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ROSS BUSH, DISTRICT CLERK
MIDLAND COUNTY, TEXAS
BENNA CAIN DEPUTY

NO. CR 29,320-A

| EX PARTE | * | IN THE DISTRICT COURT |
|---|---|---|
| | * | |
| | * | 385TH JUDICIAL DISTRICT |
| | * | |
| JARED MORRISON | * | MIDLAND COUNTY, TEXAS |

**ORDER ON POSTCONVICTION WRIT OF HABEAS CORPUS**

**ON THIS DAY** came on for consideration the Applicant's Petition for Postconviction Writ of Habeas Corpus filed on December 30, 2014, and having considered the same, the court enters the following findings of fact, conclusions of law and recommendations:

**I.**

**HISTORY OF THE CASE**

The Applicant is presently in the custody of the Institutional Division of the Texas Department of Criminal Justice by virtue of a judgment and sentence in cause number CR 29,320 in the 385th District Court of Midland County, Texas on the 28th day of April, 2011 wherein the Applicant's deferred adjudication and community supervision granted for the offense of sexual assault of a child by causing the penetration of the female sexual organ of the child by the sexual organ of the Applicant was revoked, the Applicant was adjudicated guilty of the offense of sexual assault of a child and the Applicant was sentenced to 16 years in the Institutional Division of the Texas Department of Criminal

Justice. The Applicant appealed from the revocation of his deferred adjudication and adjudication of guilt and sentence to the Court of Appeals for the Eleventh Judicial District at Eastland, and the Court of Appeals affirmed the revocation of the Applicant's deferred adjudication, adjudication of guilt and sentence in cause number 11-11-00191-CR in an opinion delivered on May 30, 2013. Petition for discretionary review was refused by the Court of Criminal Appeals in cause number PD-0767-13 on October 23, 2013. The mandate of the Court of Appeals issued on January 13, 2014.

## II.

## BACKGROUND INFORMATION

The Applicant was charged by indictment on the 26th day of February, 2004 with the second degree felony offense of sexual assault of a child by causing the penetration of the sexual organ of a female child under the age of 17 with the sexual organ of the Applicant alleged to have occurred on June 11, 2003 in violation of section 22.011 Penal code.

The Applicant was represented by Ian Cantacuzene, attorney at law. On the 6th day of May, 2004, the Applicant waived trial by jury and entered a plea of guilty to the offense of sexual assault of a child pursuant to a plea bargain agreement by the terms of which an adjudication of guilt would be deferred and the Applicant would be placed on

community supervision for a period of nine years. The Court accepted the plea bargain agreement and deferred an adjudication of guilt and placed the Applicant on community supervision in accordance with the plea bargain agreement. See judgment deferring adjudication of guilt placing the Applicant on community supervision filed on May 6, 2004. On March 28, 2005, the State filed a motion to revoke the Applicant's community supervision and to proceed with an adjudication of guilt. See motion to revoke. The firm of Novert Morales was retained to represent the Applicant. See letter of firm on April 12, 2005. On the 17th day of May, 2005, the Applicant's community supervision was modified. See Judgment Modifying Community Supervision Upon a Deferred Adjudication of Guilt Imposing Sanctions/TAIP filed on May 17, 2005. On August 17, 2006, Mr. Rick Navarrete, attorney at law, filed notice that he was retained to represent the Applicant in the case. See letter dated August 17, 2006. On August 9, 2007 Mr. Navarrete filed a motion to modify the terms and conditions of community supervision. See motion to modify. On September 20, 2007, the Court entered an order modifying the terms and conditions of the Applicant's community supervision. See Order filed on September 2, 2007. On April 27, 2009, the State filed a motion to modify the Applicant's community supervision to require that the Applicant enroll in a Treatment Alternative Incarceration Program. See motion. The Applicant's agreed to the modification of his community supervision. See Applicant's

agreement to modification of community supervision filed on April 27, 2009. See agreement. The Court ordered that the Applicant's community supervision be modified to require Applicant to enroll in the Treatment Alternative Incarceration Program on April 28, 2009. See order. On April 7, 2010, the State filed a motion to revoke Applicant's community supervision and to proceed with an adjudication of guilt. See motion. On March 7, 2011, the State filed a first amended motion to revoke community supervision and to proceed with an adjudication of guilt. See Amended motion. On January 7, 2011, the Court appointed Tom Morgan, attorney at law, to represent the Applicant. See Order Appointing Counsel filed on January 7, 2011.

On March 5, 2011, the Applicant sent Judge Robin Darr a letter file marked March 9, 2011. A notation on the left margin the letter dated March 5, 2011 states "Ex parte letter has not been seen by Judge Darr but copy faxed to defense atty tom Morgan and State's atty Mike McCarthy." The letter states as follows:

**APPLICANT'S LETTER OF MARCH 5, 2011 TO THE COURT**

"My name is Jared Morrison. I came in front of you on March 4th for a probation revocation in cause number CR 29320. I rejected the offer of seven years. Therefore I will come in front of your Honor's court again on March 10th. Before then I would like to file a petition for

discretionary review and also withdraw my guilty plea that I was forced into pleading on May 6th, 2004. Since I have been incarcerated I have found evidence that was withheld from me by my attorney at that them that would of gave me a very good chance of an acquittal if I went to trial in 2004. Therefore I respectfully ask the court to hear my case and please give me the chance of legal due process that was taken from me and my brother/co-defendant, when our attorney's forced and scared us into pleading guilty and taking the nine year of probation which was the plea bargin (sic). My attorney Ian Cantacuzene and my brother's attorney Tom Morgan at first told us we had a good chance at an acquittal then at the pre-trial they both told us that if we took our case to trial we would do at least the next 15-20 years of our lives in prison getting raped and beat up every day. They said that's what happens to people with sex crimes in prison. They also continued to harp on the notion that we had no chance to win at trial. Because of this fallacious rhetoric I believe we were given ineffective counsel which violates our constitutional rights to competent counsel that is suppose represent us with their vast knowledge of the law. During my two visits to the law library I have found out by doing some research that what they [Applicant's attorney and his brother's, Jason Morrison, attorney] told us was not true. I apologize to you for this length letter but I feel that it would behoove me to give you a brief account of what happened in my offense. In June of 2003 my

cousin brought a girl to our house in which she brought a bottle of Tequilla (sic) in with her and after ten or twenty minutes of conversation she asked everyone if we wanted to take turns doing body shots on her. After that one thing led to another and then the offense took place. It was 100 percent consentual (sic) and she was never harmed or threatened in any manner regardless of what some of the discovery says. We thought she was 21 because my cousin was 18 and was not old enough to purchase the tequilla (sic). She also dressed, cooked and acted like she was 21. Plus we did not even think my cousin would of brought a minor to our house. Well six months later we found out from a detective she was not of legal age then we turned ourselves in for the charge that over the last seven years has cost us over $40,000 between bond, attorney fees, and probation and counseling costs, we have lost a lot of liberty and unalienable rights that most violent criminal still have including the pursuit of happiness. I've lost contact with my daughter, nephews, nieces, church youth and friend's kids that looked up to me and I cherish, love and would never harm. Plus now I have a life sentence being labeled the worst thing someone could be labeled in this present day, "a sex offender" and it's all due to the fact of the misunderstanding of some ones age. I assure the court that I'm not the monster or the threat to society the state and media wants society to think I am and I would never intentionally or knowingly do harm to a child or anyone in a

manner like I am charged with. That brings me to one of the reasons I could have been acquitted in a trial by jury. According to Texas Penal Code 22.011 sexual assault it says in subsection (a2) a person commits an offense if the person "intentionally" or "knowingly": A) causes the penetration of the sexual organ of a child by any means," so one must intentionally or knowingly do all parts of the said statute in order to be guilty if in the statute it mentions "intentionally" or "knowingly." Therefore since I did not knowingly or intentionally cause the penetration of a "childs" (sic) sexual organ how can I be criminally responsible, labeled, and treated like a socially dangerous individual who needs to be incarcerated for at least two years or made to go through years of expensive counseling and monitored closely by the state since during the offense my mental state was not in the capacity of engaging in a crime which the statute states is a requirement to commit that offense and my attorney told me that my mental state of not knowing she was a child did not matter. In my interpretation of the law, with this new information I found including case law of some cases like mine that ended in acquittals with this same evidence I could of used this new information as a defense. Therefore I believe I have the due process right to start my trial over because of ineffective cousel (sic) and the fact I was not mentally fit to make a choice to my right to a fair jury trial because I was scared and pressured into taking the plea bargin (sic) by my

attorney. Also we were never told we could have requested a "jury charge on mistake of fact" which is in Teas Penal code 8.02, or the fact we could've possibly used "rule 412" evidence of previous sexual conduct in criminal cases. I also have a lot more research that can help prove my case including the Texas law, written definitions of the words "intentionally" and "knowingly." My four hours of research in the law library just validates the fact our attorneys did not do their job in representing us properly. The offense of sexual assault of a child is a 3g offense which stands next to crimes like murder, aggravated robbery, aggravated kidnapping, and other hanious (sic) crimes which cause severe injury or death to a victim and in the normal text it should stand with these horrible crimes. These crimes like murder, or aggravated robbery require a culpable mental state someone must intentionally or knowingly kill some one (sic) to be guilty of murder. If someone kills someone without intent or knowledge then it is manslaughter which carrys (sic) a lot less of a sentence just because of the mental state of not intentionally or knowingly doing the crime. Killing someone is a crime regardless of intent or knowledge but without intent or knowledge "manslaughter" is not a 3g offense (I don't think. I still need to research some more things)[.] Having consentual (sic) sex is not a crime in itself unless someone knowingly or intentionally has sex with someone under the age of 17. So how can one who is unfortunatly (sic) misrepresented in the age of a minor

and has consentual (sic) sex with them be criminalized on the same list as someone who knowingly or intentionally takes someone[']s life or threatens someone['] life then robs them. I have never done a crime that has caused a victim like the crimes stated in the 3g list including the one I am on probation for. It has never been in my heart to hurt people or to create victims. I am a man of God and was put on this earth to help people which I've done my whole life, even during my incarceration. It is my hope and prayer that you accept my request and let me use my new information and have a chance to a fair trial. I sent a letter to the county clerk requesting the same thing including all my discovery in my case. I hope that is OK I'm not sure of the right process of filing petitions and requesting stuff. So I ask you for our permission that I can acquire all of my discovery. I'd like also to request new counsel due to the fact my court appointed attorney who is Tom Morgan was my brother/co-defendant's paid attorney seven years ago and was responsible for not giving us adequate knowledge of the law and is now a conflict of interest in my case. I would also like to request the courts allow me to take a polygraph test to prove I did not know the age of the girl in my case and I did not force her. I apologize again for taking up your time with this matter and I think you dearly for your consideration with my petition." "Respectfully Jared Morrison."

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On March 9, 2011, the Applicant's attorney, Tom Morgan, filed a motion to withdraw as counsel of record. See motion to withdraw by Tom Morgan. On March 18, 2011, the Court granted Mr. Tom Morgan's motion to withdraw as counsel and appointed David Rogers, attorney at law, to represent the Applicant. See Order Substituting Counsel. On April 28, 2011, Applicant's attorney, David Rogers, filed a motion for continuance of the revocation hearing set for April 28, 2011. See Motion for Continuance filed with the Clerk of the Court on May 2, 2011. The Motion for Continuance states in section 2, "2. The Defendant has filed a Post Conviction Writ or has attempted to file a Post Conviction Writ challenging the original conviction. The Defendant requests that this trial be postponed until the Post Conviction Writ Process is concluded." See Motion for Continuance. The motion for continuance was denied. On April 28, 2011, an evidentiary hearing was held on the State's Amended motion to revoke community supervision and to proceed with an adjudication of guilt. The Court revoked the Applicant's community supervision, adjudicated the Applicant guilty of sexual assault of a child and sentenced the Applicant to 16 years in the Institutional Division of the Texas Department of Criminal Justice. See judgment revoking community supervision and adjudicating guilt, sentence to ID-TDCJ filed on May 2, 2011. The Applicant appealed the revocation of his community supervision, adjudication of guilt and

sentence to the Court of Appeals for the Eleventh District at Eastland. The Court of Appeals affirmed the revocation of the Applicant's deferred adjudication, adjudication of guilt and sentence in cause number 11-11-00191-CR in an opinion delivered on May 30, 2013. Petition for discretionary review was refused by the Court of Criminal Appeals in cause number PD-0767-13 on October 23, 2013. The mandate of the Court of Appeals issued on January 13, 2014.

The Applicant's twin brother, Jason Morrison, DOB: 3/8/1976, was also charged with the offense of sexual assault of the same child victim under Section 22.011 Penal Code in cause number CR 29,321 in the 385th District Court of Midland County, Texas. See the indictment. Jason Morrison was represented by Tom Morgan on the charge. See the judgment deferring adjudication of guilt filed on May 6, 2004. On the 6th day of May, 2004, Jason was granted a deferred adjudication of guilt and placed on community supervision for a period of nine years. See the judgment deferring adjudication of guilt filed on May 6, 2004. The State filed a motion to revoke the deferred adjudication and to proceed with an adjudication of guilt. Jason Morrison was represented on the motion to revoke by Mark Dettman. On the 4th day of August, 2011, Jason Morrison entered a plea of true to the motion to revoke community supervision pursuant to a plea bargain agreement by the terms of which the Applicant's community supervision would be revoked and an

adjudication of guilt entered to the offense of sexual assault and that his punishment would be assessed at seven years in the Institutional Division of the Texas Department of Criminal Justice. The Court accepted the plea bargain agreement and revoked the Defendant's community supervision, adjudicated the Defendant guilty and assessed the Defendant's punishment at seven years in prison in accordance with the plea bargain agreement. See Judgment Revoking Community Supervision and Adjudicating Guilt and Sentence to ID-TDCJ filed in cause number CR 29,321 on August, 2011. See judgment revoking community supervision, adjudicating the defendant guilty and sentencing the defendant seven years in prison.

**II.**

**ALLEGATIONS OF THE APPLICANT**

The Applicant's complaints that his conviction and sentence for the offense of sexual assault of a child should be set aside are stated in section on the Court's Findings of Fact and Conclusions of law.

**III.**

**NECESSITY FOR AN EVIDENTIARY HEARING**

There is no necessity for an evidentiary hearing because there are no facts in issue which cannot be ascertained from the record and Applicant's Application and

documents and exhibits attached thereto and the affidavits of defense counsel ordered by the Court.

**IV.**

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATIONS**

**A.**

**THE INDICTMENT CHARGED AGAINST THE APPLICANT FOR THE OFFENSE OF SEXUAL ASSAULT OF A CHILD UNDER SECTION 22.011 PENAL CODE IN EFFECT IN JUNE 2003**

The indictment alleged in relevant part that the Applicant on or about the 11th day of June, 2003 "did then and there intentionally and knowingly cause the penetration of the female sexual organ of [redacted] by the sexual organ of the said JARED MORRISON, and the said [redacted] was then and there a child younger than 17 years of age and not the spouse of the said JARED MORRISON." See indictment.

The Applicant's birthday is March 8, 1976 as recited in the judgment of conviction in cause number CR 29,320. The offense of sexual assault of a child was committed on the 11th day of June, 2003 as recited in the judgment of conviction in cause number CR 29,320. The Applicant was, therefore, 27 years, 3 months and 4 days old on June 11, 2003, the day the offense was committed.

The indictment alleged an offense of sexual assault of

a child under Section 22.011(a)(2)(A) Penal Code in effect in 2003 prior to September 1, 2003 which provided as follows: (a) A person commits an offense if the person: (2) intentionally or knowingly: (A) causes the penetration of the anus or female sexual organ of a child by any means." Section 21.011(c) provides: "'Child' means a person younger than 17 years of age who is not the spouse of the actor." Section 21.011 (e)(1) provides: It is an affirmative defense to prosecution under Subsection (a)(2) that: (1) the actor was not more than three years older than the victim and at the time of the offense: (A) was not required under Chapter 62, Code of Criminal Procedure, as added by Chapter 668, Acts of the 75th Legislature, Regular Session, 1997, to register for life as a sex offender, or (B) was not a person who under Chapter 62 had a reportable conviction or adjudication for an offense under this section; and (2) the victim was a child of 14 years of age or older."

**B.**

**THE LAW APPLICABLE TO SEXUAL OFFENSES AGAINST CHILDREN**

Sexual assault of a child under Section 22.011 Penal Code is a strict liability offense and the actor's knowledge that the child was under the age of 17 is not an element of the offense, and the statute does not require that the State allege or prove that the actor knew that the child was under

the age of 17 at the time of the commission of the offense. Fleming v. State, 441 S.W.3d 253 (Tex. Crim. App. 2014); Bryne v. State, 358 S.W.3d 745 (Tex. App.--San Antonio 2011, no pet.); Vasquez v. State, 622 S.W.2d 864 (Tex. Crim. App. 1981); Scott v. State, 36 S.W.3d 240, 242 (Tex. App.--Houston [1st Dist.] 2001, pet. ref'd); Jackson v. State, 889 S.W.2d 615 (Tex. App.--Houston [14th Dist.] 1994, no pet.); Zubia v. State, 998 S.W.2d 226 (Tex. Crim. App. 1999). Mateo v. State, 935 S.W.2d 512 (Tex. App.--Austin 1996, no pet.). The provision of statutes involving sexual offenses against children that the defendant's knowledge that the child was under the age of consent is not an element of the offense does not violate the due process of law under 14th Amendment of the Constitution of the United States or due course of law under Article 1 section 19 of the Texas Constitution. Fleming v. State, 441 S.W.3d 253 (Tex. Crim. App. 2014); Bryne v. State, 358 S.W.3d 745 (Tex. App.--San Antonio 2011, no pet.) The Court of Criminal Appeals in Fleming v. State, 441 S.W.3d 253 (Tex. Crim. App. 2014) held, "Texas Penal Code Section 22.021 is not unconstitutional under the Due Process Clause of the Fourteenth Amendment or the Due Course of Law provision of the Texas Constitution for failing to require the State to prove that the defendant had a culpable mental state regarding the victim's age or for failure to

recognize an affirmative defense based on the defendant's belief that the victim was 17 years of age or older."

The defense of mistake of fact under Section 8.02 Penal Code that the actor formed a reasonable but mistaken belief that the child was 17 years of age or older at the time of the offense does not apply to sexual offenses against children. Fleming v. State, 441 S.W.3d 253 (Tex. Crim. App. 2014); Bryne v. State, 358 S.W.3d 745 (Tex. App.--San Antonio 2011, no pet.); Vasquez v. State, 622 S.W.2d 864 (Tex. Crim. App. 1981); Jackson v. State, 889 S.W.2d 615 (Tex. App.--Houston [14th Dist.] 1994, no pet.); Zubia v. State, 998 S.W.2d 226 (Tex. Crim. App. 1999); Jackson v. State, 889 S.W.2d 615 (Tex. App.--Houston [14th Dist.] 1994, no pet.); Zubia v. State, 998 S.W.2d 226 (Tex. Crim. App. 1999). The fact that there is no mistake of fact defense to the age of the child of a sexual offense under Texas law does not violate the 14th Amendment to the Constitution of the United States or the due course of law provision of the Texas Constitution. Fleming v. State, 441 S.W.3d 253 (Tex. Crim. App. 2014); Bryne v. State, 358 S.W.3d 745 (Tex. App.--San Antonio 2011, no pet.)

Section 22.011 Penal Code is not vague or uncertain with respect to the fact that the statute does not require that the actor know that the child is under the age of 17 or

that mistake of fact as to the age of the child is not a defense. Had the legislature required for commission 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 other offenses. The offense of capital murder of a peace officer or fireman under Section 19.03(a)(1) Penal Code provides: "(a) A person commits an offense if the person commits murder as defined under Section 19.02(b)(1) and: (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman." The offense of resisting arrest under Section 38.03(a) Penal Code provides: "(a) A person commits an offense if he intentionally prevents or obstructs a person he knows is a peace officer or a person acting in a peace officer's presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another." The first degree felony offense of aggravated assault of a public servant or security guard under Section 22.02(b)(2)(B) & (D) Penal Code provides: "(b) An offense under this section is a felony of the second degree, except that the offense is a felony of the first degree if: (2) regardless of whether the offense is committed under Subsection (a)(1) or (a)(2), the

offense is committed: (B) against a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant; (C) ...; or (D) against a person the actor knows is a security officer while the officer is performing a duty as a security officer." See also the offense of Improper Relationship Between Educator & Student under Section 21.12(a)(2)(A) & (B) Penal Code. The appellate courts of Texas have long held that sexual offense offenses against children do not require that the actor knew that the child was under 17 or 14 years of age at the time of the offense and that a mistake of fact under Section 8.02 Penal Code as to the age of the child is not a defense and that such was the intent of the legislature in enacting the offense. In construing Section 21.09 Penal Code, the predecessor statute of Section 22.011 Penal Code, the Court of Criminal Appeals in Vasquez v. State, 622 S.W.2d 864 (Tex. Crim. App. 1981) stated with respect to the indictment that charged that the defendant, "... did then and there knowingly have sexual intercourse with (prosecutrix) and at the time of the said intercourse (prosecutrix) was a female younger than seventeen years of age and was not the wife of the said RICARDO VASQUEZ: "Clearly it [former Section 21.09 Penal Code repealed effective September 1, 1983] does not

require the State to show that appellant knew the victim to be younger than seventeen, but, contrary to appellant's contentions, such is not required." The Court further stated,

> In enacting this provision, it appears that the Legislature intended to carry forward the general provisions relating to the prior "statutory rape" law. The Commentary following Section 21.09, supra, notes the following: "... (W)hen the fact is age in sexual offenses involving children Texas Courts and those of most other American jurisdictions have denied the defense of ignorance or mistake. (citations omitted) The 1970 proposed code would have partially changed this rule (in Section 21.12(a)), thus recognizing that the ignorant or mistaken actor does not possess the culpability this code requires for imposition of criminal responsibility, by making reasonable ignorance or mistake about age between 14 and 16 (now 17) a defense, but this limited change was rejected."

The Court further stated,

> Prior to the enactment of Section 21.09, statutory rape was defined in Article 1183, V.A.P.C. (1925). Under that provision, it had consistently been held that a female under the age fixed by statute was deemed in law to be incapable of consenting to an act of sexual intercourse, and one who had committed 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. See 48 Tex.Jur.2d, Rape, Section 9, pages 640-641.
>
> There being an obvious manifestation on the part of the Legislature not to change the requirement relating to the age of the victim in a rape of a child case, ignorance or mistake of law are not defenses. This being so, it follows that to require the State to allege and prove the appellant knew the prosecutrix to have been under the age of seventeen would establish ignorance or

> mistake as a defense in contravention of the clear legislative intent. Such allegation and proof are not required.

The Court of Criminal Appeals in Fleming v. State, 441 S.W.3d 253 (Tex. Crim. App. 2014) stated, "There is no mens rea as to age listed in either the sexual assault or murder statutes and there is no fundamental right to a mens rea element regarding the age of the victim in these contexts. n4 Because this statute serves the legitimate state objective of protecting children, we will not read a mens rea element into the statute and do not believe that failure to require mens rea as to the victim's age violates the federal or state constitution. The statutory prohibition of an adult having sex with a person who is under the age of consent serves to protect young people from being coerced by the power of an older, more mature person. The fact that the statute does not require the State to prove mens rea as to the victim's age places the burden on the adult to ascertain the age of a potential sexual partner and to avoid sexual encounters with those who are determined to be too young to consent to such encounters. If the adult chooses not to ascertain the age of a sexual partner, then the adult assumes the risk that he or she may be held liable for the conduct if it [PAGE 259] turns out that the sexual partner is under age." The Court of Criminal Appeals addressed the constitutionality of the defense of mistake of fact with

regard to sexual offenses against children. "While both the sexual assault and the murder statutes specify a more severe punishment based on the age of the victim, neither offense contains a provision that allows for a mistake-of-fact defense as to the age of the victim. Under Penal Code Section 8.02(a), "It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for the commission of the offense." Because Section 22.021 requires no culpability as to the age of the victim, there is nothing for the defendant's mistaken belief to negate, and his mistake cannot be a defense to prosecution. ¶ Appellant asks for an affirmative defense so that he may claim that even though the allegations in the indictment are true, he should not be convicted due to his assertion that he did not know that K.M. was 13 years of age. The legislature's intent of protecting children from sexual assault is clear, and it outweighs any claim of the right to present a mistake-of-age defense. When a defendant voluntarily engages in sexual activity with someone who may be within a protected age group, he should know that there may be criminal consequences and there will be no excuse for such actions. When it comes to protecting those who are unable, due to their tender age, to consent to sexual activity, the legislature simply does not allow any

variance. ¶ It would be unconscionable for us to allow a 25-year-old man who was having sex with a 13-year-old child to claim that his actions were excused because he reasonably believed that he was having sex with an adult. Such a defense is precluded by the overriding interest in protecting children." The Court of Criminal Appeals held, "Texas Penal Code Section 22.021 is not unconstitutional under the Due Process Clause of the Fourteenth Amendment or the Due Course of Law provision of the Texas Constitution for failing to require the State to prove that the defendant had a culpable mental state regarding the victim's age or for failure to recognize an affirmative defense based on the defendant's belief that the victim was 17 years of age or older. The decision of the court of appeals is affirmed." Fleming v. State, 441 S.W.3d 253 (Tex. Crim. App. 2014)

C.

## THE STATUTES AND CONSTITUTIONAL PROVISIONS CITED BY THE APPLICANT

## CONSTITUTION OF THE UNITED STATES

**Article 1 Section 9, Cl 2. Habeas corpus.**

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.

**Amendment 1. Religious and Political Freedom**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

**Amendment 5**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

**Amendment 6**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of

counsel for his defense.

**Amendment 14**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein 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 to any person within its jurisdiction the equal protection of the laws.

## CONSTITUTION OF THE STATE OF TEXAS

**Article 1 Section 3. Equal Rights**

All men, when they form a social compact, have equal rights, and no man, or men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services.

**Article 1 section 9. Searches and Seizures**

The people shall be secure in their persons, houses, papers and possessions, from all unreasonable seizures or searches, and no warrant to search any place, or to seize any person or thing, shall issue without describing them as near as may be, nor without probable cause, supported by oath or affirmation.

**Article I Section 10. Rights of accused in criminal prosecutions**

1. Right to a speedy public trial.

2. Right to notice of the charges and copy of the accusation.

3. Right against self-incrimination.

4. Right to counsel.

5. Right to confront witnesses.

6. Right to compulsory process.

7. Right to present evidence by deposition.

8. Right to an indictment by a Grand Jury for a felony offense.

In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition, under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger.

**Article I Section 12. Habeas corpus**

The writ of habeas corpus is a writ of right, and shall never be suspended. The Legislature shall enact laws to render the remedy speedy and effectual.

**Article I Section 19. Deprivation of life, liberty, etc.; due course of law**

No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land.

**Article I Section 28. Suspension of Laws**

No power of suspending laws in this State shall be exercised except by the Legislature.

**Article II Section 1. Division of Powers; Three Separate Departments; Exercise of Power Properly Attached to Other Departments**

The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

**Article 3 Section 1. Senate and House of Representatives**

The Legislative power of this State shall be vested in a Senate and House of Representatives, which together shall be styled "The Legislature of the State of Texas."

**Article V Section 8. Jurisdiction of District Court.**

District Court jurisdiction consists of exclusive, appellate, and original jurisdiction of all actions, proceedings, and remedies, except in cases where exclusive, appellate, or original jurisdiction may be conferred by this Constitution or other law on some other court, tribunal, or administrative body. District Court judges shall have the power to issue writs necessary to enforce their jurisdiction.

The District Court shall have appellate jurisdiction and general supervisory control over the County Commissioners Court, with such exceptions and under such regulations as may be prescribed by law.

**TEXAS PENAL CODE**

**Texas Penal Code Section 2.01. Proof Beyond a Reasonable Doubt**

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or

otherwise charged with, the offense gives rise to no inference of guilt at his trial.

**Texas Penal Code Section 6.02. Requirement of Culpability**

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

(b) If the definition of an offense does not prescribe a culpable mental state, a culpable mental state is nevertheless required unless the definition plainly dispenses with any mental element.

(c) If the definition of an offense does not prescribe a culpable mental state, but one is nevertheless required under Subsection (b), intent, knowledge, or recklessness suffices to establish criminal responsibility.

(d) Culpable mental states are classified according to relative degrees, from highest to lowest, as follows:

(1) intentional;

(2) knowing;

(3) reckless;

(4) criminal negligence.

(e) Proof of a higher degree of culpability than that charged constitutes proof of the culpability charged.

(f) An offense defined by municipal ordinance or by order of a county commissioners court may not dispense with the requirement of a culpable mental state if the offense is punishable by a fine exceeding the amount authorized by Section 12.23.

**Texas Penal Code 8.02. Mistake of Fact**

(a) It is a defense to prosecution that the actor through mistake formed a reasonable belief about a matter of fact if his mistaken belief negated the kind of culpability required for commission of the offense.

(b) Although an actor's mistake of fact may constitute a defense to the offense charged, he may nevertheless be

convicted of any lesser included offense of which he would be guilty if the fact were as he believed.

*****

**D.**

**AFFIDAVITS BY DEFENSE COUNSEL**

The Court ordered that counsel for defense, Ian Cantacuzene, Applicant's counsel on his initial guilty plea, David Rogers, Applicant's counsel on the State's motion to revoke the Applicant's deferred adjudication of guilt and community supervision and Thomas Morgan, counsel for Applicant's brother and co-defendant, to submit affidavits addressing the Applicant's complaints.

**AFFIDAVIT OF IAN CANTACUZENE**
**APPLICANT'S COUNSEL ON HIS INITIAL GUILTY PLEA**

The undersigned appeared in person before me today and stated under oath:

"My name is Rodion Cantacuzene, Jr., I am over the age of 18 and am competent to make this affidavit. The facts stated in this affidavit are within my personal knowledge and are true and correct."

The undersigned counsel was hired by Applicant, Jared Morrison, on January 15, 2004 to represent him on a charge of Sexual Assault of a Child.

Applicant, Jared Morrison, was charged by indictment on February 26, 2004 with the second-degree felony offense of sexual assault of a child by causing the penetration of the sexual organ of a female child under the age of 17 with the sexual organ of the Applicant which was alleged to have occurred on June 11, 2003 in violation of section 22.011 Texas Penal Code.

The brother of Applicant was also charged with the offense of sexual assault of a child against the same victim sexually assaulted by applicant arising out of the same incident. Applicant's brother was represented by Thomas S. Morgan.

The undersigned counsel obtained discovery from the District Attorney's Office and discussed the facts of the case as well as the law with applicant. Applicant admitted to the undersigned counsel that he had engaged in sex with the victim who he thought to be of legal consensual age.

The undersigned counsel and Thomas S. Morgan met with Applicant and his brother to discuss the consequences of proceeding to trial and the fact that it is not a legal defense at the guilt or innocence phase of a trial that the victim may have lied about her age or that applicant and or his brother reasonably believed that the victim was of legal

age to consent to the sexual contact. The undersigned counsel would have explained to applicant that the victim could not consent legally to the sexual assault. The undersigned counsel explained to Applicant that his mistake of fact would not give rise to this defense if he proceeded to trial and that the result of trial would be a conviction for the sexual assault which would result in a final conviction. The undersigned counsel would have explained to applicant the risk in the event of a conviction of a period of incarceration up 20 years in the Texas Department of Criminal Justice. As part of discussions concerning the range of punishment the undersigned counsel would have explained that people convicted of sexual assault of a child are treated very poorly in prison. This treatment could include physical and sexual abuse by other inmates.

Applicant entered a plea of guilty to the indictment and received deferred adjudication. While entering the plea of guilty did not make applicant happy, the Applicant's decision to accept the plea offer in this case was made freely and voluntarily with the knowledge of the facts for and against the defendant, with a knowledge of the full range of punishment and the potential consequences and benefits of a deferred adjudication, with a knowledge of the requirements to register as a sexual offender and with a knowledge of the consequences of a conviction. The

undersigned counsel always explains to a client the right of trial by jury, that the burden of proof is always on the State to prove beyond a reasonable doubt each and every element of the offense charged, a defendant's right to remain silent as well as the right to testify, that the decision to testify was ultimately a defendant's decision, that the defendant also has the right to the appearance confrontation and cross examination of witnesses, and that the defendant always has the right to appeal any conviction or sentence unless such right is waived as part of a plea agreement. The understanding of these rights were also contained in the courts written admonishments which were reviewed and signed by Applicant and the undersigned counsel as part of his plea hearing.

The undersigned counsel has always questioned whether it is just and right that the defense of mistake of fact is unavailable as a legal defense in a sexual assault of a child case. Unfortunately, case law is quite clear that no such defense is legally permissible in the State of Texas. This was true in 2004 when the defendant entered his plea of guilty to the indictment and remains true today at the time the undersigned counsel writes this affidavit.

Applicant unfortunately does not understand that the issue in the case is not whether he intended to have sex

with a child victim. The issue was whether in Midland County, Texas, and on or about June 11, 2003, did the defendant intentionally and knowingly cause the penetration of the sexual organ of the victim by the sexual organ of Applicant, and was the victim a child younger than 17 years of age on or about June 11, 2003 and not the spouse of Applicant.

The undersigned counsel did inform Applicant that his knowledge of the true age of the child was not an element of the offense under section 22.011 of the Penal Code. The undersigned counsel did inform Applicant that the State did not have to prove that the Applicant knew the child was under 17, only that the child was in fact under the age of 17 at the time of the commission of the offense. The undersigned counsel did inform Applicant that mistake of fact therefore is not a defense to the commission of the offense. The undersigned counsel does not believe that he scared or pressured Applicant into taking a plea bargain in this case. The undersigned counsel only told the Applicant the legal reality of his situation based on the law and the facts of the case. The Applicant while not happy with the advice of counsel did knowingly and voluntarily waive his right to trial by jury and entered a plea of guilty with a knowledge of the facts and the law applicable to his case. The undersigned counsel reviewed all the contents of the

District Attorney's file in this case with Applicant. The undersigned counsel did not file a motion to declare the statute unconstitutional as relevant Texas case law has dealt with this issue of the strict liability aspect of 22.011 Penal Code on numerous occasions and confirmed the strict liability of a defendant under 22.011 of the Penal Code. The undersigned counsel does not file frivolous pre-trial motions. Such a motion as Applicant now says should have been filed on his behalf would have been frivolous.

It is unfortunate Applicant finds himself is his current situation, his current incarceration is a result of Applicant's conduct and not a result of ineffective assistance of counsel.

**AFFIDAVIT OF DAVID ROGERS,**
**COUNSEL FOR APPLICANT ON STATE'S MOTION TO REVOKE**
**DEFERRED ADJUDICATION OF GUILT AND COMMUNITY SUPERVISION**

BEFORE ME, the undersigned authority, personally appeared DAVID G. ROGERS, who, by me duly sworn, deposed as follows:

**Initial Appointment and File Review**

I received an order dated March 28, 2100, substituting me for Tom Morgan. I reviewed the Motion to Adjudicate Guilt and I reviewed the District Clerk's file. I reviewed the letter to Judge Darr dated March 5, 2011. I confirmed the plea offer of 7 years in the Texas Department of Criminal justice with the prosecutor.

**1st Client Meeting**

Shortly after receiving the appointment, I had a jail conference with Mr. Morrison. I conveyed the plea offer of 7 years. He rejected the offer. We discussed the Motion to Adjudicate and the fact that he was currently serving a federal prison sentence for Failure to Register as a Sex Offender. We spent a great deal of time discussing his March 5, 2011 letter. I informed him I read the letter and also told him that the judge had not read the letter and considered it an ex parte communication that she was not going to review. Morrison was convinced he received ineffective assistance of counsel at his initial plea because he was not advised of any mistake of fact defense. He had spent several hours in the law library researching the issue. He stated he did not know the girl's age and therefore could not be guilty of the offense. I informed him mistake of fact was not a defense, and knowledge or lack of knowledge about her age was not a defense. However, due to his insistence that it was, I told him I would find some case law to prove his position was incorrect. Further, I told him that the judge was not considering the letter as any type of request for post conviction relief. I told him his request was improper and he needed to file a proper writ as set forth in the Texas Code of Criminal Procedure. I specifically informed him that I was not appointed to represent him on any writ, but was only appointed to represent him on his Motion to Adjudicate.

**Investigation and Preparation**

On March 23, 2011, I researched the issues related to the victim's age. I downloaded *Artiga v. State No. 14-97-01418-CR (1999 Tex. App. Lexis 2878)*. This case held that aggravated assault does not require that the defendant knew the age of the child was under 14. I also downloaded *Johnson v. State 967 S.W.2d 848 (Tex. Crim. 1998)*. This case held the State was not required to show that a defendant knew the victim's age. Additionally, I downloaded *Vasquez v. State 622 S.W.2d 864 (Tex. Crim. 1981)*. This case stated ignorance or mistake of law was not a defense. I downloaded *Mateo v. State 935 S.W.2d 512 (Tex. App-Austin 1996)*. This case held that the State is not required to allege or prove that the defendant knew the complainant's age, and it was not improper to refuse a mistake of fact instruction.

I reviewed the district attorney's file. I had a phone conference with Ian Cantacuzene, Morrison's trial counsel, regarding his plea. I reviewed the file in *United States of America v. Jared Anthony Morrison; MO-10-CR-213, in the Western District of Texas for the Midland Odessa Division.* This included a review of Morrison's signed factual basis

and judgment. Morrison was sentenced to 18 months in the Bureau of Prisons, and the sentence was to run consecutively with the state sentence.

On March 28, 2011, I received a letter from Mr. Morrison, acknowledging that I advised him of his improper filing. Specifically, he stated he realized that he should have filed a habeas corpus. He acknowledged that I told him I found some case law. However, he incorrectly represented that such case law was helpful to his arguments. At no point, did I ever tell Mr. Morrison that the case law I had found would be helpful in overturning his conviction. He also acknowledged that I requested a list of witnesses, but Mr. Morrison represented in his letter that he did not know if anyone would be helpful or not.

On April 7, 2011, I sent Mr. Morrison a letter notifying him that his case was set for trial on April 20, 2011. The trial was continued until April 28, 2011 at the request of the State.

Several days prior to the trial, I had another jail conference with Mr. Morrison. I reviewed my research with him and specifically informed him that he was incorrect in his belief this case law supported his position. I told him this case law established that mistake of fact was not a defense and that the state did not have to prove he knew the victim's age. I also informed him that I discussed the original plea with Ian Cantacuzene and Mr. Cantacuzene disagreed with the allegations included in Mr. Morrison's letter. I explained to Mr. Morrison that at this point, I believed he would not be successful even if he had filed a proper writ, based on the letter's contents. Furthermore, I told him he had not filed a proper writ, and once again, I advised him that I was not appointed to represent him on any writ; the Court was not considering his letter, and any motions for continuances he filed would be denied. I told him based on my file review, my conversation with Mr. Cantacuzene, and my legal research that I did not see any ineffective assistance of counsel and that his legal arguments would fail. I advised him to wait to file any writ until after the hearing on the Motion to Adjudicate.

I stated that it would be best to admit to his conduct while on deferred, accept full responsibility, and plea for mercy. I further told him his current actions were contrary to any acceptance of responsibility. I told him the State could prove the allegations in the motion and if he wanted a lower sentence, he should accept responsibility, explain his actions, and request leniency. I told him witnesses might be

helpful but would not serve as an adequate substitute for him accepting full responsibility. Mr. Morrison disagreed with my legal analysis and my recommendations, and he further instructed me to file a continuance. He believed that he would be acquitted based on the allegations in his letter. Again, I made it clear that his allegations were incorrect and that he was going to trial on April 28, 2011. During this meeting, Mr. Morrison failed to provide me the names of any witnesses and he never indicated he would consider the 7 years plea offer or any other plea offer. Throughout our conversation, Mr. Morrison continued to maintain he was wrongfully convicted.

**Trial-April 28, 2011**

I filed a motion for continuance with the Court as instructed by Mr. Morrison, and I presented the same at the beginning of the Motion to Adjudicate hearing. While I did not believe the motion would be granted, I filed the motion out of an abundance of caution. The State also requested a continuance because Mr. Morrison had appealed his federal sentence and the State wanted to amend its motion to allege Mr. Morrison was simply charged with the offense of Failure to Register as a Sex Offender instead of actually being convicted of the offense. The trial court denied both requests for continuances, and continued forward with the hearing. The Court stated she was adjudicating Mr. Morrison's guilt and then asked if there was any further evidence prior to assessing Mr. Morrison's punishment. Mr. Morrsion had no further evidence, and the State requested that the Court "take judicial notice of the file for that portion of the proceedings, as well as the evidence she heard in the adjudication phase." The Court sentenced Mr. Morrison to 16 years in prison and ordered his sentence to run consecutively with his federal sentence. Mr. Morrison requested to speak to the Court at that time, and I said "no." The Court then gave me the opportunity to consult with Mr. Morrison, and after our consultation, Mr. Morrison did not renew his request to speak with the Court.

**Post Trial**

I filed a Motion for New Trial and a notice of appeal on behalf of Mr. Morrison. On appeal, I raised the following points of error: (1) the trial court's oral pronouncement and written judgment were in conflict; (2) the sentence was cruel and unusual in violation of both the United States and Texas constitutions; (3) the trial court abused its discretion in ordering consecutive sentences; (4) the trial court erred in admitting the sex offender registration file;

and (5) the evidence was insufficient to prove Mr. Morrison violated the terms and conditions of his deferred adjudication. I did not raise the denial of the motion for continuance because I did not believe it was a legally valid issue on appeal as Mr. Morrison did not have any proper writ before the trial court. The appellate court affirmed Mr. Morrison's conviction on appeal.

**Ground 1**

As set forth above, I informed Mr. Morrison that lack of knowledge and mistake of fact were not defenses. I informed him of this fact during our first meeting and I conducted additional research and located case law contrary to Mr. Morrison's position. I informed Mr. Morrison of the holdings of the case law I found. I informed him that based on my file review, legal research, and phone conversation with Mr. Cantacuzene, he would not be successful on a writ that was based on the allegations he was making in his letter. In other words, I told him he would not be successful. I informed him he had not properly filed a writ and the Court was not considering Mr. Morrison's letter as a writ. I told him that a post conviction writ was his only vehicle for attacking the sentence and that he should file this type of writ after the revocation hearing. I told him that it appeared he was not accepting responsibility and therefore he should wait to file a post conviction writ. I told him that I did not believe the Court would grant a motion for continuance. I informed him that he was proceeding to trial on April 28, 2011. I informed him that the entire trial would take place on the April 28th, 2011. I outlined a strategy for the hearing for both the adjudication phase and punishment phase, but he disregarded my advice, refused to take responsibility for his actions, and failed to plead for mercy from the Court at the hearing.

**Ground 9**

As stated above, the Court adjudicated Mr. Morrison guilty of the underlying offense and then asked if there was any further evidence for purposes of assessing Mr. Morrison's punishment. Mr. Morrison did not provide me with the names of any witnesses to be called at the hearing. As stated above, he sent me a letter and indicated he was not sure who could or could not help his case. We had a discussion about the strategy for the hearing, and at no point did Mr. Morrison provide me with the names of any potential witnesses or ask me to contact anyone regarding the case.

**Ground 10**

I told Mr. Morrison that he could not speak because I surmised that what he would say would be unhelpful to his case at that particular time in the proceedings. The Court then gave me an opportunity to consult with Mr. Morrison, and I was able to explain to him why he would not benefit from speaking or addressing the Court. During our consultation, Mr. Morrison told me he wanted to address the issues he had raised in his letter. I told Mr. Morrison that if he was simply going to address his issues from the letter and contend he was not guilty of the underlying offense that these representations and arguments would not benefit him in regards to lessening the sentence the Court had just assessed. After our consultation, Mr. Morrison followed my advice and did not request to speak to the Court again. Mr. Morrison knew that this was his final hearing; that the Court would decide whether to adjudicate him; and that if the Court adjudicated his guilt, the Court would then sentence him.

**Ground 11**

I did not raise the denial of the Motion for Continuance in Mr. Morrison's appeal. I did not believe it was a valid point of error. I could not show harm. Mr. Morrison did not have a proper writ before the Court, and even if he did have a proper writ before the Court, Mr. Morrison's legal basis was incorrect. I reviewed the file and transcript from an appellate standpoint and determined that my initial analysis was correct and that the denial of the motion was not an abuse of discretion. Thus, I did not include the denial of the motion for continuance as an issue on appeal.

**Ground 13**

As stated above, I advised Mr. Morrison that I was not appointed to represent him on any writ and that I was only appointed to represent him on the Motion to Adjudicate. However, as a courtesy to Mr. Morrison, I reviewed the file, performed legal research, and consulted with Mr. Cantacuzene. I then made Mr. Morrison aware of the results of my investigation, and I told him I did not believe he would be successful on his writ. Clearly, Mr. Morrison disagreed with my legal opinion regarding same.

**AFFIDAVIT OF THOMAS MORGAN**
**ATTORNEY FOR APPLICANT'S BROTHER**
**AND CO-DEFENDANT, JASON MORRISON**

Before me, the undersigned authority, personally appeared Thomas S. Morgan, who, upon his oath, stated the following:

"I did represent Jason Morrison with regard to the charge by indictment, of Sexual Assault of a Child (under 17 years of age).

I was retained on the case. Jason Morrison informed me the sexual activity was totally consensual by both he and the victim. Moreover, Jason Morrison told me he believed the victim was, as best I can recall, 21 years of age, but certainly at least 17 years of age. He totally believed she was an adult.

I informed Jason Morrison, based on Texas case law, that even though he was convinced she was an adult, at all times, what he believed did not matter at all. Indeed, the only thing the Midland County District Attorney had to prove was that she was, indeed, under the age of 17 when this sexual activity occurred.

At no time did I ever tell Jason Morrison that there was a legal defense of "mistake of fact", so that I never told Jason Morrison that he could take the case to trial and, if the jury believed that he mistakenly believed that she was an adult, this would be a defense to this indictment. It was very important that Jason Morrison understood that believing the child was an adult was not a defense, and did not build his hopes that he had any chance of being found not guilty once the evidence revealed the victim was under 17 at the time of the sexual activity.

What I told Jason Morrison was the law, in Texas, in 2004, and I believe the law is still the law at this time. This is a strict liability statute.

I always give my clients the option of taking the case to a jury or not. I always carefully go over all options to my client, including criminal cases. The Midland County District Attorney did offer deferred adjudication, which meant that Jason Morrison would have no conviction on his record at all, Jason Morrison would not go to prison, nor do time in the Midland County Jail as a condition of community supervision. He would spend every night in his own bed, in his own home, if he did not violate the conditions of

community supervision.

At no time did I coerce, force, scare, or pressure Jason Morrison to waive his right to trial by jury and enter a plea of guilty to the offense of sexual assault of a child, pursuant to a plea agreement for a deferred adjudication of guilt for 9 years. Rather, Jason Morrison pled guilty to sexual assault of a child freely and voluntarily.

I have never told neither Jason Morrison nor his brother Jared Morrison, that the defense of mistake of fact was a defense that would have been available at a jury trial. As I mentioned, this is a strict liability statute, and so informed Jason Morrison. I do not recall whether I talked to Jared Morrison about the defense of mistake of fact, however, I know I never told Jason Morrison that the defense of mistake of fact would have existed had he had a jury trial.

I correctly informed Jason Morrison of the law, namely, that mistake of fact was not a defense at all under Texas law, and what he believed in mind (sic), regarding the victim's age, was not a defense at all."

**E.**

**APPLICANT'S GROUND ONE**

**GROUND ONE:** Counsel [David Rogers] failed to properly inform applicant ("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, and Article 1 § 10 of the Texas Constitution. (Ineffective assistance of counsel)

**FACTS SUPPORTING GROUND ONE:**

(1) On May 6, 2004 Morrison was pressured into pleading guilty to a Texas Penal Code 22.011 (a)(2)(A) (22.011) violation. He was sentence 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, 2001 Morrison plead guilty in federal court to a federal S.O.R.N.A. violation.

(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 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", and "E").

(5) On March 18, 2011 David Rogers ("Rogers") replaced Morrison original court appointed counsel Tom Morgan ("Morgan")[on State's motion to revoke community supervision and to proceed with an adjudication of guilt] 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 committing 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 he was entitled to a mistake of fact defense, and because he was not yet convicted of the 22.011 charge, according to the 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 [of Section 22.011 Penal Code] that the prosecutor does not have to prove [the defendant's] knowledge of the complainant'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 pleading to the court [letters Applicant sent 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, all while Morrison was relying on hopes of a new jury trial. (See Exhibit "E" A 9).

(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 finding 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 defendant 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 almost seven years after the judgment.

(8) Morrison was denied counsel in a critical stage of the criminal proceedings, or whenever his substantial rights were affected, by Rogers stating on the record that he was not assigned to help Morrison with his Writ of Habeas Corpus, See (RR 3 p. 6, and 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 proceedings by not appointing him counsel to assist with his pre-conviction Habeas Corpus issue, even at Morrison's request."

**1.**

The Applicant complains in ground one "Counsel [David

Rogers] failed to properly inform applicant ("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, and Article 1 § 10 of the Texas Constitution. (Ineffective assistance of counsel)." The Applicant states "(a) Morrison was never counseled about the court of Appeals' interpretation [of Section 22.011 Penal Code] that the prosecutor does not have to prove [the defendant's] knowledge of the complainant'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."

The affidavit by Ian Cantacuzene, Applicant's attorney on his original plea of guilty, states that counsel informed the Applicant that the Applicant that the Applicant's knowledge that the alleged victim was under the age of 17 was not an element of the offense of sexual assault of a child that the State had to prove and the defense of mistake of fact did not apply to the offense.

The affidavit by David Rogers, Applicant's counsel on the State's motion to revoke community supervision and to proceed with an adjudication of guilt, states that he also informed the Applicant that the Applicant that the

Applicant's knowledge that the alleged victim was under the age of 17 was not an element of the offense of sexual assault of a child that the State had to prove and the defense of mistake of fact did not apply to the offense. The affidavit by David Rogers also states, "On March 23, 2011, I researched the issues related to the victim's age. I downloaded *Artiga v. State No. 14-97-01418-CR (1999 Tex. App. Lexis 2878).* This case held that aggravated assault does not require that the defendant knew the age of the child was under 14. I also downloaded *Johnson v. State 967 S.W.2d 848 (Tex. Crim. 1998).* This case held the State was not required to show that a defendant knew the victim's age. Additionally, I downloaded *Vasquez v. State 622 S.W.2d 864 (Tex. Crim. 1981).* This case stated ignorance or mistake of law was not a defense. I downloaded *Mateo v. State 935 S.W.2d 512 (Tex. App-Austin 1996).* This case held that the State is not required to allege or prove that the defendant knew the complainant's age, and it was not improper to refuse a mistake of fact instruction." Mr. Rogers also states in his affidavit, "Several days prior to the trial, I had another jail conference with Mr. Morrison. I reviewed my research with him and specifically informed him that he was incorrect in his belief this case law supported his position. I told him this case law established that mistake of fact was not a defense and that the state did not have to

prove he knew the victim's age." The affidavit by David Rogers further states, "As set forth above, I informed Mr. Morrison that lack of knowledge and mistake of fact were not defenses. I informed him of this fact during our first meeting and I conducted additional research and located case law contrary to Mr. Morrison's position. I informed Mr. Morrison of the holdings of the case law I found."

The law is clear. Sexual assault of a child under Section 22.011 Penal Code is a strict liability offense and the actor's knowledge that the child was under the age of 17 is not an element of the offense, and the statute does not require that the State allege or prove that the actor knew that the child was under the age of 17 at the time of the commission of the offense. The defense of mistake of fact under Section 8.02 Penal Code that the actor formed a reasonable but mistaken belief that the child was 17 years of age or older at the time of the offense does not apply to sexual offenses against children.

The Court finds that both Ian Cantacuzene, Applicant's counsel on the Applicant's guilty plea, and David Rogers, Applicant's counsel on the State's motion to revoke community supervision, both clearly and correctly informed the Applicant of the law applicable to Applicant's offense of sexual assault of a child. The Court finds that the

Applicant's complaint in ground one that "Counsel [David Rogers] failed to properly inform applicant ("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, and Article 1 § 10 of the Texas Constitution. (Ineffective assistance of counsel)" and that the Applicant's complaint that "Morrison was never counseled about the court of Appeals' interpretation [of Section 22.011 Penal Code] that the prosecutor does not have to prove [the defendant's] knowledge of the complainant'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" is without merit.

**2.**

The Applicant also complains in ground one, "(b) Morrison was never counseled about his improper pleading to the court [letters Applicant sent 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, all while Morrison was relying on hopes of a new jury trial. (See Exhibit "E" A 9)."

On March 5, 2011, the Applicant sent Judge Robin Darr a letter file marked March 9, 2011. A notation on the left margin the letter dated March 5, 2011 states "Ex parte letter has not been seen by Judge Darr but copy faxed to defense atty tom Morgan and State's atty Mike McCarthy." The Applicant stated in the letter, "I would like to file a petition for discretionary review and also withdraw my guilty plea that I was forced into pleading on May 6th, 2004." The Applicant stated, "In June of 2003 my cousin brought a girl to our house in which she brought a bottle of Tequilla (sic) in with her and after ten or twenty minutes of conversation she asked everyone if we wanted to take turns doing body shots on her. After that one thing led to another and then the offense took place. It was 100 percent consentual (sic) and she was never harmed or threatened in any manner regardless of what some of the discovery says. We thought she was 21 because my cousin was 18 and was not old enough to purchase the tequilla (sic). She also dressed, cooked and acted like she was 21. Plus we did not even think my cousin would of brought a minor to our house. Well six months later we found out from a detective she was not of legal age then we turned ourselves in for the charge that over the last seven years has cost us over $40,000 between

bond, attorney fees, and probation and counseling costs, we have lost a lot of liberty and unalienable rights that most violent criminal still have including the pursuit of happiness." The Applicant further stated in the letter, "According to Texas Penal Code 22.011 sexual assault it says in subsection (a2) a person commits an offense if the person "intentionally" or "knowingly": A) causes the penetration of the sexual organ of a child by any means," so one must intentionally or knowingly do all parts of the said statute in order to be guilty if in the statute it mentions "intentionally" or "knowingly." Therefore since I did not knowingly or intentionally cause the penetration of a "childs" (sic) sexual organ how can I be criminally responsible, labeled, and treated like a socially dangerous individual who needs to be incarcerated for at least two years or made to go through years of expensive counseling and monitored closely by the state since during the offense my mental state was not in the capacity of engaging in a crime which the statute states is a requirement to commit that offense and my attorney told me that my mental state of not knowing she was a child did not matter. In my interpretation of the law, with this new information I found including case law of some cases like mine that ended in acquittals with this same evidence I could of used this new information as a defense. Therefore I believe I have the due process right to start my trial over because of ineffective cousel (sic) and the fact I was not mentally fit to make a

choice to my right to a fair jury trial because I was scared and pressured into taking the plea bargin (sic) by my attorney. Also we were never told we could have requested a "jury charge on mistake of fact" which is in Teas Penal code 8.02, or the fact we could've possibly used "rule 412" evidence of previous sexual conduct in criminal cases."

The Applicant requested in the letter, "It is my hope and prayer that you accept my request and let me use my new information and have a chance to a fair trial. I sent a letter to the county clerk requesting the same thing including all my discovery in my case. I hope that is OK I'm not sure of the right process of filing petitions and requesting stuff. So I ask you for our permission that I can acquire all of my discovery. I'd like also to request new counsel due to the fact my court appointed attorney who is Tom Morgan was my brother/co-defendant's paid attorney seven years ago and was responsible for not giving us adequate knowledge of the law and is now a conflict of interest in my case. I would also like to request the courts allow me to take a polygraph test to prove I did not know the age of the girl in my case and I did not force her. I apologize again for taking up your time with this matter and I think you dearly for your consideration with my petition." See the letter quoted above.

David Rogers, counsel for the Applicant on the State's

motion to revoke community supervision, states in his affidavit, "Several days prior to the trial, I had another jail conference with Mr. Morrison. I reviewed my research with him and specifically informed him that he was incorrect in his belief this case law supported his position. I told him this case law established that mistake of fact was not a defense and that the state did not have to prove he knew the victim's age. I also informed him that I discussed the original plea with Ian Cantacuzene and Mr. Cantacuzene disagreed with the allegations included in Mr. Morrison's letter. I explained to Mr. Morrison that at this point, I believed he would not be successful even if he had filed a proper writ, based on the letter's contents. Furthermore, I told him he had not filed a proper writ, and once again, I advised him that I was not appointed to represent him on any writ; the Court was not considering his letter, and any motions for continuances he filed would be denied. I told him based on my file review, my conversation with Mr. Cantacuzene, and my legal research that I did not see any ineffective assistance of counsel and that his legal arguments would fail. I advised him to wait to file any writ until after the hearing on the Motion to Adjudicate." Mr. Rogers further states in his affidavit, "As set forth above, I informed Mr. Morrison that lack of knowledge and mistake of fact were not defenses. I informed him of this fact during our first meeting and I conducted additional research and located case law contrary to Mr. Morrison's position. I

informed Mr. Morrison of the holdings of the case law I found. I informed him that based on my file review, legal research, and phone conversation with Mr. Cantacuzene, he would not be successful on a writ that was based on the allegations he was making in his letter. In other words, I told him he would not be successful. I informed him he had not properly filed a writ and the Court was not considering Mr. Morrison's letter as a writ. I told him that a post conviction writ was his only vehicle for attacking the sentence and that he should file this type of writ after the revocation hearing. I told him that it appeared he was not accepting responsibility and therefore he should wait to file a post conviction writ. I told him that I did not believe the Court would grant a motion for continuance. I informed him that he was proceeding to trial on April 28, 2011. I informed him that the entire trial would take place on the April 28$^{th}$, 2011. I outlined a strategy for the hearing for both the adjudication phase and punishment phase, but he disregarded my advice, refused to take responsibility for his actions, and failed to plead for mercy from the Court at the hearing."

Applicant's letter to the court did not constitute an Application for postconviction writ of habeas corpus under Article 11.072 C.C.P. The Applicant's right to appeal from his plea of guilty and deferred adjudication of guilt had long expired. David Rogers, Applicant's attorney on the

State's motion to revoke the Applicant's community supervision, did in fact counsel the Applicant about his improper pleading to the court and informed the Applicant that his attempted request for relief through the letter was futile.

The Applicant's complaint is without merit.

**3.**

The Applicant complains, "(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."

The Applicant's complaints set out in his letter to the court did not constitute an application for postconviction writ of habeas corpus under Article 11.072 C.C.P.. The Applicant was not entitled to court appointed counsel for the purpose of filing an application for postconviction writ of habeas corpus under Article 11.07 C.C.P. The Applicant's complaints in his letter to the court that the State was required to prove that the Applicant's knew that the child victim was under 17 years of age and that the Applicant was entitled to the defense of mistake of fact with respect to the age of the alleged victim are not the law and would not

entitle the Applicant to any relief under a properly filed application for postconviction writ of habeas corpus under Article 11.072 C.C.P. Finally, defense counsel is not required to do a futile thing.

The Applicant's complaint is without merit.

**4.**

The Applicant complains, "(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 finding 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 defendant which made the pleadings proper."

On March 5, 2011, the Applicant sent Judge Robin Darr a letter file marked March 9, 2011. A notation on the left margin the letter dated March 5, 2011 states "Ex parte letter has not been seen by Judge Darr but copy faxed to defense atty tom Morgan and State's atty Mike McCarthy." The Applicant was represented on March 5, 2011 on the State's motion to revoke community supervision by Tom Morgan.

On March 9, 2011, the Applicant's attorney, Tom Morgan, filed a motion to withdraw as counsel of record. See motion to withdraw by Tom Morgan. On March 18, 2011, the Court granted Mr. Tom Morgan's motion to withdraw as counsel and appointed David Rogers, attorney at law, to represent the Applicant. See Order Substituting Counsel. On April 28, 2011, Applicant's attorney, David Rogers, filed a motion for continuance of the revocation hearing set for April 28, 2011. See Motion for Continuance filed with the Clerk of the Court on May 2, 2011. The Motion for Continuance states in section 2, "2. The Defendant has filed a Post Conviction Writ or has attempted to file a Post Conviction Writ challenging the original conviction. The Defendant requests that this trial be postponed until the Post Conviction Writ Process is concluded." See Motion for Continuance. The motion for continuance was denied.

The Applicant was represented by Tom Morgan on March 5, 2011 until he was relieved on March 18, 2011 and David Rogers appointed on March 18, 2011. The Applicant was not "a pro se defendant which made the pleadings proper." The Applicant's letter to the court on March 5, 2011 did not constitute an application for postconviction writ of habeas corpus under Article 11.072 C.C.P. and, moreover, stated no ground for relief under Article 11.072 C.C.P.

The Applicant's complaint is without merit.

**5.**

The Applicant complains, "(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 almost seven years after the judgment."

Mr. David Rogers states in his affidavit, "As set forth above, I informed Mr. Morrison that lack of knowledge and mistake of fact were not defenses. I informed him of this fact during our first meeting and I conducted additional research and located case law contrary to Mr. Morrison's position. I informed Mr. Morrison of the holdings of the case law I found. I informed him that based on my file review, legal research, and phone conversation with Mr. Cantacuzene, he would not be successful on a writ that was based on the allegations he was making in his letter. In other words, I told him he would not be successful. I informed him he had not properly filed a writ and the Court was not considering Mr. Morrison's letter as a writ. I told him that a post conviction writ was his only vehicle for attacking the sentence and that he should file this type of writ after the revocation hearing. I told him that it

appeared he was not accepting responsibility and therefore he should wait to file a post conviction writ. I told him that I did not believe the Court would grant a motion for continuance. I informed him that he was proceeding to trial on April 28, 2011. I informed him that the entire trial would take place on the April 28th, 2011. I outlined a strategy for the hearing for both the adjudication phase and punishment phase, but he disregarded my advice, refused to take responsibility for his actions, and failed to plead for mercy from the Court at the hearing."

The Applicant's complaint is without merit.

6.

The Applicant complains, "(8) Morrison was denied counsel in a critical stage of the criminal proceedings, or whenever his substantial rights were affected, by Rogers stating on the record that he was not assigned to help Morrison with his Writ of Habeas Corpus, See (RR 3 p. 6, and 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 proceedings by not appointing him counsel to assist with his pre-conviction Habeas Corpus issue, even at Morrison's request."

An indigent defendant is not entitled to court appointed counsel for the purpose of filed an application for postconviction writ of habeas corpus under Article 11.072 C.C.P. David Rogers, Applicant's counsel, did in fact counsel Applicant and inform him that in a prosecution for sexual assault of a child the State is not required to prove that the defendant knew the child was under age and that mistake of fact as to the age of the child is not a defense. The Applicant's complaints in his letter that the law requires the State to prove in a prosecution for sexual assault of a child that the defendant knew that the child was under 17 years of age and that the defense of mistake of fact applied to the offense is not the law and would not entitle the Applicant to relief under a properly filed application for postconviction writ of habeas corpus under Article 11.072 C.C.P.

The Applicant's complaint is without merit.

**F.**

**APPLICANT'S GROUND TWO**

**GROUND TWO:** Texas courts have violated Article 2 § 1, and Article 1 § 19 of the Texas Constitution by suspending legislative written law without constitutional authority, in violation of Article 1 § 28 of the Texas Constitution, at the same time violating Article 3 § 1, and the Fourteenth and Fifth Amendments of the United states 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, 201, and government Code §§ 312.002, 311.002, 311.011, 311.021, 311.022. This separation of powers violation has denied Morrison his right to due process.

**FACTS SUPPORTING GROUND TWO:**

Since its reenactment in 1983, the Texas courts have violated the Separation of Powers Doctrine by going outside of their constitutional boundries (sic) 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 22.0111 s being a strict liability offense, against legislative intent, by first going to extratextual (sic) factors outside of the plain language of the statutes and citing pre-1983 case law to determine:

(1) That the complaint being a child is not an element of the crime in regards to the prescribed CMS, suspending Penal code section 2.01.

(2) The state does not have to how 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 theses statutes along with them not following the Statutory Construction 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 plea (sic) guilty, even though he was, according to the plain language of the statute in 22.011 in conjunction with 6.02, 8.02 and 2.01, and Government code Chapter 311 and § 312.002 not guilty of all elements of the offense defined in 22.011 (a)(2)(A).

The Applicant's complaints as stated above are without merit.

G.

APPLICANT'S GROUND THREE

**GROUND THREE:** 22.011 is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article 1 § § 3, 19 of the Texas Constitution.

**FACTS SUPPORTING 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 Court of Appeals and state as a legitimate State's interest for the statute. This violation causes 22.011 to be underinclusive (sic). 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.

The Applicant's complaints as stated above are without merit.

H.

APPLICANT'S GROUND FOUR

**GROUND FOUR:** 22.011 is unconstitutional as-applied to Morrison's specific situation because it violated Morrison's equal protection rights under the Fourteenth Amendment of the United States Constitution and Article 1 § § 3, 19 of the Texas Constitution.

**FACTS SUPPORTING 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 (White) who brought the minor to Morrison's house with alcohol, and told Morrison and Morrison's co-defendant Jason Morrison 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, 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.

The Applicant's complaints as stated above are without merit.

**I.**

**APPLICANT'S GROUND FIVE**

**GROUND FIVE:** 22.011 is unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article 1 § § 3, 19 of the Texas Constitution.

**FACTS SUPPORTING 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 Court of Appeals) it treats violators of 22.011 differently from violators of all other felonies, obscenity 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 courts and prosecutors as being a strict liability offense, despite Supreme Court holdings of proper statutory construction that say otherwise. That violates the Equal Protection of Laws because all other felonies, common laws, and obscenity laws that 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.

22.0111 is the only statute that section 602 does not apply to, according to the Court of Appeals. That is also a violation of Equal Protection of Laws.

The Applicant's complaints as stated above are without merit.

**J.**

**APPLICANT'S GROUND SIX**

**GROUND SIX:** 22.011 is unconstitutional because it violates the First, Fifth, Ninth, and Fourteenth Amendments of the United States Constitution along with Article 1 § § 9, 19 of the Texas Constitution by being overbroad in its strict liability interpretation.

**FACTS SUPPORTING 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 or 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 legitimate state's interest at stake. 22.011 has been interpreted by the Court of Appeals 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 or 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.

The 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 a sexual relationship with a 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 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 a constitutionally protected natural right, 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 than 25 years to alleviate the possibility they may end up in prison for 20 years for making a mistake in judgement (sic) of someone's age without any kind of defense. The strict liability interpretation also make 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 applied to Morrison if the statute was interpreted like the plain language of the statute suggests, to modify "of a child", or if the courts at least allowed a reasonable mistake of age defense like the federal laws offer. 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 and legitimate state's interests, and it would not inhibit nor chill these First Amendment protected rights.

The Applicant's complaints as stated above are without merit.

## K.

## APPLICANT'S 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 and Article 1 & 19 of the Texas Constitution by being unconstitutionally vague and ambiguous.

**FACTS SUPPORTING GROUNG (SIC) 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 Court of Appeals as only 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 comlaintant (sic) 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 more naturally is 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 at 14 to 16 year old child's (sic). This is how the plan language of the statute is literally read using correct rules of English grammar and syntax.

Having two interpretations, one that is interpreted by the plain language of the statute that the legislators prescribed, which have no indications of strict liability, and the other being interpreted with a subjective view by the Court of Appeals, 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 case law.

The vagueness of 22.011 has also not established determinate guidelines for law enforcement and can and has impermissibly deligated (sic) 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.

The Applicant's complaints as stated above are without merit.

**L.**

**APPLICANT'S GROUND EIGHT**

**GROUND EIGHT:** Morrison's rights under the Sixth, Fourteenth, and Article 1 § 9 clause 2 of the United States Constitution, and Article 1 §§ 10, 12, 19, and Article 5 section 8 of the Texas Constitution was 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 with properly filing his complaint, and the court did not properly notify him about the improper ex parte communication that was reason for denying continuance.

**FACTS SUPPORTING GROUND EIGHT:**

Morrison presented a Motion for Continuance at the beginning of his motion to revoke probation hearing in order

to postpone the 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 and Exhibits "JJ" and "E" p.7).

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 of the elements of 22.011 as the plain language of the statute suggests. (See Exhibits "D", "E", 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 replace 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 Motion for Continuance to allow Morrison time to properly file his pre-trial 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 essence is suspending the right of Writ of Habeas Corpus.

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 with properly filing his complaint, and the court did not properly notify him about the improper ex parte communication that was reason for denying continuance.

The Applicant complains in ground eight that "Morrison's rights under the Sixth, Fourteenth, and Article 1 § 9 clause 2 of the United States Constitution, and Article 1 §§ 10, 12, 19, and Article 5 section 8 of the Texas Constitution was 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 Applicant pled guilty to the offense of sexual assault of a child on May 6, 2004, and an adjudication of guilt was deferred and the Applicant was placed on community supervision. The State's filed a motion to revoke community supervision and to proceed with an adjudication of guilt and the motion was heard on the 28th day of April, 2011. Counsel for the Applicant filed a motion for continuance on the day of the hearing that stated in item 2, "The Defendant has filed a Post Conviction Writ or has attempted to file a Post Conviction Writ challenging the original conviction. The Defendant requests that this trial be postponed until the Post Conviction Writ Process is concluded." See the Defendant's motion for continuance filed on April 28, 2011, the day of the scheduled hearing. The trial court denied the Defendant's motion for continuance.

The Applicant had every right under Article 11.072 C.C.P. to file an application for postconviction writ of habeas corpus to attempt to set aside his deferred adjudication and community supervision for the offense of sexual assault of a child entered on May 6, 2004. The application for postconviction writ of habeas corpus under Article 11.072 C.C.P. may be filed by counsel for the

applicant or by the applicant acting pro se. A defendant, indigent or not, does not have a right to the appointment of counsel for the purposes of filing a postconviction writ of habeas corpus under Article 11.072 C.C.P. The Applicant had 6 years, 11 months and 22 days from the date of his deferred adjudication on May 6, 2004 to the date of the hearing on the State's motion to revoke community supervision on April 28, 2011 to file an application for postconviction writ of habeas corpus under Article 11.072 C.C.P. to set aside his deferred adjudication and community supervision. The Applicant's pro se letter to the court dated March 5, 2011 in which the Applicant contended that in a prosecution for the offense of sexual assault of a child, the State had to prove that the defendant knew that the victim was under 17 years of age and that the defense of mistake of fact applied to the offense did not constitute an application for postconviction writ of habeas corpus under Article 11.072 C.C.P. A court is not required to continue a hearing on a motion to revoke community supervision to allow the defendant to file an application for postconviction writ of habeas corpus under Article 11.072 C.C.P. to attack the underlying community supervision. Overruling the Applicant's motion for continuance did not prevent the Applicant "from exercising his constitutional right for Writ of Habeas Corpus in the trial court" and did not prevent the Applicant

"from objecting and preserving on record his issues raised in this instant Writ of Habeas Corpus for further review."

The Applicant also complains that "[t]he 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 with properly filing his complaint, and the court did not properly notify him about the improper ex parte communication that was reason for denying continuance."

First, the Court is not required to appoint an indigent defendant counsel for the purpose of filing a postconviction writ of habeas corpus under Article 11.072 C.C.P. Second, David Rogers, counsel for the Applicant on the State's motion to revoke community supervision, did in fact "effectively counsel him about the decisions relating to his habeas corpus issues." The habeas issues were whether in a prosecution for sexual assault of a child, the State had the burden to prove that the defendant knew that the child was younger than 17 years of age and whether the defense of mistake of fact as to the age of the child applied to the offense of sexual assault of a child.

The affidavit by Ian Cantacuzene, Applicant's attorney on his original plea of guilty, states that counsel informed the Applicant that the Applicant that the Applicant's

knowledge that the alleged victim was under the age of 17 was not an element of the offense of sexual assault of a child that the State had to prove and the defense of mistake of fact did not apply to the offense.

The affidavit by David Rogers, Applicant's counsel on the State's motion to revoke community supervision and to proceed with an adjudication of guilt, states that he also informed the Applicant that the Applicant that the Applicant's knowledge that the alleged victim was under the age of 17 was not an element of the offense of sexual assault of a child that the State had to prove and the defense of mistake of fact did not apply to the offense. The affidavit by David Rogers also states, "On March 23, 2011, I researched the issues related to the victim's age. I downloaded *Artiga v. State No. 14-97-01418-CR (1999 Tex. App. Lexis 2878)*. This case held that aggravated assault does not require that the defendant knew the age of the child was under 14. I also downloaded *Johnson v. State 967 S.W.2d 848 (Tex. Crim. 1998)*. This case held the State was not required to show that a defendant knew the victim's age. Additionally, I downloaded *Vasquez v. State 622 S.W.2d 864 (Tex. Crim. 1981)*. This case stated ignorance or mistake of law was not a defense. I downloaded *Mateo v. State 935 S.W.2d 512 (Tex. App-Austin 1996)*. This case held that the State is not required to allege or prove that the defendant

knew the complainant's age, and it was not improper to refuse a mistake of fact instruction." Mr. Rogers also states in his affidavit, "Several days prior to the trial, I had another jail conference with Mr. Morrison. I reviewed my research with him and specifically informed him that he was incorrect in his belief this case law supported his position. I told him this case law established that mistake of fact was not a defense and that the state did not have to prove he knew the victim's age." The affidavit by David Rogers further states, "As set forth above, I informed Mr. Morrison that lack of knowledge and mistake of fact were not defenses. I informed him of this fact during our first meeting and I conducted additional research and located case law contrary to Mr. Morrison's position. I informed Mr. Morrison of the holdings of the case law I found."

The Applicant also complains that "the court did not properly notify him about the improper ex parte communication that was reason for denying continuance." The court is not counsel for defendant. The Court sent the Applicant's pro se letter or communication to the Court dated March 5, 2011 to Tom Morgan, court appointed counsel for the Applicant. The Applicant's "ex parte communication" was not the "reason" that the court denied the Applicant's motion to continue the hearing on the State's motion to revoke community supervision.

The Applicant's complaints as stated above are without merit.

M.

**APPLICANT'S GROUND NINE**

**GROUND NINE:** Rogers was ineffective by not requesting a seperate (sic) 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 and Article 1 § 10 of the Texas Constitution.

**FACTS SUPPORTING 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 p.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 separate punishment hearing to allow Morrison character witnesses to testify on his behalf befor (sic) 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 (sic) citizens of the town who knew his character to testify that he was a hard working and talented business owner, and family man who is an asset to the community, not a danger to society, and that he just made a few mistakes in judgement (sic), but

does not belong in prison for a long time. These prominate (sic) citizens who knew his character were Morrison's mother Jana Morrison (A long time teacher at Midland Freshman High School) who would have obviously testified to her sons 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, which would have mitigated his punishment.

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 liaison officer who also knew Morrison's character, would have also 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 also testified that Morrison had good character, and benifited (sic) 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 the punishment. (See Exhibits "L" p. 2-3, "M" P. 5).

Because Rogers did not request a seperate (sic) 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 cause the court not to hear any mitigating testimony in Morrison's favor and only heard the aggravating factors from the state, which prejudiced Morrison and cause 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 (sic) 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.

That affidavit by David Rogers states, "As stated above, the Court adjudicated Mr. Morrison guilty of the underlying offense and then asked if there was any further evidence for purposes of assessing Mr. Morrison's punishment. Mr. Morrison did not provide me with the names of any witnesses to be called at the hearing. As stated above, he sent me a letter and indicated he was not sure who could or could not help his case. We had a discussion about the strategy for the hearing, and at no point did Mr. Morrison provide me with the names of any potential witnesses or ask me to contact anyone regarding the case."

The Court finds the Applicant's complaint as stated above without merit.

N.

**APPLICANT'S GROUND TEN**

**GROUND TEN:** Morrison's rights under the First, Fifth, Sixth, and Fourteenth Amendment of the United States Constitution, along with his rights under Article 1 § § 10, 19 of Texas Constitution were violated when the trial court and his attorney both denied Morrison the right to address the court on his own behalf.

**FACTS SUPPORTING GROUND TEN:**

Before the court was adjourned and shortly after the sentencing 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 not allowed to speak on his own behalf which violated the Sixth Amendment.

Article 1 § 10 of the Texa's Constitution says:

"A defendant shall have the right of being heard by himself or counsel or both."

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 separate 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 for a separate 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 benefit.

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 separate 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 issue 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 separate punishment hearing to be in compliance with Morrison's constitutional rights by allowing him the compulsory process of obtaining witnesses in his favor during the punishment hearing where the witnesses would have testified in Morrison's favor. There is a very reasonable probability that the trial court 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 allocate 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 issue 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.

Applicant's attorney, David Rogers, states in his affidavit, "I told Mr. Morrison that he could not speak because I surmised that what he would say would be unhelpful to his case at that particular time in the proceedings. The Court then gave me an opportunity to consult with Mr. Morrison, and I was able to explain to him why he would not benefit from speaking or addressing the Court. During our

consultation, Mr. Morrison told me he wanted to address the issues he had raised in his letter. I told Mr. Morrison that if he was simply going to address his issues from the letter and contend he was not guilty of the underlying offense that these representations and arguments would not benefit him in regards to lessening the sentence the Court had just assessed. After our consultation, Mr. Morrison followed my advice and did not request to speak to the Court again. Mr. Morrison knew that this was his final hearing; that the Court would decide whether to adjudicate him; and that if the Court adjudicated his guilt, the Court would then sentence him."

The Court finds the Applicant's complaint as stated above without merit.

O.

**APPLICANT'S GROUND ELEVEN**

**GROUND ELEVEN:** Morrison's rights under the Sixth and Fourteenth Amendments of the United States Constitution along with Article 1 & 10 of the Texas Constitution was violated when Morrison's appellate counsel David Rogers did not raise on appeal the trial court's err in overruling his Motion for Continuance.

**FACTS SUPPORTING GROUND ELEVEN:**

David Rogers asked 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 he was on probation for. (See RR 3 pp 5-9 and Exhibit "J").

Motion for Continuance was overruled and the trial court went ahead with 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 Judgment (see Exhibit "K"). In ground 4 was a complaint that the trial judge erred by not granting Morrison's continuance.

On July 20, 2011 Rogers filed for Notice of Appeal.

On October 10, 2011 Rogers filed the appellant's brief. He raise 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 reasoning stated in ground eight about Morrison's right of Writ of Habeas Corpus being denied, that the Court of Appeals would have held a decision in Morrison's favor and remanded 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.

David Rogers, Applicant's attorney on appeal states in his affidavit, "I did not raise the denial of the Motion for Continuance in Mr. Morrison's appeal. I did not believe it was a valid point of error. I could not show harm. Mr. Morrison did not have a proper writ before the Court, and even if he did have a proper writ before the Court, Mr. Morrison's legal basis was incorrect. I reviewed the file and transcript from an appellate standpoint and determined

that my initial analysis was correct and that the denial of the motion was not an abuse of discretion. Thus, I did not include the denial of the motion for continuance as an issue on appeal."

The Court finds the Applicant's complaint as stated above without merit.

**P.**

**APPLICANT'S 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 along with Article 1 §§ 10, 19 of the Texas 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.

**FACTS SUPPORTING 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 solely 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 2 and ground 5. 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 searched 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 probed he was not guilty of all 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.

The affidavit of Ian Cantacuzene, counsel for the Applicant upon his plea of guilty to the offense of sexual

assault of a child resulting in a deferred adjudication of guilt, states, "The undersigned counsel did inform Applicant that his knowledge of the true age of the child was not an element of the offense under Section 22.011 of the Penal Code. The undersigned counsel did inform Applicant that the State did not have to prove that the Applicant knew the child was under 17, only that the child was in fact under the age of 17 at the time of the commission of the offense. The undersigned counsel did inform Applicant that mistake of fact therefore is not a defense to the commission of the offense."

The law is clear. Sexual assault of a child under Section 22.011 Penal Code is a strict liability offense and the actor's knowledge that the child was under the age of 17 is not an element of the offense, and the statute does not require that the State allege or prove that the actor knew that the child was under the age of 17 at the time of the commission of the offense. The defense of mistake of fact under Section 8.02 Penal Code that the actor formed a reasonable but mistaken belief that the child was 17 years of age or older at the time of the offense does not apply to sexual offenses against children. The offense of sexual assault of a child under Section 22.011 Penal Code is not overbroad or vague in violation of the Constitution of the United States or the State of Texas and does not violate

equal protection of the law under the United States Constitution or the Constitution of the State of Texas. Counsel for the defense is not required to make meritless assaults on the law.

The Applicant's complaints are without merit.

**Q.**

**APPLICANT'S GROUND THIRTEEN**

**GROUND THIRTEEN:** Morrison was denied effective assistance of counsel in violation of rights under the Sixth and Fourteenth Amendments of the United States Constitution along with Article 1 § § 10, 19 of the Texas 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.

**FACTS SUPPORTING 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 that by the way the plain language of 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 the other penal codes that supported his rationale. (See Exhibit "E" and Statements 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 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.

David Rogers, Applicant's counsel, states in his affidavit, "As stated above, I advised Mr. Morrison that I was not appointed to represent him on any writ and that I was only appointed to represent him on the Motion to Adjudicate. However, as a courtesy to Mr. Morrison, I reviewed the file, performed legal research, and consulted with Mr. Cantacuzene. I then made Mr. Morrison aware of the results of my investigation, and I told him I did not believe he would be successful on his writ. Clearly, Mr. Morrison disagreed with my legal opinion regarding same."

The law is clear. Sexual assault of a child under Section 22.011 Penal Code is a strict liability offense and

the actor's knowledge that the child was under the age of 17 is not an element of the offense, and the statute does not require that the State allege or prove that the actor knew that the child was under the age of 17 at the time of the commission of the offense. The defense of mistake of fact under Section 8.02 Penal Code that the actor formed a reasonable but mistaken belief that the child was 17 years of age or older at the time of the offense does not apply to sexual offenses against children. The offense of sexual assault of a child under Section 22.011 Penal Code is not overbroad or vague in violation of the Constitution of the United States or the State of Texas and does not violate equal protection of the law under the United States Constitution or the Constitution of the State of Texas. Counsel for the defense is not required to make meritless assaults on the law.

The Applicant's complaints are without merit.

**R.**

**APPLICANT'S GROUND FOURTEEN**

**GROUND FOURTEEN:** Morrison's rights under the First, Fifth, Sixth, Forteenth Amendments and Article 3 § 1 of the United States Constitution were violated by the Court of Appeals' seperation (sic) of powers violations proved in ground two, Morrison is, therefore, actually innocent of the 22.011 charge because if it was not for the separation 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.

**FACTS SUPPORTING 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. 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 (sic) to "of a child". Therefore, the legislature did intend that knowledge of the status of the complaintant (sic) 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 existence and that the legislature did not intend to dispense with any mental element, suspending section 6.02 and 2.01. They have also suspended 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 (sic).

Because the Court of Appeals violated the Seperation (sic) 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 (sic) of Powers Doctrine, nor denied him Equal Protection of the Laws as proved in grounds two and five, Morrison would the have (sic) gone to jury trial and been acquitted. Because he did not know the female in his case was a child, 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.

The Applicant's complaints as stated above are without merit.

V.

**CONCLUSION**

Having considered the Applicant's Application for Postconviction Writ of Habeas Corpus, the court is of the opinion that the application is without merit and should be denied.

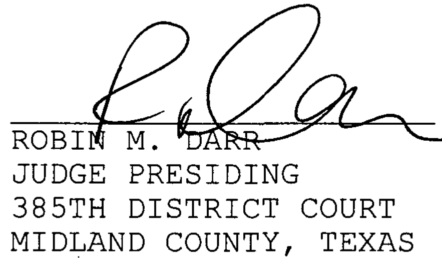
The clerk of the court is directed to prepare a transcript to include the indictment, judgment and sentence on the Applicant plea of guilty and deferred adjudication of guilt filed on May 6, 2004, the plea papers associated with the Applicant's plea of guilty on May 6, 2004, the letter of representation filed on April 12, 2005 by the Morales Law firm, the judgment modifying community supervision filed on May 17, 2005, the order appointing Ray Fivecoat counsel for the Applicant filed on the 28th day of July, 2006, the letter of representation filed by Rick Navarrete filed on August 17, 2006, the motion to substitute counsel filed August 17, 2006, Defendant's Motion to Modify terms and Conditions of Community Supervision filed on August 9, 2007, Order on Defendant's Motion to Modify Terms and Conditions of Community Supervision filed on September 20, 2007, the motion to modify community supervision filed on April 27, 2009, the agreement to modification of community supervision filed on April 27, 2009, the order modifying community supervision filed on April 30, 2009, the motion to revoke community supervision and to proceed with an adjudication of

guilt filed on April 7, 2010, the order appointing Tom Morgan counsel filed on January 7, 2011, the first amended motion to revoke community supervision and to proceed with an adjudication of guilt filed on March 7, 2011, the 2 page letter from Applicant to the Court filed on March 3, 2011, the 4 page letter from the Applicant to the Court filed on March 5, 2011, the motion to withdraw as counsel of record by Tom Morgan filed on March 9, 2011, the order substituting attorney David Rogers for Tom Morgan filed on March 18, 2011, the motion for continuance by David Rogers filed on April 28, 2011, the judgment revoking community supervision and adjudicating guilt filed on May 2, 2011, the opinion of the Court of Appeals filed on June 3, 2013, the mandate of the Court of Appeals filed on January 22, 2014, the Court's designation of issues to be resolved filed on January 22, 2015, the Court's order for affidavit by David Rogers filed on January 22, 2015, the court's order for affidavit by Ian Cantacuzene filed on January 22, 2015, the court's order for affidavit by Tom Morgan filed on January 22, 2015, the affidavit by Tomas Morgan filed on January 30, 2015, the affidavit by David Rogers filed on January 30, 2015, the affidavit by Ian Cantacuzen filed on February 3, 2015, the Applicant's motion to correct discrepancies in the Court's designations of issues to be resolved filed on February 4, 2015, the Court's amended designation of issue to be resolved filed on February 10, 2015, the Applicant's application for postconviction writ of habeas corpus and

documents attached thereto and submitted in support thereof and this Order and transmit the same to the Texas Court of Criminal Appeals in Austin, Texas.

The clerk is further directed to serve a copy of this order on the Applicant and the State.

Signed the 6 day of March, 2015.



ROBIN M. DARR
JUDGE PRESIDING
385TH DISTRICT COURT
MIDLAND COUNTY, TEXAS