated so to avoid such constitutional doubts. To employ the interpretation that Morrison and the plain language suggests would not hinder the

effectiveness of the statute, and it is not contrary to the intent of the legislators. To keep the interpretation as is, is actually contrary to the intent of the legislature and raises all kinds of constitutional questions as proved in the previous grounds of this Writ of Habeas Corpus. Also see **Howard v. State 617 S.W.2d 191, 192 n.1 (Tex Crim. 1979):**

> "The court may not sever from the statute an element of the offense where such action would **broaden the scope of the statute**, prohibit new conduct, and **violate legislative intent.**" (Emphasis added).

However, if a statute is not readily subject to a narrowing construction, courts may not assume the legislative prerogative and rewrite the statute in order to save it. See Olvera supra at 552.

Morrison concedes to the fact that 22.011 is readily subject to a narrowing construction and need not be rewritten. The vagueness issue challenged can easily be resolved merely through a matter of interpretation. By doing a proper statutory construction analysis and interpreting the CMS to modify "of a child", how the plain language suggests would suffice. The results would be a win-win for all parties involved, without adding or taking away from the language of the statute. If the Court of Criminal Appeals does do a proper statutory construction analysis, then 22.011 can remain as it is written, it would be free from any constitutional doubts, and it would remain just as effective in protecting 14 to 16 year old minors from being targeted and solicited into having sex with adults. But since they failed to, it must be struck down.

> "[The Court of Criminal Appeals'] 'plain language' statutory interpretation, must also analyze laws to avoid, when possible, constitutional infirmities." See **Lobo v. State 90 S.W.3d 324, 326 n.4 (Tex Crim. 2004); State v. Marcovich 77 S.W.3d 274, 282 (2002).**

VII.

Most other cases that Morrison has found regarding vagueness, that discuss intent, the courts or state have said the mens rea element mitigates the vagueness of the statute regarding adequacy of notice as held in Hoffman Estates supra at 1193, and they have used the intent requirement prescribed in the offense to sustain, or try to sustain, the statute's constitutionality by suggesting that the CMS gives fair warning and notice to the actor. See Kramer at 176:

> "The state argues that § 42.07 is not vague because the statute's requirement of intent makes the application turn on the state of mind of the actor, and therefore, insures that the actor will have notice of the proscribed conduct."

Also see **Ex parte Ellis 309 S.W.3d 71, 90 (Tex Crim. 2010)** where the Court of Criminal Appeals used the intent requirement to sustain an unconstitutional vagueness challenge in several Election Code provisions:

> "The election code provisions at issue require that a contributor have a certain

intent before the contribution is deemed illegal, and it requires that the recipient know that a contribution is in fact illegal, which entails knowing the intent of the contributor, before imposing criminal liability. The state has the burden to prove the applicable CMS, and if it cannot, the defendant is entitled to an acquittal."

As a final factor they determined, because the Election Code provision provided an intent requirement, that the statutes were not facially void for vaqueness. In **State v. Carmaco 203 S.W.3d 596, 599 (14th App. 2006)** they came to a similar conclusion:

"The trial court believed the regulation failed to give fair notice to a dancer as it would subject her to arbitrariness and oppression by having to defend prosecutions time after time when someone walked up behind her with in 6 feet without her knowing. See **Stransberry v. Holmes 613 F.2d 1285 (5th Cir. 1980).** However, because a CMS accompanies the regulation, a dancer would not be subject to prosecution unless she **"intentionally"** or **"knowingly"** performed within six feet of a patron behind her or on a stage lower than eighteen inches." (Emphasis added).

This being said, then the opposite must hold true as well for 22.011, because although an intentionally or knowingly requirement is present, 22.011 is nevertheless, void of the prescribed scienter requirement as interpreted by the Court of Appeals and, therefore, is unconstitutionally vague in this respect to adequacy of notice, because a person of ordinary intelligence does not have fair notice that his intentional conduct is or can be illegal and subjects him to 20 years in prison.

In **Sanchez v. State 995 S.W.2d 677 (Tex Crim. 1999)** the Court of Criminal Appeals upheld the constitutionality of the official oppression/sexual harassment statute that was challenged as being facially vague. They held that:

"Because the perpetrator **must intend the sexual nature of his conduct and must know that the conduct is unwelcome** to trigger a violation of the statute, the unwelcome sexual conduct phrase reasonably informs ordinary citizens of the conduct proscribed and provides adequate quidelines for enforcement." Id. at 689. (Emphasis added).

They also held that the phrase "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" was a reasonable specific phrase for due process/vagueness purposes primarily because the phrase is modified by the CMS of intentionally.They interpreted "unwelcome" as modifying all subsequent elements. They justified the constitutionality of the vagueness claim by saying that to be criminally liable of the sexual harassment portion of the official oppression provision an official must:

(1) **Intend** the sexual nature of his conduct.

(2) **Be aware** that the conduct is unwelcome.

(3) **Intend** submission to the conduct to be made as a term of condition of enjoying something of value to the recipient or another person- something of value that the official is in a position to withhold or provide.

In other words the official **must intend** to carry out sexual extortion. Id. at 688.

Unlike in 22.011 the First Amendment is not implicated by such activities because the conduct the official "intended" to do was an illegal act not protected by the First Amendment, and the CMS prescribed in the offense satisfies the adequacy of notice requirement for due process purposes. Which that cannot be said about the CMS in 22.011, as interpreted by the Court of Appeals as being strict liability.

Basically, Sanchez, Caramaco, Ellis, Kramer, and Hoffman Estates show that a requirement of intent to do the crime is a primary factor that decides if a statute is unconstitutionally vague as to notifying the public of what is criminal, and since 22.011, on its face, does have an intent or knowing requirement that can and has been interpreted to modify the only element that makes the statute criminal (of a child), but the Court of Appeals has taken that away and interpreted the statute's CMS to only modify the sexual act, the interpretation implicates conduct that is protected by the First Amendment and it has and will continue to chill that constitutionally protected conduct as shown in ground six. And because 22.011 has been interpreted two different ways and the strict liability interpretation is not written or defined by the legislators in advance, to give a person of ordinary intelligence a reasonable opportunity to know that they will go to prison for 2 to 20 years if they cause the penetration of the sexual organ of a child (14 to 16 years), regardless whether they intended or knew that they penetrated a 14 to 16 year old child's sexual organ, and it does not matter if the 14 to 16 year old minor lied about her age, had her friends lie as well, or had a fake I.D. Because the intentionally or knowingly element does not modify the criminal element of the offense (as interpreted by the courts), 22.011 is unconstitutionally vague on its face and as-applied to Morrison as it applies to the adequacy of notice factor defined in Grayned supra, and the prescribed CMS cannot be said to mitigate the adequacy of notice as done in Sanchez, Caramaco, Ellis, and the other above mentioned cases.

VIII.

Morrison will now show 22.011 is also unconstitutionally vague on its face and as-applied to his situation under the second prong of Grayned:

"Criminal laws must establish determinate guidelines for law enforcement." Because 22.011's CMS has been and (unless the Court of Criminal Appeals does something about it), will remain to be interpreted to modify only the act, (by the Court of Appeals and state) and has been interpreted to modify "of a child" by some juries, other defendants, some judges, and Morrison, the statute will remain unconstitutionally vague until a more narrowly drawn construction is made to either clearly dispense with the mental element "of a child" (which the legislature would have to do) or to simply interpret that the CMS modifies "of a child" as the plain language suggests. Or it

could also easily be decided to allow for an affirmative defense of mistake of age/fact like the plain languaqe of section 8.02 demands. Either of the three would save the statute from being unconstitutionally vague and ambiguous. The way 22.011 reads now, along with the Court of Appeals' overbroad interpretation hanging over it in fine print has not established determinate guidelines for law enforcement.

It has been confused by people of ordinary intelliqence as to what exactly the CMS attatches to that makes the actor culpable, and the vagueness has impermissibly deligated the basic policy matters to judges and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory applications.

Proof of this can be seen in the obvious subjective opinions from the Court of Appeals in cases like Byrne and Scott supra, where the courts had to stretch the law beyond its limits to justify the strict liability status of statutory rape and affirm the convictions, regardless of the legislative intent or plain language of the statute in the reenacted 22.011, as shown in ground two and five.

The jury in Johnson's trial (See Johnson v. State 967 S.W.2d at 858) is a prime example of how the vagueness poses dangers of arbitrary applications. They could not understand the meaning of the vague and ambiguous law in the very similarly written statute 22.021. Because the ambiguity and vagueness the jury had to write a note to the trial judge for clarity. It must be inferred that the jury was people of ordinary intelligence. They acquitted Johnson on the 22.021 charge because they did not know if intentionally or knowingly attatched to only the act as inadvertant sexual conduct, or whether Johnson had to know the female was a child to be guilty. The trial judge must have also not known how to interpret the vagueness of the statute, because he did not answer the jury's questions about the statute's meaning and he did not charge them on the court of appeals' strict liability interpretation, and Johnson was acquitted.

Due to Morrison's limited resources he is unable to determine how many times other juries have had the same confusion and had to ask the same questions as the jury in Johnson's trial, or just acquitted a defendant based off of the literal, plain language of the statute. Or if the district judge or prosecutor interpreted the statute literally and quashed the indictment because the prosecutor could not prove knowledge of age when the defendant did not know the complaintant was a child. Morrison is confident that if he did have the proper resources that gave him access to trial court records, he would find other cases like Johnson's where the judge, jury and/or state interpreted the statute the same way he does and acquitted the defendant based on not being able to prove the defendant **intentionally** or **knowingly** caused the penetration of the sexual organ of a **child** by any means. It happened in Johnson, it could reasonably happen elsewhere.

> "Where inherently vague statutory language permits selective enforcement, there is a denial of Due Process." **Smith v. Goyen 415 U.S. 566, 576.**

The Johnson case is clear proof that 22.011 is unconstitutionally vague because, the identically written statute 22.021, permitted selective enforcement and acquitted Johnson because the jury and the judge either interpreted the CMS to modify "of a child" or they could not make a definate interpretation and acquitted Johnson based off of the rule of lenity.

The way 22.011 is written could very easily result in selective enforcement from law enforcement based on this scenerio or ones similar:

> A district attorney or judge's 23 year old son has sex with a 16 year old minor who he reasonably believed was 21 years. It was a one night stand and a few weeks later her mother found out about it and notified the police department. The 23 year old was arrested for a 22.011 violation. He gave his statement and the 16 year old admitted that she lied and told him she was 21 years so sne could drink alcohol with him. The prosecutor or judge had the indictment quashed because they interpreted the statute's CMS as modifying "of a child" like the plain language suggests, and since it could not be proved the 23 year old **intentionally** or **knowingly** penetrated the sexual organ **of a child**, he was not convicted of the crime.

The way 22.011 is written, it is more natural to interpret the language literally as the CMS modifying "of a child" than it being interpreted as being strict liability which makes this and other selective enforcement scenerios a substantial possibility.

> "as such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest." See **Kolender v. Lawson 103. S.Ct 1855, 1858 (1983).**

A detective investigating a 22.011 charge could also interpret the statute literally and drop the charges on a suspect who could prove they thought the minor was an adult. It all depends on the particular detective's personal predilections, showing another example of how selective enforcement caused by the vagueness of 22.011 is probable.

Morrison has proven that 22.011 is unconstitutionally vague on its face because the statute has not established determinate guidelines for law enforcement, judges, juries, nor prosecutors as to what criminal elements the CMS attatches to, and it has been interpreted different ways which has caused selective enforcement of the law, and does in fact present a substantial danger of arbitrary and discriminatory application. See Kolender supra at 1858, and n.7:

> "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilictions."

Morrison's as-applied challenge regarding this issue is that he firmly relied on the Johnson jury's decision that acquitted Johnson in making his decision to reject a seven year plea offer that the state offered for his plea of true to several probation violations, which ultimately resulted in him being sentenced to 16 years.

(See statement of facts, and ground one). If 22.011 and 22.021 would have been written more clearly and would have dispensed with the mental element of the actor's knowledge of the complaintant's age as required by 6.02(b), then Morrison would have been properly notified of the forbidden conduct and known to accept the seven year plea offer. Or if the Court of Appeals would have interpreted the statute like the Johnson jury did, and how Morrison and others of ordinary intelligence do, then Morrison would have been allowed a proper defense and been acquitted like Johnson. The selective enforcement caused by the vagueness of 22.011 is what affected Morrison's ability to accept the seven year plea and caused him to be sentenced to 16 years instead. This proves 22.011 is unconstitutionally vague in this respect as-applied to Morrison.

IX.

"Either the lack of notice or lack of guidelines for law enforcement is an independant ground for finding a statute void for vagueness." See **Adley v. State 718 S.W.2d 682, 685 (Tex Crim. 1985).**

Morrison has proven that 22.011 is unconstitutionally vaque under both prongs in Grayned, and by the reasoning shown in ground six (How 22.011 is overbroad), the vagueness of 22.011 has also implicated Morrison's First Amendment freedoms and has and will continue to abridge and chill his freedom of intimate association and natural right to coplulate, therefore, 22.011 must be held at a greater degree of specifity and be sufficiently definate not to abridge First Amendment protected rights. Since 22.011 is not narrowly drawn it is also unconstitutionally vague under this third factor stated in Kramer and Sanchez supra.

B. REQUEST FOR RELIEF

Since Morrison has proved 22.011 is unconstitutionally vague on its face and as-applied to his situation, he asks the Honorable Judge at this fine court to reverse his conviction and order the prosecution dismissed like done in other cases where a statute has been deemed unconstitutionally vague. Or if they think it better to save the statute, and after a proper statutory construction analysis has been given, and they interpret 22.011 how the literal plain language suggests by interpreting the CMS as modifying "of a child", or narrolwly tailor the statute by allowing a mistake of fact defense regarding age, then reverse Morrison's conviction and order prosecution dismissed or order a new jury trial so he can show his lack of intent or knowledge that he penetrated the sexual organ of a child. If the court finds that 22.011 is ambiguous, and chooses to use its ambiquity to rely on extratextual factors, instead of relying on the plain language of the statute, (as stated in Boykin) and they use the extratextual factors to uphold the constitutionality of the vagueness claim, then invoke the rule of lenity in Morrison's favor and acquitt him and order his release from prison.

C. Clearly Established Federal Law as Determined by the Supreme Court, Summarized

1) **Grayned v. City of Rockford 408 U.S. 104 (1972)** (Held that it is the basic principles of Due Process that an enactment is void for vaguness if its prohibitions are not clearly defined. Vague laws offend these important values:
   a. Vague laws may trap the innocent by not providing fair warning.
   b. To prevent arbitrary and discriminatory enforcement of the laws, the laws must provide explicit standards for those who apply and enforce them.
   c. Where a vague statute abuts upon First Amendment protected freedoms and it operates to inhibit the exercise of those freedoms, the uncertain meanings inevitably lead citizens to steer far wide of the unlawful zone than if the boundries of the forbidden area were clearly marked.
2) **U.S. v. Williams 170 LED2d 650 (2008)** (Held that a conviction fails to comport with Due Process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or it is so standardless that it authorizes or encourages seriously discrimatory enforcement.)
3) **Hill v. Colorado 120 S.Ct 2480 (2000)** (Same holding as Williams id. Also held that § 18-9-122(3) was not vague because the scienter requirement prescribed in the statute ameliorates vagueness.)
4) **City of Chicago v. Moralas 119 S.Ct 1849** (Held statute was unconstitutionally vague in failing to provide fair notice of prohibited conduct, and by failing to establish minimal guidelines for law enforcement.)
5) **Kolender v. Lawson 103 S.Ct 1855 (1983)** (The Void for Vagueness Doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not ecourage arbitrary or discriminatory enforcement.)
6) **Jones v. U.S. 119 S.Ct 1215, 1222 (1999)** (Held that where a statute is susceptible to two constructions, by one of which grave and doubtful constitutional questions arise and by the other which such questions are avoided, the Court's duty is to adopt the latter.)
7) **Smith v. Goyen 415 U.S. 566, 576** (Held that where inherently vague statutory language permits selective enforcement, there is a denial of Due Process.)
8) **Liparota v. U.S. 105 S.Ct 2084** (Held: Requiring a mens rea is in keeping with our longstanding recognition of the principle that ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity. In Liparota the Rule of Lenity directly supports petitioner's contention that the government must prove knowledge of illegality to convict him under2024(b)(1).)

D. State Court's Disposition for Ground Seven/2254(d)(1),(2)

On page 16-18 of the trial court's findings, the District Court attempts to discredit this vagueness ground by comparing 22.011 to other statutes like capital murder (19.03(a)(1)) resisting arrest (38.03(a)) aggrivated assault of a public servant (22.02(b)(2)(B),(D))to say, had the legislature required for commision of the offense of sexual assault or indecency with a child that the actor must know that the child was under the age of consent, the legislature would have done so as the legislature has done in defining those offenses. This inquiry to resolve Morrison's vaguness ground is an unreasonable application of clearly established federal law as determined by the Supreme Court. Morrison has not seen a Supreme Court case use this type of inquiry to justify the constitutionality of a vague and ambiguous statute like 22.011 that has been interpreted two different ways. It is, however, common known clearly established federal law as detrimined by the Supreme Court that the legislature does not necessarily have to specifically list each element of the crime that it wants the CMS to attach to like is suggested in the trial court's findings. It is actually also established with Supreme Court precident, in numerous cases, that the legislature does not even have to mention a CMS in the statute at all, and in those instances a mens rea is nevertheless required, unless the statute clearly dispenses with the mental element. So in that respect, had the Legislature intended for the CMS not to modify"of a child", they would have specifically dispensed with that mental element as they have done in statutes like Texas Penal Code 20A.02(b)(1) (Trafficking a Person), 43.05(a)(2) (Compelling Prostitution), or 25.06 (Harboring a Runaway Child). See page 47 of this brief. Also if the Legislature intended for 6.02 to not apply to 22.011, they woud have specifically mandated it into statute like they did in section 49.11.

To interpret the statute like the trial court suggests, would have 22.011 reading like this:

> "A person commits an offense if the person: Intentionally or Knowingly: Causes the penetration of the sexual organ of a child by any means, and the person must know it was a child to commit the offense."

That reading would be absurd and superfluous. The Legislature does not need to make superfluous statutes. Morrison was not even discussing crimes like murder, resiting arrest, or aggrivated assault of a public servant in his void for vaguness argument, except to show those crimes do not even compare to 22.011, because they are crimes regardless of the victim's status, and the only thing that makes 22.011 a crime is the status of the complainant being a child from 14 to 16 years. That distinction makes those statutes distinguishable, and the trial court's argument frivolous regarding the proper test for void for vaguness statutes. This satisfies

the second prong of 2254(d)(1). Morrison's argument is simply that 22.011, on its face, has an intentionally or knowingly mens rea requirement that can be, has been, and will continue to be interpreted by people of ordinary intelligence to modify "of a child", because the statute's plain language in conjunction with Section 6.02(a) and (b) say that it does because no where in any statute has the legislature said that the required CMS does not modify "of a child". Morrison has proven with clear and convincing evidence from other court cases that other people of ordinary intelligence have also interpreted the statute like he does, and that literal plain language interpretation has acquitted someone of the similarly written offense of 22.021. See **Johnson v. State 967 S.W.2d at858** Supra. Also see **Scott v.** State 36 **S.W.3d 240 (2001)** to see how another defendant and his attorney interpreted 22.011 the same way. This proves that 22.011 is unconstitutionally vague by clearly establishedfederal law standards, and the District Court's decision to deny relief regarding the evidence Morrison provided in his Ground Seven argument is erroneous, and was an unreasonable determination of the facts in light of the evidence Morrison presented to the state court in his 11.07 Memorandum of Law. This satisfies 2254(D)(2).

Since this ground should also be evaluated by strict scrutiny, and the state courts, nor the state raised any compelling governmental interests to sustain the constitutionality of Morrison's facial and as-applied void for vaguness claim, as required by strict scrutiny standards, and there decision to deny relief was opposite that reached by the Supreme Court cases that discuss void for vaguness claims, which Morrison cited to while arguing how the Texas Courts of Appeals' strict liability interpretation of 22.011 does not track the plain language of the statute, and has and will continue to cause 22.011 to be vague and ambiguous. And because they decided the case differently from the aforementioned Supreme Court holdings on a set of materially indistinguishable facts, 2254(d)(1) has been satisfied, regarding the first, "contrary to" prong as well. Morrison has also proved with clear and convincing evidence that the state court's findings are clearly erroneous.

E. Conclusion

The plain language of a statute determines the legislative intent of the statute which has gone through the two Houses of Legislation, then went to be approved by the Governor so the law could be made so to properly inform the common citizens about what is required of them, and to let them also know the punishment that will ensue if they do not comply with the law. Due Process of Law demands that penal provisions are clear so that people of ordinary intelligence can be properlyinformed

of what is expected of them. The Legislature in writing section 22.011 was clear in prescribing a CMS requirement in the heading of 22.011(a)(2), without dispensing with any mental element, therefore, to Morrison and other people of ordinary intelligence, that CMS/mens rea applies to the entire statute, and any mens rea that may exist in the statute, including "of a child", making it a requirement for someone to commit 22.011, they must intentionally or knowingly penetrate the sexual organ of a child. For some reason the Texas Courts have gone against the plain language of the statute, and legislative intent, and formed an interpretation that is contrary to that plain language and legislative intent, making 22.011 strict liability. How can a statute be strict liability if the statute has a prescribed CMS that is required by the legislature to be proved. The Legislature mentions no strict liability indicators in the statute, yet the courts have read one into it. This dichotomy has rendered 22.011 vague and ambiguous, and has caused Morrison to be imprisoned for 16 years. It is Morrison's hope and prayer that this Honorable Federal Court will, objectively, look at the plain language of the statute like the Supreme Court has done in cases like Liporota, Flores-Figueroa, Staples, X-Citement video, and Williams, and understand how Morrison has, and other people have and will continue to interpret the statute as requiring a mens rea as to not only the act, but also to what makes the act criminal. And to see how the strict liability interpretation of 22.011, has not given Morrison and others fair notice of the strict liability aspect of 22.011, and has not given judges, juries, and law enforcement determinate guidelines of enforcement. By that fair notice not being properly given, Morrison was sentenced to 16 years in prison. Morrison prays for relief as this judicious court sees necessary.

XII. CONSTITUTIONAL GROUNDS AND SUPPORTING FACTS FOR GROUND EIGHT

GROUND EIGHT: 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 him from exercising his constitutional right for Writ of Habeas Corpus in the trial court, and from objecting and preserving on record his issues raised in this instant Writ of Habeas Corpus for further review.

The trial court also abused its discretion by not appointing Morrison counsel to effectively counsel him about the decisions relating to his habeas corpus issues, and to help him properly file his complaint, and the court did not properly notify him about the ex parte communication that was reason for denying continuance.

SUPPORTING FACTS FOR GROUND EIGHT:

Morrison presented a Motion for Continuance at the beginning of his motion to revoke probation hearing in order to postpone his revocation hearing so he could have a pre-conviction Writ of Habeas Corpus hearing heard under 11.07 § 2, and be afforded a new jury trial before he was convicted of the original 22.011 charge that he was on deferred adjudication probation for. (See RR 3 pp 5-6; Exhibit "E", "J").

The reason for the habeas corpus hearing was to allow Morrison to explain to the court or jury his rationale about the plain language of several statutes in conjunction with each other that would give him an acquittal at a jury trial, since Morrison believed that the minor in his 22.011 charge was an adult at the time of the offense. Because of how he interpreted the plain language of the statutes: 22.011, 6.02, 8.02, and 2.01, he petitioned the court for relief through a pro se letter that he thought would be construed as a pre-conviction Writ of Habeas Corpus that would be heard before the revocation hearing. In the letter he asked to withdraw his coerced and involuntary, 2004 guilty plea due to ineffective assistance of counsel, and to be afforded a new jury trial on the original 22.011 charge so he could explain to a jury that he was not guilty of all the elements of 22.011 as the plain language of the statute suggests. (See Exhibits "D", "E", "G", and "L"; Statement of Facts; Ground one and two).

The Motion for Continuance- that 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 because:

> "[Morrison] has counsel and when you have counsel, then counsel files any motions that you see necessary." (RR 3 p. 9).

At the time Morrison wrote the letter on March 5, 2011, Tom Morgan was his counsel, not Rogers. Morgan was a conflict of interest because Morgan was part of the reason for Morrison's involuntary plea in 2004, which was the issue in Morrison's letter requesting relief. That conflict of interest was the reason Rogers replaced Morgan as

counsel, therefore because of the conflict of interest, Morrison was acting as a pro se litigant at the time he filed the letter, making it a proper filing and not hybrid like the trial judge said. Therefore, Judge Darr abused her discretion in overruling Morrison's continuance because he had counsel and counsel should have filed the writ.

The trial judge then asked Rogers if he had seen the letter. He said he has seen it, but it was out of his scope of appointment to do any kind of 11.07 writ. (RR 3 P.9). Since counsel said he was not assigned to do any kind of writ, Judge Darr should have concluded that Morrison had the right to assert his complaint through a pro se Writ of Habeas Corpus and granted the Motion for Continuance to allow Morrison time to properly file his pre-conviction Writ of Habeas Corpus issues, or she should have granted continuance and appointed Morrison counsel to properly counsel him on the matter before he was convicted at the motion to revoke hearing.

The abuse of discretion of denying the Motion for Continuance prevented Morrison from exercising his right to Writ of Habeas Corpus, and it thwarted him from being able to object to the issues raised in this Writ of Habeas Corpus. It also tainted the record for preservation of Morrison's issues for appeal and collateral attack, which amounts to a violation of due process. Under the trial court's reasoning to deny Morrison's continuance, how is a regular citizen suppose to exercise 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? That in essance is suspending the right of Writ of Habeas Corpus.

A. ARGUMENT FOR GROUND EIGHT

Article 1 Scetion 12 of the Texas Constitution commands:

"The Writ of Habeas Corpus is a writ of right and shall never be suspended."

Article 1 Section 9 Clause 2 of the United States Constitution commands:

"The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

The trial judge suspended Morrison's right to Writ of Habeas Corpus when she abused her discretion by overruling his Motion for Continuance which prevented him from presenting his Writ of Habeas Corpus issues to the trial court before his Motion to Revoke Probation hearing was heard, which resulted in him being convicted of the 22.011 charge and sentenced to 16 years incarceration.

Article V Section 8 of the Texas Constitution gives the district court jurisdiction to settle matters of writ of habeas corpus. See T.C.C.P. 11.08; 11.07 § 2; 11.072; and 11.05. Also see **Ex parte Hargett 819 S.W.2d 866, 867 and n.1 (Tex Crim. 1991).**

> District court judges have a mandatory duty to issue Writ of Habeas Corpus, upon defendants' pre-conviction petition for writ, to let writ be served upon sheriff, and to timely hear merits of defendant's complaint... where petition substantially complied with requirements of such petition, and writ was one of right under the constitution. See **In Re Piper 105 S.W.3d 107, 109-110 (2003).**

Also see T.C.C.P. 11.05:

> "It is the duty of a district court upon proper motion to grant writ under the rules prescribed by law."

Morrison sent in a pro se Writ of Habeas Corpus pleading on March 5, 2011 (Exhibit "D").

> "Pro se habeas petitions are not held to the same stringent and rigorous standards as are pleadings filed by lawyers and the filings by pro se petitioners are entitled to the benifit of liberal construction. It is the substance of relief sought not the label attatched to it, that determines the true nature and operative of a habeas filing." **Hernandez v. Thaler 630 F.3d 420, 426 (5th Cir. 2011)**
>
> "Laymen should not be penalized to the extent of violating his constitutional rights because of the title he gives the document he files with the court." See **Chapman v. State 242 F.Supp 378.**
>
> "In cases of Writ of Habeas Corpus, courts are encouraged to evaluate substance over form." See **Ex parte Cantu 913 S.W.2d 701, 704 (1995).**
>
> "The courts are not limited by the denominations of pleadings, but may look to the essance of the pleadings." See **White v. Reiter 640 S.W.2d 586, 593 (Tex Crim. 1982);** also Ex parte Cantu supra at 704.

Prior to the Motion to Revoke Probation hearing, Morrison sent a pro se letter to the trial court pleading for relief by requesting to withdraw his 2004 guilty plea due to ineffective assistance of counsel, because he was given erroneous advice, and his plea of guilty was involuntary because it was coerced by his attorney at his pre-trial hearing on May 6, 2004. Morrison requested a new jury trial and also a new attorney because of the way he interpreted the plain language of 22.011, 6.02, 8.02, and 2.01

as saying the prosecutor must prove he had to have the intent or knowledge to cause the penetration of the sexual organ "of a child", or that he could have used the mistake of fact defense. His rationale was in opposition of what his and his brother's attorney, Morgan had told them about "Ignorance of the law is no defense." That statement along with his counsel's vehement attitude to accept the plea affected Morrison's decision to plead guilty and accept the state's offer of nine years deferred adjudication probation. Morrison knew it was a crime to have sexual relations with minors and ignorance of the law was not what he was claiming. He was claiming he did not know the female in his charge was a minor, which is mistake of fact (8.02), which he found out in 2011 was a defense, not ignorance of the law (8.01) which is not a defense. That, being represented by Morgan, and his rationale based off the plain language of those statutes is what spurred his requested relief.

Granted, Morrison's pro se pleading was far from what the courts and judiciary would consider as a proper Writ of Habeas Corpus, that is because that is exactly what it was, a "pro se" Writ of Habeas Corpus pleading. Morrison up until his revocation hearing had spent less than 12 hours in the law library and he knew nothing about court procedure or how to properly request for relief through a Writ of Habeas Corpus. He had no help from any attorney (even after his request for help) about how to properly file his issues through a proper Writ of Habeas Corpus. All Morrison knew was that he had found out by going to the law library, and doing some reading, that his attorney Cantacuzine and his brother's attorney, Morgan (who was his attorney at that point) lied to them for some reason about their lack of knowledge that the female in their case was a minor would not matter because ignorance of the law is no defense, and regardless of their lack of knowing her true age they would be found guilty if they went to a jury trial and sentenced to prison, but according to the plain language of 22.011, 6.02, 8.02, and 2.01, he found out it did matter and if he was not lied to and coerced into pleading guilty and had gone to a jury trial the jury would have acquitted him because Morrison was confident the state could not prove beyond a reasonable doubt that he knew the sexual organ he penetrated was one of a child's. Since Morgan was his attorney, the only thing Morrison knew to do was write a letter to the only fair and unbiased person whom he could trust about the matter. That was the judge over his case, the Honorable Judge Darr.

To Morrison the letter of the law was clearly written, and the CMS modified "of a child" making it an element of the offense the prosecutor must prove under 2.01 and 6.02(a), because the statute never dispensed with any mental element under 6.02(b), so he thought that was the way it was suppose to be interpreted and the court and jury would also interpret the clear languange the same way, and the court would grant him relief by letting him withdraw his guilty plea and letting him start over with a new

jury trial. The court received the letter on March 8, 2011. It was filed and time stamped on March 9, 2011.

The fact that Morrison was appointed new counsel 13 days after he sent the petition for relief, and his revocation hearings kept getting postponed, supported his assumption that the courts were going to help him. His scheduled hearings after the court received his pleading were postponed (for reasons unknown to him) three or four times. At the March 18, 2011 Motion to Withdraw From Counsel hearing, Morgan withdrew from counsel because of the conflict of interest, and Judge Darr appointed Rogers to represent Morrison. During the hearing Judge Darr asked Morrison what he had to say. (RR 3 p.5). Morrison told the court that he agreed with Morgan that Morgan was a conflict of interest and it would be appropriate if another attorney represented him, and that his letter was a Writ of Habeas Corpus. Morrison stated that he guessed he had the right to, but was not sure about how to file stuff, and he wanted the court to realize what the situation was. Instead of taking up a lot of the court's time and explaining everything to the court, he assumed she read the letter and said:

"I guess you read the letter?" (RR 2 pp.5-6).

The court then told Morrison that she did not read the letter because it was an ex parte communication. He asked the court:

"I'm not suppose to send the letter directly to you?" (RR 2 p.6)

She told him he was not suppose to send her facts about the case, and that she did not really read the letter, but the court coordinator reads letters that come in and if she believes that they are an ex parte communication to the court about facts in the case, then she files them so they are there for posterity. (RR 2 p. 6).

Morrison left the hearing confused and not knowing what to do about getting the relief he sought. He did not know at that time, or even understood what an "ex parte" communication was. He assumed his newly appointed attorney would make sure everything was done properly so he could get the relief he requested. So, at his first meeting with Rogers on March 24, 2011, he asked Rogers to make sure everything was filed properly. Rogers told Morrison that he was not assigned to do the Writ of Habeas Corpus but he had to go to the court house anyway, and would "check on somethings". He also told Morrison he would send him some case law to help. After the meeting Morrison was under the impression Rogers would make sure his pleading was filed properly. He did not hear back from Rogers about the matter until April 26, 2011, two days before the revocation hearing. During the time from March 10 (when his revocation hearing was originally set), to April 26, Morrison's trial dates kept getting postponed. He thought it was because of his habeas corpus issues, and the trial court was going to give him a hearing and issue the Writ of Habeas Corpus before his Motion to Revoke hearing (See Exhibits "Q" and "R").

On April 26, 2011 Rogers met with Morrison and told him his revocation hearing was on April 28, 2011. Morrison asked him to file a Motion for Continuance so he could make sure his Writ of Habeas Corpus hearing was given to him before he was convicted on the Motion to Revoke hearing.

On April 28, 2011 Rogers presented the court with the Motion for Continuance so the court could hear Morrison's Writ of Habeas Corpus issues prior to the revocation hearing. Rogers made it clear that Morrison would be harmed if the motion was not granted and he was convicted before he had the opportunity to assert his issues. The Motion was denied because the court did not construe the letter as a Writ of Habeas Corpus because it was a pro se letter and Morrison had counsel. And Counsel must file any motions that Morrison sees necessary. She then asked Rogers if he had seen the letter. He said he had seen it, but wasn't assigned to do any 11.07 writs. (RR 3 p.9).

The trial court abused its discretion by not granting continuance to allow Morrison to have a Writ of Habeas Corpus hearing before his Motion to Revoke probation was ruled on, and he was convicted, and by not assigning him counsel to counsel him about it.

> "It is well settled that a criminal action may be continued on the written motion of the state or of the defendant, so long as sufficient cause is shown." See T.C.C.P. 29.03; Also see **Williams v. State 172 S.W.3d 730, 733 (2005):** "A Motion for Continuance based on equitable grounds rather than statutory grounds, is entirely within the discretion of the court and will only call for reversal if it is shown that the court clearly abused its discretion. Id. An applicant must show that he was actually prejudiced by the trial court's decision to grant continuance." Id. The samething applies when Motion for Continuance is denied. See **U.S. v. Ross 58 F.3d 154, 159 (5th Cir. 1995).**

Morrison's attorney Rogers, did show sufficient cause for the continuance, as well as the harm that would come to Morrison if the Continuance was not granted. (See RR 3 pp. 5-7, and Exhibit "J"). The state did not object to the continuance and actually said they "would not mind there being a continuance..." (RR 3 p.7). There was no reason to deny the continuance because Morrison showed sufficient cause and both parties agreed.

The trial court judge abused her discretion by denying continuance because she left Morrison without any option of properly exercising his constitutional right to present his habeas corpus issues before the trial court, which also prevented him from preserving his issues for further review, since he could not file the writ (according to the trial judge) pro se while having counsel, and at the same time his attorney, Rogers, would not help him with it because he was not assigned to, and it was out of his scope of counsel. Under these state created impediments it was impossible for Morrison to exercise his right to file a Writ of Habeas Corpus with the trial court, resulting in prejudice.

Judge Darr also abused her discretion because she should have known that Rogers was not Morrison's counsel at the time Morrison filed the pleading. Morrison at that time was acting pro se because of the conflict of interest with Morgan, therefore, the

pleading was not hybrid representation. She would have known that had she read the letter. Judge Darr erred by not reading the letter, and failing to advise Morrison about his improper ex parte communications under ethics opinion NO. 154[5], which requires that a Judge upon receiving an ex parte communication in the form of a letter, shall take the following action:

(1) Preserve the original letter by delevering it to the County Clerk to be file marked and kept in the clerk's file.

That rule was properly done.

(2) Send a copy of the letter to all opposing counsel and pro se litigants.

The prosecutor and Morgan received a copy of the letter. That rule was properly done.

(3) Read the letter to determine if it is a proper or improper ex parte communication. If in the judge's opinion it is an improper communication the judge should notify the communicant that the communication was improper and the communications should cease.

That did not happen. Judge Darr erred by not reading the letter pursuant to this ethics opinion, and Morrison was not notified that his communication was improper until March 18, 2011 when he assumed she read the letter. But he was still not properly advised about how to properly file his pleadings with the court.

(4) The judge is to immediately notify all counsel of the conduct.

That was properly done.

(5) The judge shall take no action in response to the improper communication from the exparte communicant.

That was mostly done, except for Morrison receiving new counsel, Morrison's other requests were not even acknowledged.

(6) It is the duty for the court administrator for the judge to notify the communicant that the letter is an improper communication.

That was never done, and it resulted in harm to Morrison because he never had the opportunity to make sure his pleadings were filed properly.

If the court would have notified Morrison and told him his letter was improper and that he would have no attorney to help him with it, he would have known to research the proper way to file a pre-conviction Writ of Habeas Corpus, and then filed it properly with the court, resulting in the continuance not being denied because the writ would have been issued and heard before the Motion to Revoke hearing.

5. Morrison's only reference to this rule that he was able to find was a letter shown to him by a fellow prisoner, that was from the court coordinator at the District Court in San Angelo. That prisoner also sent pro se ex parte communications to the court. in the letter it cited these ethic opinions, and that prisoner was properly informed about court procedure. Due to Morrison's limited resources he was unable to find the exact language of the ethics opinions, but contends they must apply to his case as well

Morrison was essentially left in the dark without counsel or help from the courts about his habeas corpus issues, and because of the vagueness and ambiguity of 22.011 he had good reason to file and proclaim to the trial court the habeas corpus issues that he thought he filed with the court. Morrison was severely prejudiced by the trial judge overruling his Motion for Continuance, and also not assigning him counsel to effectively counsel him about the matter. If the trial judge did not abuse her discretion and appointed Morrison effective counsel, and then granted continuance, he would have then properly filed his pre-conviction Writ of Habeas Corpus where he would have had a reasonable probability of getting relief through the trial court, and given a new jury trial as requested and acquitted. He would have also presented the issues he presents in this Writ of Habeas Corpus and the issues would have been properly preserved for review. That is the harm Morrison alleges that was caused by the abuse of discretion. If Morrison would have been given a motion for continuance and allowed a habeas corpus hearing he would have raised to the trial court the issues he presents now and been given relief before his conviction and not been sentenced to 16 years prison. Morrison's right to Writ of Habeas Corpus was suspended and denied by the trial court.

B. REQUEST FOR RELIEF

Morrison has shown that the trial court clearly abused its discretion by denying his Motion for Continuance, suspending his right to Writ of Habeas Corpus, not assigning him counsel to properly assist him about the habeas corpus issues, and leaving him ignorant about proper court procedure. Morrison has also shown how this abuse of discretion has prejudiced him. Morrison contends that the harm that was done, is at this point irreversable because the logical fix for this ground would be to reverse and remand his conviction and/or sentence back to the point of the trial court's error with instructions to the trial court to allow Morrison a pre-conviction Writ of Habeas Corpus hearing, prior to his revocation hearing, and appoint him an attorney to properly counsel him on the matter. That would in fact allow Morrison to assert his Writ of Habeas Corpus issues at the district court level, and then he would be granted or denied a new jury trial. Either way, the state or Morrison would appeal to the Court of Appeals on the same issues raised now, and eventually these same issues would again be back at the same spot Morrison is at now, The Highest Court in Texas. Except that the issues would then properly be objected to and preserved at the trial court level for further review, but a lot of judicial resources would be used, when these issues in the instant Writ of Habeas Corpus need to be reviewed by the state's highest court anyway, which WAS NOT DONE.) Therefore, Morrison asks this fine court to recognize the abuse of discretion and the prejudice it caused by preventing him to object to these issues raised now,

and the relief requested would be to not hold any lack of objection or preservation of complaints against Morrison by procedurally barring him from raising then now. Or if this Honorable Court sees it necessary to remand back to the point of the error and allows Morrison to assert his issues before the trial court, then Morrison asks this court to first do a proper statutory construction analysis on the plain language of 22.011 as requested in Grounds Two, and Five, then announce the holding of what the prescribed CMS in 22.011(a)(2) attaches to, or give relief that this Fine Federal Court sees as necessary to resolve this ground.

C. Clearly Established Federal Law as Determined by the Supreme Court, Summarized

Due to the fact T,D,C,J. pulled out the Supreme Court Digest books from the Huntsville Unit law library while Morrison was working on Grounds 8-14, it became very difficult for Morrison to locate and research the appropriate Supreme Court controlling cases that support these grounds, therefore, Morrison cites a couple 5th Circuit cases that did not cite the Supreme Court cases in their opinions, and a few Supreme Cout holdings that he stumbled across in researching other grounds or from other sources. Morrison hopes that these few cases will suffice to establish clearly established federal law, regarding the rest of his grounds.

1) **U.S. v. Hall 152 F.3d 381 (5th Cir. 1998)** (A district courts denial of a contunuance will warrant reversal only upon the showing that the denial caused serious prejudice.)
2) **Boumediene v. Bush 171 LED2d 41 (2008)** (Held that staute that suspended Writ of Habeas Corpus to terrorists was unconstitutional, and persons deemed Enemy Combatants retain their right to Writ of Habeas Corpus.)

D. State Court's Disposition for Ground Eight/2254(d)(1),(2)

On page 64 to the top of page 72 the district court's decision to recommend denying Morrison relief was contrary to clearly established federal law as determined by the Supreme Court. That decision was also an unreasonable determination of the facts that Morrison presented to them in his 11.07's Memorandum of Law Pp. 87-95, satisfying 2254(d)(1) and (2).

The trial court stated that Morrison had every right under Article 11.072 C.C.P. to file for Post-Conviction writ of HABEAS CORPUS The court alsosaid that the application for Writ of Habeas Corpus 11.072 may be filed by counsel for [Morrison] or by [Morrison] acting pro se, and [Morrison] has no right to appointed counsel for puposes of filing an 11.072 writ

Since Morrison was appointed counsel, which according to the trial court's above comment that he has no right to appointed counsel, regarding his 11.072,

and because she did not grant his continuance because she did not construe the pro se letter, he sent to the court, as a writ because he had counsel and when someone has counsel, then counsel files any motions that they see necessary. (See RR2 p.9). Since Rogers was appointed, that then restricted counsel from helping Morrison with his 11.07 §2 writ as the court claims. The court said that Morrison has no right to appointed counsel for the purposes of filing an 11.072 writ, but he can hire one, or do one pro se, nevertheless, at the hearing, the trial court denied Morrison's Motion for Continuance, which was requested to allow Morrison the opportunity to file for a habeas corpus hearing before he was convicted at the Motion to Revoke Probation hearing, and was based on his pro se Motion for Writ of Habeas Corpus. At the revocation hearing, the trial court ultimately denied Morrison's Motion for Continuance because he had counsel..(which was"appointed counsel"), therefore his pro se letter was not contrued as a writ. This event completely self-defeats all the logic that the district court tries to use to justify the abuse of dicretion lodged in Ground Eight, regardless of Morrison's pro se letter's improper form. The trial court also relied heavily on the affidavit of Morrison's counsel to discount this ground by saying Morrison was properly counseled about his decisions relating to his habeas corpus issues. The affidavits relied upon are not supported by the record, and Morrison has proved them to be false. Regardless of the trial court's attempt to discredit Morrison's Ground Eight the simple fact is, is that Morrison had the right to Writ of Habeas Corpus in the trial court, and he wanted to ~~purse~~ pursue that right. His appointed counsel would not do one for him, and the trial court would not allow him to exercise that right pro se neither, therefore, the trial court's decision to not recommend relief for this ground is contrary to clearly established federal law that says everyone, including terrorists are allowed the right to Writ of Habeas Corpus. Morrison has proved with clear and convincing evidence that the state court's findings are erroneous.

E. Conclusion

It may be true that Morrison was not entitled to appointed counsel for a Post-Conviction Writ of Habeas Corpus 11.072 in his particular situation, but Morrison asserts that it is surely unconstitutional for the court to appoint counsel to prevent someone from filing a pro se Writ of Habeas Corpus, at the same time his appointed counsel would not help him with it. Morrison's "every right under Article 11.072 C.C.P to file a pro se Writ of Habeas Corpus" was impeded by the district court, regardless of what justifications the trial court now tries to use to say he was not entitled to a writ or continuance. Morrison's main concern in lodging

this ground is that the court denying him a continuance, prevented him from properly requesting a pre-conviction Writ of Habeas Corpus in the trial court, and that resulted in the grounds that he now raises as not being properly preserved before the trial court or appellate court, which could, according to the procedual default rules, procedurally bar him from raising his constitutional issues from being presented in Post Conviction Writ of Habeas Corpus.

It is Morrison's hope and prayer that this fair, and Honorable Federal Court does see this as a state created impediment which prevented him from properly objecting, and preserving these issues he now addresses to this court, and the court excuses him from any procedural default for not properly preserving the issues at the trial or apellate courts. Or if this court could be so gracious to consider his two pleadings that he filed with the court in March of 2011 (Exhibits "C" and "D") as sufficient to preserve these issues, that would suffice as well.

Morrison also asks this court to consider that since he was sentenced to nine more years in prison by rejecting the seven year plea, to raise these issues in the trial court, that he on that account alone should not be procedurally barred at this juncture now.

XIII. CONSTITUTIONAL GROUND AND SUPPORTING FACTS FOR GROUND NINE

GROUND NINE: Trial counsel David Rogers was ineffective by not requesting a seperate punishment hearing to allow Morrison the opportunity to have character witnesses testify on his behalf to mitigate the punishment before sentencing. This violated Morrison's rights under the Sixth and Fourteenth Amendments of the United States Constitution.

SUPPORTING FACTS FOR GROUND NINE:

On April 28, 2011 Morrison went to a probation revocation hearing. The trial court found Morrison's violation of probation allegations to be true and sentenced him to 16 years T.D.C.J. (RR 3 pp. 65-66).

Prior to the pronouncement the trial judge asked:

"Is there any legal reason sentence should not be pronounced at this time?"

Rogers said:

"No, your Honor."

Rogers was ineffective by not requesting a seperate punishment hearing to allow Morrison character witnesses to testify on his behalf before sentencing. Morrison went into the revocation hearing thinking the hearing would get continued so his pre-conviction Writ of Habeas Corpus would be resolved before he was revoked and sentenced to prison. He was also not notified about the hearing until April 26, 2011, two days before the hearing. Therefore, Morrison did not have character witnesses lined up for that hearing.

Since the trial court did not grant continuance, Morrison wanted to have several prominate citizens of the town who knew his character to testify that he was a hard working and talented business owner, and family man who was an asset to the community, not a danger to society, and that he just made a few mistakes in judgement, but does not belong in prison for a long time. These prominate citizens who knew his character were his mother Jana Morrison (a long time teacher at Midland Freshman High School) who would have obviously testified to her son's good character.

A witness not so obvious, his probation officer from 2006 to 2010, Kim Rogers, who also knew his good character because they met at least once a week for four years and discussed his life. Granted Mrs. Rogers was doing her job when she had to file the motion to revoke probation on Morrison, but if she would have been called to testify, Morrison has no doubt that she would have testified about his good character and informed the court that he should not be imprisoned for a lengthy amount of time.

Kim Garcia, Morrison's sex offender treatment counselor who knew Morrison's good character because she saw, counseled, listened to, and read Morrison's thoughts and philosophies every week for three years, would have testified that Morrison was an

asset to the community and a loving father to his son, and loving husband to his wife, and a hard worker that is not a danger to society nor belongs in prison.

Ross Bush, the District Clerk of Midland, who use to be the court/probation office liasion officer who also knew Morrison's character, would have testified on his behalf and told the court Morrison does not belong in prison.

Jerry Moralas, the City's City Counselman At-large, was a client of Morrison's construction business. He would have testified that Morrison had a good character, and benifited the community with his hard work ethics and by treating his clients honorably, and always doing them excellent jobs.

Morrison would have also called other clients of his that would have been glad to testify on his behalf, which their testimony would have mitigated his punishment as well.

Morrison's preacher, Jim O'Bannion along with other members of his church who knew and loved him would have also testified on his behalf, and said nothing but good things about his character that would have mitigated his punishment. (see PURPLE Exhibits "L" p.23, "M" p5)

Because Rogers did not request a seperate punishment hearing or call witnesses to testify on Morrison's behalf, Morrison was denied effective assistance of counsel by being denied the compulsory process for obtaining witnesses in his favor that is also guaranteed by the Sixth Amendment. This ineffectiveness caused the court not to hear any mitigating testimony in Morrison's favor, and only hear the aggrivating factors from the state, which prejudiced Morrison and caused him to receive a longer sentence than he would have received had he had an array of witnesses to testify on his behalf.

If Rogers would have asked for a seperate punishment hearing and allowed Morrison the right to the compulsory process of obtaining witnesses in his favor, then the witnesses would have testified on Morrison's behalf and there is a reasonable probability that the witness testimony would have mitigated Morrison's punishment and he would have received a less severe sentence than 16 years incarceration.

A. Clearly Established Federal Law as Determined by the Supreme Court, Summarized

1) **Strickland v. Washington 104 S.Ct 2052 (1984)** (Same IAC holdings as Ground One).
2) **Williams v. Taylor 120 S.Ct 1495 (2000)** (Held counsel was ineffective for not investigating, interviewing, or presenting mitigating witness testimony. And Williams was prejudiced because of counsel's deficient performance.)

B. State Court's Disposition for Ground Nine/2254(d)(1),(2)

On page 74 of the trial court's findings, the trial court denied recommendation for relief by only relying on the untrue and unsupported by the record statements

made in the Affidavit of David Rogers, which stated: "Mr. Morrison did not provide me with the names of any witnesses to be called at the hearing... He sent me a letter and indicated he was not sure who could or could not help in his case... At no point did Mr. Morrison provide me with any names of potential witnesses or ask me to contact anyone regarding the case."

Rogers used a comment made in the letter (Exhibit "E" p.6 of 10),that Morrison wrote to him on March 28, 2011, to try to discredit Morrison's Ground Nine. Rogers said he requested a list of witnesses, and Morrison represented in Exhibit "E" that he did not know if anyone would be helpful or not. That statement, however true, is twisted out of its context. The statement regarding Morrison's remarks to the list of witnesses requested was: "In your letter you said you need a list of key witnesses. I'll try to find out the address of the people who can help in the **original case** if we need them. I'm not sure who can help out or not, I guess that is a question we can talk about at a visit." (See Exhibit "E" Pp6-7 of 10).

Morrison's statement like Rogers suggested had nothing to do with character witnesses, that could have mitigated his punishment if he was found guilty at the MOtion to Revoke Probation hearing's guilt/innocence phase. Rogers states later in his affidavit that he knew Morrison would be unsuccessful on his writ and the state could prove the allegations in the motion, therefore, he would be found guilty of the charge and be sentenced. Rogers then claims he told MOrrison witnesses might be helpful, but would not serve as an adequate substitute for accepting full responsibility.

Rogers never told Morrison anything about character witnesses, but if he was so confident in Morrison not getting the relief, like he stated in his affidavit, then he should have made sure to tell Morrison to contact character witnesses to testify on his behalf at the punishment phase, so to mitigate his punisment, especially since he also said in his affidavit that character witnesses might have been helpful.

The above statements in Morrison's letter to Rogers shows Morrison's mindset, that at that time he was focussed on on getting a new trial on the **original case.** Also the letter Rogers wrote Morrison regarding the list of "key" witnesses, shows Rogers was asking about "key" witnesses that could help at the guilt phase of the new trial or evidentiary hearing for the original case, not the punishment phase for the revocation hearing. The fact that the trial court relied only on the Affidavit of David Rogers, which is not supported by the record, to reccomend the denial of relief, is a decision that is contrary to the clearly established federal

law as determined by the Supreme Court because they did not address the two prongs of **Strickland**, nor the requirements discussed in **Williams v. Taylor** or other Supreme Court cases dealing with IAC issues where counsel failed to call witnesses or submit mitigating testimony for punishment. This satisfies 2254(d)(1). Morrison has also proven with clear and convincing evidence that the state court's findings are erroneous. Morrison asserts that the failure of the state court to address these issues requires de novo review in this court as stated in Ground One.

B. Conclusion

Because Morrison was so confident in getting relief from the court because of the rationale he developed from the plain-literal language of 22.011, 2.01, 6.02, and 8.02, and because of counsel's deficient performance as proved in Ground One, and Exhibits "A"-"R", and other motions, Morriosn was expecting the court to be fair, and give him an evidentiary hearing or a new jury trial relating to his Habeas issues. Therefore, he did not think he would need character witnesses at that point because he was sure his Motion to Revoke Probation hearing would be postponed, again to allow him the opportunity to assert his colorable issues. Rogers claims that he knew Morriosn would not be given relief, and character witnesses might have been helpful in mitigating his sentence, but he, nonetheless, chose not to request a separate punishment hearing to allow time to gather these witnesses. This is clearly ineffective assistance of counsel that prejudiced Morrison. Morrison prays for relief as this Fine Federal Court allows.

XIV. CONSTITUTIONAL GROUND AND SUPPORTING FACTS FOR GROUND TEN

GROUND TEN: Morrison's rights under the First, Fifth, Sixth, and Fourteenth Amendment of the United States Constitution were violated when the trial court and his attorney both denied Morrison the right to address the court on his own behalf.

SUPPORTING FACTS FOR GROUND TEN:

Before the court was adjourned and shortly after the sentence was pronounced Morrison asked the court:

"Can I say something?" (RR 3 p. 66).

Rogers and the court did not allow Morrison to speak on his own behalf. The First Amendment of the United States Constitution was violated because Morrison was abridged in his freedom of speech and was not allowed to speak on his own behalf which also violated the Fifth, Sixth, and Fourteenth Amendments under the Due Process of Law Clause.

Morrison wanted to be heard but was not allowed and that violated his constitutional rights. Even though the court had pronounced his sentence, since Rogers did not request a seperate punishment hearing, Morrison wanted to ask the court to reconsider the punishment and explain that he was not given the opportunity to have any character witnesses to testify on his behalf, and he wanted to ask the court for a seperate punishment hearing so he could have the opportunity to call some of his friends and family to show the court that he has a support group that loves him, and they could testify as to his good character, as stated in ground nine. Morrison was worried that the fact that even his own mother was not there to support him and testify on his behalf, surely must have not looked good from the sentencing Judge's view and he figured if he had some people to testify on his behalf it would influence her decision about his punishment to his benifit.

Morrison also wanted to explain to the court his reasoning for rejecting the seven year offer and to make sure his premise behind the letter he sent to the court was explained for the record.

Since Morrison was denied his constitutional right to be heard by himself, he lost the opportunity to ask for a seperate punishment hearing so he could be able to exercise his right to the compulsory process of obtaining witnesses to testify in his favor, and he was also unable to preserve for the record the issues he now raises on the instant Writ of Habeas Corpus.

If Morrison was allowed to exercise his right to address the court there is a reasonable probability that the court would have granted a seperate punishment hearing to be in compliance with Morrison's constitutional rights by allowing him the compulsory process of obtaining witnesses in his favor, and during the punishment

hearing ~~the~~ the witnesses would have testified in Morrison's favor. There is a very reasonable probability that the trial judge would had sentenced Morrison to less than 16 years in prison had she heard the testimony from Morrison's character witnesses.

If the court would have allowed Morrison the ability to allocute and speak on his own behalf, and Rogers was not ineffective by telling him he could not speak, Morrison would have been able to address the court his issues that he wanted addressed in his Habeas Corpus then they would have been preserved on record for further review and there is a reasonable probability the trial judge would have understood his rationale and granted him relief by giving him an evidentiary hearing, then a new jury trial, or withdrew the proclaimed sentence and sentenced him to the lower sentence of seven years.

A. Clearly Established Federal Law as Detrmined by the Supreme Court, Summarized

1) **Strickland v. Washington 104 S.Ct 2052 (1984)** (Same IAC holdings as Ground One).
2) Morrison is not sure what Supreme Court case deals with the right for a defendant to address the court on his own behalf, or if there is one at all, but he asks this court to invoke any Supreme Court holdings that relate to his constitutional right to allocution and/or addressing the court to preserve issues for the record.

B. State Court's Disposition for Ground Ten/2254(d)(1),(2)

On page 76-77 the trial court again relied only on trial counsel's unsupported and false affidavit to make a determination of recommending Morrison's 11.07 to be denied. There was no attempt to use the clearly established federal law tests required from **Strickland** to assess Morriosn's Ground Ten IAC claim. There was also no attempt to address any Supreme Court law to resolve Morrison's issue about not being able to address the court about his issues so to preserve them for further review. Therefore the State court's decision was contrary to clearly established federal law as determined by the Supreme Court as determined in Strickland or other holdings that may be appropriatly used to support MOrrison's Ground Ten IAC/ Trial Court Abuse of Discretion claims that prevented him from addressing the court. That has satisfied 2254(d)(1), and should be reviewed de novo as well. Morrison has shown with clear and convincing evidence that the state court's findings are erroneous.

C. Conclusion

The Constitution guarantees all people the right to speak on their own behalf in a court of law. Rogers attempts to justify his ineffectiveness in preventing Morrison from speaking to the court because "[He] surmised that what [Morrison]

would say would be unhelpful to **his case at that particular time** in the proceeding" (Emphasis added). He then went on to say that Morrison told him that he wanted to address the issues from the letter and contend he was not guilty on the underlying offense, and that his arguments would not benifit Morrison in lessening the sentence at that time. That may or may not have been true about Morrison's sentence being lessened by what he wanted to say, but what Rogers and the trial court both fail to mention is that this is not Morrison's only reason for wanting to address the court. He also wanted to preserve his issues for further review, which Rogers admittedly prevented by telling Morrison not to speak to the court about the issues.

It is Morrison's hope and prayer that this Federal Court will judiciously see that by Rogers preventing him from addressing the trial court, it prevented him from properly preserving the issues he now raises, for further review, and this court excuses him from any procedural default regarding him not properly raising, objecting, or preserving his constitutional issues before raising them during this 2254.

Regarding Morrison's aspiration to request a separate punishment hearing, Rogers stated that Morrison knew that this was his final hearing; that the court would decide to adjudicate him; and if the court adjudicated his guilt, the court would then sentence him. If Morrison knew that this was his final hearing, why then did Rogers file a Motion for Continuance? Morrison thought the court would grant his Motion for Continuance and he would not need character witnesses at that time. (See MOtion to Disqualify Affidavit of David Rogers pp12-13).

XV. CONSTITUTIONAL VIOLATION AND SUPPORTING FACTS FOR GROUND ELEVEN

GROUND ELEVEN: Morrison's rights under the Sixth and Fourteenth Amendments of the United States Constitution were violated when Morrison's appellate counsel David Rogers did not raise on appeal the trial court's err in overruling his Motion for Continuance.

SUPPORTING FACTS FOR GROUND ELEVEN:

David Rogers askes for a Motion for Continuance for Morrison's motion to revoke probation hearing so Morrison could assert his habeas corpus issues before the trial court, before he was convicted of the charge that he was on probation for. (See RR 3 pp. 5-9; and Exhibit "J").

The Motion for Continuance was overruled and the trial court went ahead with the Motion to Revoke probation hearing. (RR 3 p. 11).

Morrison was harmed because his probation violations were found to be true and he was sentenced to 16 years in prison.

On May 24, 2011 Rogers filed for a new trial and Motion for Arrest in Judgement (See Exhibit "K"). In ground 4 was a complaint that the trial judge erred by not granting Morrison's continuance. And Morrison was harmend by the error.

On July 20, 2011 Rogers filed for Notice of Appeal.

On October 10, 2011 Rogers filed the Appellant's Brief. He raised five grounds, and despite Morrison's request, Rogers did not raise the overruling of the Motion for Continuance on appeal, which harmed Morrison by that ground not being in front of the Court of Appeals for review. (See Exhibits "L", and "M").

If Rogers would not have been ineffective and he would have properly raised that issue on appeal, there is a reasonable probability, by reasonings stated in ground eight about Morrison's right to Writ of Habeas Corpus being denied, that the Court of Appeals would have held a decision in Morrison's favor and remanded his case back to the trial court so Morrison could have properly addressed his habeas corpus issues at the trial court level and then been granted relief, offered a lesser sentence, or new jury trial. His issues would have then been properly preserved for review as well.

A. Clearly Established Federal Law as Determined by the Supreme Court, Summarized

1) **Stickland v. Washington 104 S.Ct 2052 (1984)** (Same IAC holdings as Ground One.)
2) **Evitts v. Lucey 469 U.S. 387 (1985)** (Held right of counsel at Direct Appeal.)
3) **Stallings' v. U.S. 536 F.3d 624, 627 (2008)** (In assessing whether an attorney was ineffective for failing to present an issue on appeal, courts look first to see if the attorney missed a "significant and obvious" issue; if so the courts compare the neglected issues to those actually raised; if the ignored issues were

clearly stronger, then apellate counsel was deficient; to show prejudice a petitioner must show that there is a reasonable probability the omitted claim would have altered the outcome of the appeal had it been raised.)

B. State Court's Disposition for Ground Eleven/2254(d)(1),(2)

On pages 78-79 of the trial court's findings, the trial court relies only on counsel's untrue and unsupported affidavit to deny Morrison recommendation for relief, regarding appellate counsel's effective assistance in appealing the trial court's err in overruling Morrison's MOtion for Continuance, and suspending his constitutional right to Writ of Habeas Corpus. That decision was contrary to the clearly established federal law as determined by the Supreme Court regarding the above IAC precident and others that deal with IAC on appeal. 2254(d)(1) has been satisfied, and morrison asks the court for a de novo review of this ground as well since the trial court nor the Court of Criminal Appeals applied any proper Supreme Court precidents to deny relief. Morrison has proven that the state court's findings are erroneous.

C. Conclusion

Rogers claims that he did not raise the trial court's error in denying Morrison a continuance because he did not believe it was a valid point of error and he could not show harm, and Morrison's legal basis was incorrect. He said he reviewed the file from an appellate standpoint and determined his initial analysis was correct and that the denial of the MOtion for Continuance was not an abuse of discretion.

Morrison contends that since Rogers raised the issue on Motion for New Trial, and MOtion for Arrest in Judgment (Exhibit "K"), that his initial analysis was that the trial court did abuse its discretion when it erred in denying Morrison's Motion for Continuance, which did cause Morrison harm, and he should have raised that issue on appeal like he did the rest of the issues he raise in Exhibit "K". (See Exhibit "K", and Motion to Disqualify Affidavit of David Rogers).

Morrison has proven with Supreme Court precident that his issues do have merit, and if Rogers would have presented this issue of trial court error in suspending Morrison's right to Writ of Habeas Corpus by denying continuance, that there is a reasonable probability he would have been given relief by the appellate courts, as reasoned in Grounds 2-8, then his issues would have also been properly presented to the trial court, then if the trial court did not grant relief, he would have appealed these issues on direct appeal, then they would be properly before the Court of Appeals also.Morrison asks this court to see this IAC claim as another "cause"

in preventing him from properly objecting and preserving his issues for review for this 2254. The trial court's abuse of discretion in denying Morrison the right to writ of Habeas Corpus, and to speak on his own behalf was the basis of Morrison not being allowed to properly preserve his constitutional issues for further review, and Rogers' deficient performance for not raising the issue exacerbated this error's finality. Morrison hopes and prays that this Fine Federal Court will see the merits in this IAC ground and understand the significance and prejudice that it has caused by not allowing Morrison to perfect his direct appeal, and to excuse him from any procedural default. Or give other relief as this court sees appropriate.

XVI. CONSTITUTIONAL VIOLATION AND SUPPORTING FACTS FOR GROUND TWELVE

GROUND TWELVE: Morrison was denied effective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments of the United States Constitution. Morrison's trial counsel in 2004, Ian Cantacuzine, failed to investigate, and failed to object and preserve for further review, Morrison's habeas corpus issues that he now addresses.

SUPPORTING FACTS FOR GROUND TWELVE:

Prior to Morrison's pre-trial hearing on May 6, 2004, Morrison discussed with his attorney, Ian Cantacuzine ("Cantacuzine"), on several occasions, that the female in Morrison's offense represented herself as an adult and he was unaware of the nature of the crime when he engaged in the prohibited conduct, and he felt he should not be criminally responsible because it did not seem fair that he could go to prison for doing a crime that he did not know he did, when a minor who looked and acted like an adult, came to his house with alcohol, represented herself as an adult, and initiated and consented to the sexual conduct, especially since his cousin who brought her over and did the same acts was not even charged.

At pre-trial Morrison knew nothing about the law and relied soley on Cantacuzine telling him "Ignorance of the law is no defense.", and that it did not matter that he thought the minor was an adult, he would still go to prison for 15 to 20 years if he went to a jury trial, so he had to plead guilty and accept the plea offer of nine years deferred probation.

Cantacuzine's counsel fell below a professional standard of reasonableness because he failed to properly investigate and research Morrison's case. Cantacuzine should have recognized that the strict liability aspect of 22.011 was predicated off of the pre-1983 law, and that a proper reading of 22.011 in conjunction with section 6.02, 8.02, and 2.01, along with Supreme Court statutory interpretation holdings, made the strict liability interpretation questionable, as Morrison has proved in ground two, and ground five. He also failed to object to the Court of Appeals' misinterpretation of 22.011's plain language, and the unconstitutional overbroad and vagueness effects that the strict liability interpretation causes. And he failed to object and preserve for further review the equal protection violations that Morrison raises now.

Morrison was harmed by the ineffectiveness because these issues were not raised or objected to at the pre-trial hearing or in any pre-trial motion, where there is a reasonable probability (because of the strong evidence that existed in support of Morrison's rationale) that Morrison would have received relief had Cantacuzine presented these issues before the trial court. Morrison was also harmed because Cantacuzine did not object and preserve these issues for further review.

If Cantacuzine would have done a proper investigation into Morrison's case and researched the plain language of 22.011 and the unconstitutional effects that the strict liability interpretation has had on the statute (which Morrison raises now) and if he would have properly raised the issues at or prior to the May 6, 2004 pre-trial hearing then these issues would have been properly preserved for review, and there is a reasonable probability Morrison would have received relief through the trial court, either by the trial court granting relief through pre-trial motion, or that Morrison would not have pled guilty and gone to jury trial, then proved he was not guilty of all the elements of the crime as the plain language of the statute suggests, and then the direct appeal process would have been an available avenue for relief as well, where Morrison could have received relief from one of the constitutional issues that Morrison raises now.

XVII. CONSTITUTIONAL VIOLATION AND SUPPORTING FACTS FOR GROUND THIRTEEN

GROUND THIRTEEN: Morrison was denied effective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments of the United States Constitution. Morrison's trial counsel David Rogers failed to investigate, and failed to object and preserve for further review, Morrison's habeas corpus issues that he now addresses.

SUPPORTING FACTS FOR GROUND THIRTEEN:

Prior to Morrison's probation revocation hearing on April 28, 2011, Morrison discussed with his attorney David Rogers, on several occasions through correspondence and two face to face meetings that the female in his offense represented herself to be an adult, and he was unaware of the nature of his crime when he engaged in the prohibited conduct. And he felt by the plain way the statute was written that he should not be held criminally responsible for 22.011, and he should get a new jury trial so he can show the jury he did not intentionally or knowingly cause the penetration of the sexual organ "of a child" by any means. Morrison showed Rogers the plain language of how the statute was written by the legislature along with other penal codes that supported his rationale. (See Exhibit "E" and Statement of Facts).

Rogers' counsel fell below a professional standard of reasonableness because he failed to properly investigate Morrison's case, and to research the law and recognize that the Court of Appeals' strict liability interpretation was predicated on pre-1983 law. He failed to object to the Court of Appeals' Misinterpretation of 22.011's plain language regarding the prescribed CMS in conjunction with 6.02, 8.02, and 2.01, and he failed to investigate and object to the unconstitutional overbroad and vagueness effects that the strict liability interpretation has generated. He also failed to investigate and object to the unconstitutional equal protection violations that are inherent in the statute with it being strict liability, which Morrison raises now.

Morrison was harmed by this ineffectiveness because these issues were not raised at trial, where there is a reasonable probability (because of the strong evidence that existed in support of Morrison's rationale) that Morrison would have received relief had Rogers raised these issues before the trial court. Morrison was also harmed because Rogers did not object to and preserve these issues for further review. If Rogers would have done a proper investigation into Morrison's case and researched the plain language of 22.011 and the unconstitutional effects that the strict liability interpretation has on the statute (which Morrison raises now) and if he properly raised these issues at Morrison's revocation hearing or filed the proper objections or pre-trial motions, then these issues would have been properly preserved for review, and there is a reasonable probability that Morrison would have received relief at the trial court level or on direct appeal.

A. Clearly Established Federal Law as Determined by the Supreme Court, Summarized

1) **Strickland v. Washington 104 S.Ct 2052 (1984)** (Same IAC holdings as Ground One.)

2) See Supreme Court holings as stated in Grounds 2-7, 11.

B. State Court's Disposition for Grounds Twelve and Thirteen/2254(d)(1),(2)

Because the state court's disposition for Grounds Twelve and Thirteen were vitually the same, and the grounds are both similar in nature, only dealing with different counsel, Morrison will combine the two grounds here to show that the state satisfied 2254(d)(1),(2) in both grounds. On page 81-82 for Ground Twelve and pages 83-84 for Ground Thirteen the district court relied soley on the unsupported by the record affidavits of Morrison's counsel to reccomend the denial of relief for Morrison. The court did not attempt to reasonably apply the above clearly established federal law in resolving Morrison's complaints in Grounds Twelve or Thirteen. Neither **Strickland** prong was applied. Morrison asks for a denovo review.

The trial court stated: (The law is clear, sexual assault of a child under Section 22.011 Penal Code is a strict liability offense, the actors knowledge that the child was under 17 is not an element of the offense, and the statute does not require the state to allege or prove that the actor knew that the child was under the age of 17. The defense of Mistake of Fact, under 8.02, that the actor formed a reasonable but mistaken belief that the child was 17 years or older does not apply, 22.011 is not overbroad or vague, or does it violate the Equal Protection of the Law. Counsel for the defense is not required to make meritless assaults on the law.)

The trial court's comments are conclusory, and unsupported. The decision to deny relief based on those comments was an unreasonable determination of the facts in light of all the evidence that Morrison presented in his 11.07 that proves grounds 2-7 do have merit, as determined by the Supreme Court case law holdings that Morrison cited to. The trial court's decision was also opposite that reached by the Supreme Court cases dealing with counsel not properly investigating, objecting, and preserving for further review defendant's mitigating evidence or constitutional questions of law that have manifestly violated his rights. And because they decided the case differently from the aforementioned Supreme Court holdings on a set of materially indistinguishable facts, 2254(d)(1) has been satisfied. Morrison has also shown that the requirements under 2254(d)(2) have been met for these two grounds as well. Morrison has shown with clear and convincing evidence that the state Court's findings are erroneous.

C. Conclusion

The trial court urges that: "The law is clear", and that 22.011 is strict liability. The court further goes on and not only negates the required CMS in 22.011,

it also suspends 6.02, 8.02, and 2.01, like the Courts of Appeals have done, without ever giving any deference to the Legislature's plain language of the statutes, nor clearly established federal law as determined by the Supreme Court that warns strongly about how to treat strict liability offenses, mens rea issues, and proper statutory consstruction analysis cases. If the Legislature prescribed the requirement of a mens rea into the heading of the statute and they did not clearly dispense with any mental element, and if the plain language of the statute, using the correct rules of English grammer and syntax, say that the Intentionally or Knowingly required mens rea modifies everything after it, how then is the law clear and 22.011 strict liability? A simple reading of the plain language of 22.011, 6.02, and 2.01 will show that there is a required intentionally or knowingly mens rea element prescribed in the statute, and since the statute does not dispense with any mental element or make an exception to 6.02 or 2.01, all those laws remain intact and 22.011 cannot be strict liability. That is what is clear by the literal plain language of the law. So the trial court saying the law is clear and 22.011 is strict liability is nonsensical, absurd, and is the actual "Assault on the law", as determined by the Constitution and Supreme Court Precident.

If Morrison,only a high school graduate, U.S. Navy Veteran, and construction worker most of his life, can in six months; research, articulate, and prove that 22.011 cannot be strict liability, and the strict liability interpetation is unconstitutional as stated in grounds 2-7, then surely Ian Cantacuzene and David Rogers, both experts of the law that have been to college, law school, and had plenty of everyday practice for years, could have easily noticed the constitutional infirmities that Morrison has presented during the short time they represented Morrison, and objected to and preserved for further review these issues, but they did not. They both, like the trial court did, went off of the subjective and erroneous Texas Courts of Appeals' strict liability interpretation that is contrary to the plain language of the statute and clearly established federal law as Morrison has shown, and they did not object to or preserve these issues for further review.

A thorough look at the RR.1 on pages 9 and 14 will show Morrison's reluctance in accepting the plea as having to register as a sex offender and giving up his right to appeal. On page 9 he attempted to address the court about why he did not understand why he had to register as a sex offender, and on page 14 , it is clear that he wanted to appeal the original charge but Cantacuzene told him he had nothing to appeal. That comment by Cantacuzene shows on the record that he did nothing to pursue the issues Morrison now lodges.

Morrison hopes and prays that this judicious and fair court will see that by counsel not properly investigating and researching Morrison's case, they did not realize that the strict liability interpretation by the Courts of Appeals was questionable and has generated the constituional issues Morrison has raised and proved, and because they failed to properly investigate and research these issues and object and preserve them for further review, their performance was deficient, because it fell below a reasonable professional standard by not preserving these issues for further review, and Morrison is prejudiced because the deficient performance could be construed as a procedural default at this juncture. Morrison humbly asks this Honorable Court to see these IAC claims as "cause" and "actual prejudice" and excuses him from any procedural default from not properly preserving or appealing the constitutional issues he now addresses.

Morrison also acknowledges that these constitutional issues are novel questions of law, and may not have been required to be entertained by either defense counsel, Therefore, Morriosn asks this court to excuse him from procedural default as explained in **Reed v. Ross 468 U.S. 1 (1984)**, if this court can not excuse him on the IAC claim.

Morriosn's grounds 8-13 deal mostly with showing "cause" and "actual prejudice" for Morrison not properly objecting and preserving his novel constitutional questions of law relating to grounds 2-7, 14, which he has proven do have merit. Morrison has established "cause" and "actual prejudice" to be excused from any procedural default.

XVIII. CONSTITUTIONAL VIOLATIONS AND SUPPORTING FACTS FOR GROUND FOURTEEN

GROUND FOURTEEN: Morrison's rights under the First, Fifth, Sixth, Fourteenth Amendments and Article 3 § 1 of the United States Constitution were violated by the Court of Appeals' seperation of powers violations proved in ground two, Morrison is, therefore, actually innocent of the 22.011 charge because if it was not for the seperation of powers violation as stated in ground two, or the violation of Equal Protection of Laws as stated in ground five, a jury of ordinary intelligence would not have reasonably found Morrison guilty of all the elements of 22.011 as the plain language and legislative intent of the statute suggests.

SUPPORTING FACTS FOR GROUND FOURTEEN:

Texas Penal Code section 2.01 states that no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. That is taken from the Fifth and Fourteenth Amendments of the United States Constitution. Morrison has proved that 22.011 has the requirement of an intentionally or knowingly mens rea and that the plain language of the statute and the legislative intent require that the CMS attatch to "of a child". Therefore, the legislature did intend that knowledge of the status of the complaintant being a child is an essential element of 22.011.

Morrison has also shown that the Court of Appeals has negated the CMS in 22.011, despite the fact of its existance and that the legislature did not intend to dispense with any mental element, suspending 6.02 and 2.01. They have also suspended section 8.02, the mistake of fact defense, as applying to 22.011 without constitutional authority.

Without these constitutional violations the state would have been required to prove Morrison intentionally or knowingly caused the penetration of the sexual organ "of a child" by any means, or at the least would have had to offer Morrison the affirmative defense of mistake of fact regarding the minority of the complaintant.

Because the Court of Appeals violated the Seperation of Powers Doctrine and suspended these laws, and Morrison's Equal Protection of the Laws rights were violated as well, Morrison was denied due process and is actually innocent of 22.011 because he did not fulfill all the required elements of the statute as the plain language and legislative intent suggests. Had the Court of Appeals not violated the Seperation of Powers Doctrine, nor denied him Equal Protection of the Laws as proved in ground two and five, Morrison would have gone to jury trial and been acquitted because he did not know the female in his offense was a child, and the prosecutor would not have been able to prove that he intentionally or knowingly penetrated the sexual organ "of a child". Or he could have used the affirmative defense of mistake of fact and proved beyond a preponderance of the evidence that he reasonably believed that the female was 21 years.

A. Clearly Established Federal Law as Detrmined by the Supreme Court, Summarized

1) **Murray v. Carrier 477 U.S. 478 (1986)** (Held that a petitioner must show that a constitutional violation "has probably resulted" in the conviction of one one who is actually innocent. To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence, and that no reasonable juror would have found petitioner guilty beyond a reasonable doubt.)
2) **Schlup v. Delo 513 U.S. 298 (1995)** (Held that when a federal habeas petitioner raises a claim of actual innocence to avoid a procedural bar to the consideration of the merits, the petition,like in **Carrier**, must show that a constitutional violation has probably resulted in the conviction of one who was actually innocent. And such petitioner must show that it is more likely than not that no reasonable juror would have convicted petitioner in light of the new evidence which petitioner has alleged to support his claim.)
3) **In re Winship 397 U.S. 358 (1970)** (Same holdings as stated in Ground Two).
4) See controlling Supreme Court cases in grounds 2-7.

B.State Court's Disposition for Ground Fourteen/2254(d)(1),(2)

On page 85 of the trial court's findings, the trial court merely suggested that: "The Applicants complaints as stated above are without merit." That statement is an unreasonable determination of the facts in light of the evidence that Morrison has presented in his 11.07 Memorandum of Law that proves that because the Texas courts of Appeals, and the trial court have gone against legislative intent and the plain language of 22.011 by suspending law and negating the required CMS, they have in fact violated the Separation of Powers Doctrine, and Morrison's Equal Protection of Laws rights and robbed him of him having to be proved beyond a reasonable doubt of commiting all elements of the crime charged. Or at the least, him proving his mistake of fact about him reasonably thinking the minor in his case was an adult. Morrison has also shown that if the Courtof Criminal Appeals, the Courts of Appeals, or the trial court would have done a proper statutory construction analysis of 22.011 and interpreted the statute properly with the mens rea modifying "of a child" like the literal-plain language mandates, HE would have gone to trial and been acquitted because in light of a proper reading of the statutes, and the reasonable jurists in Johnson at **Johnson v. State 967 S.W.2d at 858 (Tex Crim. 1998)**, no reasonable juror would have convicted him beyond a reasonable doubt that he "intentionally" or "knowingly" caused the penetration of the sexual organ "of a child" by any means. The state court's decision to deny relief in this actual

innocence claim was opposite that reached by the Supreme Court cases that discuss actual innocence by the defendant involving a miscarriage of justice that occured where a constitutional right has been violated, and because they decided the case differently from the aforementioned Supreme Court holdings on a set of materially indistitnguishable facts, 2254(d)(1) has been satisfied. Morrison has also satisfied the requirements under 2254(d)(2) to allow entry into this Federal Habeas Court. Morrison has proved with clear and convincing evidence that the courts findings are clearly erroneous.

C. **Conclusion**

> "Appoint Judges and Officials for each of your tribes in every town the Lord Your God is giving you, and they shall judge the people fairly. Do not pervert Justice or show partiality, do not accept a bribe, for a bribe blinds the eyes of the wise and twists the words of the innocent. Follow Justice and Justice alone, so you may live and possess the land the Lord your God is giving you."(The Holy Bible. NIV®)
>
> -Moses-, Deuteronomy 16: 18-20

The fact of the matter is that by the letter of the law, Morrison is actually innocent of 22.011. Since Morrison's first court date on May 6, 2004, until he filed his 11.07 on December 30, 2014, he has been obstructed from objecting to, and preserving his actual innocence assertion and other constitutional questions of law, that pertain to his illegal conviction and prison sentence. The above quote made by Moses, may have originally been for the Isrealites back in 1407 B.C. when Moses said this to establish the Judges that started to rule in 1375 B.C., but Morrison asserts that those wise words breathed to Moses by Yahweh, God, still apply today. Our Judges must be fair, honest, and not twist the law out of its original text to satisfy their own predilections. Morrison is thankful to God that it was his will to establish a different tier of courts that would allow him the opportunity to obtain True Justice® if a lower court denied justice like the trial court and Court of Criminal Appeals have done. It is Morrisonhope and prayer that this Fine Federal Court sets in motion the True Justice that was denied to Morrison by the Texas Courts, and this court follows the letter of the law, based off of the clearly established federal law as Morrison has presented, and realize that: Because Morrison reasonably believed that the female in his case was 21 years, and the plain language of 22.011 requires an intentionally or knowingly mens rea that modifies "of a child", and the Texas courtsviolated the Separation of Powers Doctrine when they went against the legislative intent by deeming 22.011 strict liability, which also violated Morrison's Equal Protection of the Laws rights, resulting in him not being able to show a jury that he is

actually innocent of 22.011's plain language. And that this miscarriage of justice establishes actual innocence and also passes any procedural bar that may prevent him from raising the constitutional issues he presents. Or if this court decides that another constitutional issue establishes actual innocence , that will suffice as well.

PRAYER

For the foregoing reasons, Morrison prays that this Fine Federal Court issues Writ of Habeas Corpus, and orders his release from the unconstitutional confinement that he suffers from, or give him relief by remanding his case back to the trial court for a new jury trial, or for resentencing. Morrison also prays that an evidentiary hearing be had, so in light of all the circumstances asserted in this Writ of Habeas Corpus, the identified acts or omissions that are outside the record will come into light for preservation of the record.

Morrison would like to apologize for this exteamly long Brief and Memorandum of Law, and for the time it must have taken everyone involved to have to read it,and research the arguments and support that Morrison has given.

INMATE'S UNSWORN DECLARATION

I,Jared Morrison, T.D.C.J.# 1747148, being presently incarcerated at the Huntsville Unit, Walker County, of the Texas Department of Criminal Justice, declare under penalty of perjury that the aforementioned statements are all true and correct.

Executed on June 21, 2015

6/21/15

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this PETITIONER'S BRIEF IN SUPPORT OF TITLE 28 USC SECTION 2254 was placed in the prison mail room to be mailed pre-paid priority mail to Morrison's mother, Jana Morrison so she can make copies and hand deliver a true and correct copy to the Assistant Attorney General for the state, and file the original and one copy with the United States District Court of the Western District of Texas Midlan/Odessa Division. It was mailed on June 22, 2015. TRACKING NO. 9114 9999 4423 8322 3651 26

6/22/15

Jared Morrison