

APPEAL No: 04-03-00414-CR

**IN THE FOURTH COURT OF APPEALS
FOR THE DISTRICT OF TEXAS
SAN ANTONIO, TEXAS**

JESUS ALBERTO CABAL,)
)
 Appellant.)

vs.)

Trial Court No: 01-1054-CR

THE STATE OF TEXAS,)
)
 Appellee.)
)

**APPEAL FROM AN AGGRAVATED SEXUAL ASSAULT CONVICTION ENTERED BY
THE 25th JUDICIAL DISTRICT OF TEXAS IN THE ABOVE REFERENCED
CRIMINAL CASE ON/OR ABOUT JUNE 11, 2003.**

DATED: September 16, 2004

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Appellant, *pro se*
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LIST OF INTERESTED PARTIES

The undersigned, Appellant-Defendant *pro se*, hereby certifies that the following persons have an interest in the outcome of this case:

- A. **Mr. JESUS ALBERTO CABAL**. Who is the Appellant acting *pro se* in this matter.
- B. **Mr. GREG ABBOTT**. Who is the current Texas Attorney General.
- C. **Mr. RICK PERRY**, Who is the current Governor of the State of Texas
- D. **Mr. W.C. KIRKENDALL**, Who is the Guadalupe County District Attorney (25th District).

Jesus Alberto Cabal

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Appellant-Defendant, *pro se*
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TEXAS STATUTES

22.021(a)(1)(B)(3).....

The constitutionality of this statute is hereby being challenged by the Appellant-Defendant.

U.S. CONSTITUTIONAL AMENDMENTS

Article-I, Sections 9(cl.3) &10.....
Fifth Amendment.....
Sixth Amendment.....
Eighth Amendment.....
14th Amendment.....

INTRODUCTION

This is an appeal taken from a conviction entered by a jury in the 25th judicial district of Texas sitting in the city of Seguin, Guadalupe County, state of Texas. Defendant was charged under the Texas penal code **22.021(a)(1)(B)(3)** with the aggravated sexual assault of a child which is a Class-I felony, and on April 2, 2003 *after a secret trial* in which the news media was banned from the proceedings in spite of the Defendant's objections, he was found guilty *after a mock trial and in total conflict with the evidence* which did show that Mr. Cabal had been framed and/or was the victim of a conspiracy which involved at least officers of the Seguin Police Department and the District Attorney's office for the 25th judicial district. The Defendant, Jesus Alberto Cabal was sentenced by judge Dwight Peschall on/or about June the 11 of 2003.

This is an appeal from the conviction at issue. Mr. Cabal had a court appointed lawyer with the name of Mr. Robert Caine from Austin, Texas, however, his status in regard to Mr. Cabal's representation has not been fully decided by this Court of Appeals which has ordered him to file some documents explaining why he neglected Mr. Cabal's appeal for more than a year. Mr. Cabal has not terminated Mr. Caine's employment as his attorney, Mr. Caine chose to withdraw as such. At the same time the Fourth Court of Appeals has ordered the Defendant, Mr. Cabal, to file a brief on appeal in this matter. This filing is submitted pursuant to such order.

At the outset and regarding his legal representation the Defendant-Appellant needs to remind this court that he has requested that another attorney be appointed in his case for the simple fact that

attorney Robert Caine had abandoned his appeal as has been acknowledged by some of the orders entered by this court in the past few months.

As previously stated, during the past year Defendant's attorney Mr. Caine has not filed a brief on appeal on this case and had ignored Mr. Cabal's letters inquiring about his case. Furthermore, the Fourth Court of Appeals must understand that it was Mr. Caine himself who chose to request from the court *leave to withdraw as his legal representative*. Mr. Cabal never terminated Mr. Cain's employment it was a matter of his own choice to resign. Under these conditions it is fair to say that this case **does not fall within the scope of Hill vs. State, 686 S.W.2d 184, 187 (Tex. Crim. App. 1985)**. Therefore, Mr. Cabal is **filing this brief under protest** since he believes that due to the seriousness of the case, and the fact that he is clearly the victim of a state sponsored conspiracy which aim is to destroy his moral character and ability to practice his trade, he is entitled as a matter of law to have an attorney appointed to represent him in his appeal **of the illegally obtained conviction against him** particularly since he was deported back to his country of South America on/or about August 30 of 2003.

The record of the trial in this case not only shows that the statute used to prosecute and convict Mr. Cabal for the alleged Aaggravated sexual assault of a child is clearly unlawful and **unconstitutional**, but also that he was the victim of a state sponsored conspiracy which was started at the federal level during the year of 1983 when former president Ronald Reagan issued Executive Orders depriving him of his constitutional rights in the United States up to the present case which shows that the allegations of aggravated sexual assault of a child are nothing else than a fabrication aimed at destroying Mr. Cabal's good name and ability to practice his trade.

The complete lies and contradictions of the witnesses for the state including the alleged victim

herself, and the police officers who in numerous occasions gave conflicting testimony contradicting themselves and each other, plus the attempt by the *prosecutor* and the *judge* to protect said witnesses while tampering with the rules of evidence in an attempt to stop their testimony during cross examination each time they began to lie and to contradict their own records and each others is fundamental proof of a conspiracy against the Defendant. The actions of the district judge and the prosecutor's office can be considered nothing but an outrageous violation of human rights, and of the laws and Constitutions of the state of Texas and the United States as well. In fact, these men ought to be ashamed of their outrageous conspiracy who undoubtedly must end at the desk of the president of the United States himself because *the show they put on during the trial* is nothing but a record of lies and contradictions clearly exposed by their own reports and affidavits which had been filed in earlier months during the beginning of the case. No wonder the judge and the prosecutor tried by all means to intimidate Mr. Cabal and to suppress his attempts to have those records entered as evidence before the jury. What is outrageous in this case, is that the judge and prosecutor argued that *sworn affidavits* given by police officers, the alleged victim and her partner in crime were not admissible because quote "*Such were hearsay even if it showed conflicting testimony*".

JURISDICTION

The jurisdiction of the Honorable Court of Appeal for the Fourth Judicial District of Texas is invoked herein under: the Texas Constitution, and the Rules of the Texas Supreme Court.

Defendant also invokes the jurisdiction of this court under the United States Constitutional Amendments: **5, 6, 8, and 14.**

This Petition is taken from a final judgment entered on/or about June the 11 of 2003 by judge Dwight Peschall of the 25th judicial district of Texas, in the city of Seguin, Texas, county of Guadalupe.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In this Appeal the Appellant who has been wrongfully convicted of the aggravated sexual assault of a child is also bringing a constitutional challenge to the Texas criminal statute: **22.021 (a)(1)(B)(3)** which was the law invoked by the Guadalupe County District Attorney in the town of Seguin, Texas to prosecute him for the alleged aggravated sexual assault of a child, and to obtain thereafter an unjust conviction against Mr. Cabal.

Since the Petitioner is aware that the **14th** Amendment and Article- I Sections 9 (Cl.3), and 10 of the United States Constitution clearly prohibits tampering with the rights and immunities of anyone within the jurisdiction of the United States, he has decided to challenge the constitutionality of the statute since no one in this country can be compelled to face a jury in a criminal prosecution where his constitutional protected rights to a *fair trial*, to *due process of law* and to *the equal protection of the laws* intend to be infringed. The bill of rights of the United States Constitution does protect a person's right to be treated equally before the law whether that person is **13 or 80 years old** something that the Texas statute **22.021(a)(1)(B)(3)** seems to suppress as to favor the alleged victim in the dispute.

In fact, the jury instructions allowed by this law are so irrational, and/or unfair that it causes any reasonable person to question the purpose of having a trial when a jury can be instructed that a defendant "*Does not have the right to plead any affirmative defenses to the charges at issue, and thereafter to prevail based on the merits of the case*".

Petitioner respectfully submits that the rights granted by the bill of rights are inalienable, and can not be tampered with. **U.S. Constitutional Amendment #14, Section I.; Tribe Constitutional Law**

11-2 (2d ed. 1988); 391 U.S. 145; also, please do refer to **389 U.S. 258.**

In summary, the Texas criminal statute at issue has been enacted *in violation* to the following United States Constitutional provisions and/or Amendments:

A) Article- I, Sections: 9 (Cl.3), and 10; which clearly state that no *Bills of Attainder* tampering with a defendant's right to plead affirmative defenses against the charges filed against him can be enacted by either a state or the Federal legislatures. In fact, Article-I further sets forth that no tampering with the rules of evidence is allowed by the United States Constitution.

and

B) United States Constitutional Amendments: 5, 6, 8, and 14, which clearly establish that in all criminal prosecutions the accused shall be entitled to a fair and/or an impartial trial. He or she shall have compulsory process to obtain witnesses in his favor; shall not be subjected to cruel and unusual punishment, and that the accused shall be entitled to the Equal Protection of the Laws.

STATEMENT OF THE CASE

On/or about July the 6th of 2001 a Grand Jury in the county of Guadalupe, Texas, did return an indictment against the Appellant in this matter, Jesus Alberto Cabal. He was charged with the purported “Aggravated Sexual Assault of a Child” under the Texas statute **22.021 (a)(1)(B)(3)**. on April 2, 2003 after a secret trial in which the news media was banned from the proceedings, in spite of the Defendant’s objections, **he was found guilty in total conflict with the evidence** which did show that Mr. Cabal had been framed and/or was the victim of a conspiracy which involved at least officers of the Seguin Police Department and of the states District Attorney’s office for the 25th judicial district. The Defendant, Jesus Alberto Cabal was sentenced by judge Dwight Peschal on/or about June the 11 of 2003.

To further support the argument that the Petitioner is the victim of a conspiracy at the hands of renegade government officials he submits the fact that all of the civil litigation that he has filed since the year of 1982 has been placed under a *stiff censorship* to ensure that the news media does not broadcast any matters dealing with Mr. Cabal’s law suits. The same type of gag order was put in place during the criminal trial at issue and carried out under a tremendous censorship in total violation of the 6th Amendment to the United States Constitution which requires that for reasons of fundamental fairness all criminal trials be conducted in the open, and that the public be given a chance to hear all sides of the story. In the case of Texas vs. Cabal, Mr. Cabal has complained that members of the communities where he resides and works had been prejudiced against him since it was state officials which were controlling the information (or disinformation) being disseminated in the form of rumors, without allowing Mr. Cabal’s side of the story to be told.

In his defense the Defendant has also argued that based on constitutional grounds and particularly

the Bill of Rights, no state of the Union has the legal authority to enact legislation depriving any one within the country of fundamental rights such as those protected by Section- I of the 14th Amendment to the United States Constitution which advocates the Equal Protection of the laws, and those protected by the 6th Amendment to receive a fair trial within state and federal courts alike.

In fact, **Article I sections: 9 (Cl.3) & 10**, makes it clear that *Bills of Attainder* which tend to tamper with a defendant-s right to set forth affirmative defenses to the charges against him, or tend to suppress the rules of evidence as to deny the defendant his right to receive a fair trial, and thereafter to prevail on the merits of the case are in total conflict with the United States Constitution.

This honorable Court needs to be aware that Mr. Cabal had been a lawful resident of the United States for 27 years and his record was spotless, before the dubious charges filed by the state of Texas against him, and also in the four years after the alleged incident.

**REASONS FOR REVERSING THE CONVICTION AGAINST MR. CABAL
AND/OR FOR ORDERING A NEW TRIAL IN THIS CASE**

Within this segment the Appellant respectfully submits to the Court of Appeals for the Fourth District of Texas the reasons to support his argument that he was unlawfully convicted since the statute **22.021(a)(1)(B)(3)** is clearly unconstitutional, and the *record of the trial shows* that police officers from the city of Sequin and employees of the prosecutors office for the 25th judicial district engaged in a conspiracy against him aimed at obtaining an unlawful conviction against Mr. Cabal.

**THE CONVICTION OF MR. CABAL MUST BE REVERSED AND/OR THROWN OUT
FOR THE FOLLOWING REASONS:**

A. Mr. Cabal requested from the court before trial to charge the jury with instructions dealing with **ENTRAPMENT**, something that judge Paschal did not do; yet, the record which has been generated during the trial in fact shows that Mr. Cabal had been the victim of entrapment by police officers, of a conspiracy which involved law enforcement officials **at least** at the state level, and most likely with the knowledge and approval of members of the state's prosecutors office, reason *which very well explains the stiff censorship* surrounding this prosecution. In fact in addition to all the lies and contradictions by the police officers who testified on behalf of the state, a witness with the name of Toni Tristan who was with the alleged victim during the night of the alleged rape, and who on that night stole Mr. Cabal's automobile with the alleged victim, clearly and shamelessly bragged during the trial that a police officer stopped them with a stolen vehicle, did not arrest them, nor asked them for driving licenses, but that in fact "*let them get away after warning them that they were being sought but the Texas authorities (D.P.S.)*". In this regard please refer to **pages 109 to**

111 of Mr. Tristans testimony before the jury. Also, **On page 200 lines 1-9 of agent Olivera's testimony** he totally contradicts himself when admitting that Mr. Cabal had referred to the alleged victim and her friend as "individuals" and not "girls" as the prosecutor had been leading on the jury to believe in previous paragraphs of his testimony. **On pages 207 through 209 of Mr. Olivera's testimony the judge** and the prosecutor trying to protect by all means agent Olivera in a cross examination which was leading to show that a conspiracy was unraveling which included police officers from Sequin and San Antonio aimed at "making up" a case against Mr. Cabal. **On Page 217 and 218 lines 1-5** of officer Seidenberger **he contradicts** the statements of the prosecutor who was trying to lead him on to say that Mr. Cabal had referred to the alleged victim and her friend as "girls" and not *young ladies*. **On Page 224 lines 1-15 officer** Seidenberger again is contradicting the prosecutor who was leading him on to say to the jury that Defendant had began to volunteer information about *having sex with the alleged victim* without having been asked any questions when he met Mr. Cabal at the theater parking lot. **On page 225 lines 11-25,** and **page 226, lines 1-6 officer Seidenberger** is contradicting again the prosecutor who had been leading him on, and also agent Olivera's previous testimony when stating that in fact Mr. Cabal had referred to the alleged victim and her friend as *young ladies* and not as "girls" as they were trying the make the jury believe. **On Page 245 lines 11-25, and page 248 lines 1-7 officer Seidenberger** is acknowledging once again in spite of the prosecutor's attempt to say otherwise, that Mr. Cabal had mentioned the alleged victim and her friend as being "young ladies" of 19 and 20 years of age, and not "girls" as the prosecutor was trying to get him to say.

On Page 13 lines 5-12 of detective de la Garza's testimony the prosecutor and the judge prohibiting him from explaining to the jury why Tony Tristan had to be taken to a medical doctor

for gender determination. **On page 13 and 14 lines 14-25 of De la Garza's testimony** the judge and the prosecutor again prohibiting the detective from explaining to the jury that the alleged victim and her friend Tony *already had criminal records*.

On page 20 of detective San Miguel testimony he acknowledges to the jury that Mr. Cabal had in fact referred to the alleged victim and her friend as being "*women*" and "*loose women*" not "girls" as the prosecutor was leading him on to say. **On pages 50 through 53 of detective's San Miguel testimony** he testifies before the jury that he did not know that Defendant had told him that he was born in South America and that he remained a Colombian citizen, yet when confronted with his own written record which he had tried to get Mr. Cabal to sign on the date of Mr. Cabal's police interrogation he had to admit that in fact he knew Mr. Cabal's origin and nationality. **On page 62 lines 15-24** detective San Miguel *contradicting himself once again* before the jury when acknowledging that the day Mr. Cabal was summoned to the police station, he in fact had told Mr. Cabal before subjecting him to interrogation that his stolen car had been found, but that there was a problem in that the two females involved in the incident were minors, and *one of them was claiming that she had been raped*.

Further proof of a vast conspiracy is given on **Page 80 lines 7-17 of detective Gilbert Soliz's testimony** when judge Peschall was trying to intimidate Mr. Cabal when the prosecutor was clearly trying "*to put words on Mr. Cabal's mouth*" and clearly jumping to conclusions about Mr. Cabal's intentions and/or his state of mind when he was being interrogated by the police the day he was told that his car had been found and about the true identity and ages of the auto thieves.

On page 82 lines 18 through 20 of detective Soliz's testimony he contradicts his initial testimony to the jury and under cross examination and admits that in fact Mr. Cabal had stated during his

interrogation by him and detective San Miguel that “*He had met two women who introduced themselves as adults who were 19 and 20 years old*”.

On page 83 lines 13-17 of his testimony detective Soliz fully *contradicts* his partner detective San Miguel when stating that the Defendant Jesus Cabal *was in fact in a state of shock* when he was told that the female who had stolen his car were minors of 13 and a half years of age. He went on to say that Defendant Jesus Cabal *in no time* had bragged about having sex with the alleged victim, as detective San Miguel had told the jury. **On page 86 of his testimony before the jury detective Soliz** again contradicting the prosecutor and his partner detective San Miguel, when admitting under cross examination that Mr. Cabal had been approached by two “young women” who were singing and dancing in front of the bay where he was cleaning his car at the “car wash” in the city of Sequin.

B. Mr. Cabal requested from the trial judge to charge the jury with instructions dealing with “MISTAKE OF FACTS” for the simple fact that as the medical records do show he is a legally blind person on his left eye from which he perceives multiple and distorted images. Also, the alleged victim and her friend Tony Tristan testified before the jury that they had approached Mr. Cabal all dressed up and wearing heavy make up, but the most important thing, that they had told him that they were adults of 18 and 17 years of age¹. In this regard please do see **page 50 lines 19-23 of Mr. Tristan’s testimony before the jury,** and also see **page 11 and 12 of detective De la Garza’s trial testimony** corroborating that fact about the purported ages of these 2 individuals as was told to Mr.

1

This in spite of the fact that when Mr. Cabal was approached by the 2 juveniles they represented to him as being adult women of 19 and 20 years of age. Nonetheless, according with the trial record it was established that women of ages 18 and 17 are considered adults in the state of Texas.

Cabal on such night when they approached him.

Nonetheless, the jury was not given instructions either for Mistake of Fact even if Mr. Cabal was entitled as a matter of law to have the jury receive such instruction due to the maturity and capacity of deception of these juveniles. Furthermore the trial record shows that on that night these 2 individuals were able to deceive much older people without raising doubts on any one that they were not the adults they were pretending to be. **On pages 172 and 173 of the her testimony before the jury the alleged victim**, Ms. Briones goes on to describe in detail how they got involved in an accident in San Antonio after stealing defendant's car, and somehow "engaged in negotiations" with the driver of the other vehicles without raising any suspicion on the other parties about their true ages. **On page 168 of her testimony before the jury Ms. Briones** goes on to give further evidence of her precocity and maturity while stating that she had been drinking and smoking drugs since she was eight (8) years old. **On page 181 lines 1 and 2 Ms. Nicole Briones explaining to the jury** about her sexual promiscuity stating that "In the past before meeting Mr. Cabal she had watched porno movies."

On pages 170 and 171 of her testimony before the jury Ms. Samantha Nicole Briones, the alleged victim going into detail about the fact that she is a diagnosed schizophrenic, and that in fact all the members of her dysfunctional family take a variety of drugs which are prescribed for mentally ill people. She corroborates such fact in those 2 pages by stating that she used to turn into a "different person" when she was not taking said drugs, and that in fact a few days before approaching Mr. Cabal she had stopped taking the prescriptions at issue and was running wild. **On page 109 lines 9 through 11 of his testimony before the jury**, Ms. Briones' partner in crime a Mr. Tony Tristan, admitting like *if it was not a big deal, that in the past he had stolen other vehicles.* Thus, the theft of

Defendant's automobile had not been the first time that Toni had been involved in this type of crime. Given the fact that the alleged victim Ms. Briones and her friend were nothing but "*classroom felons*" as shown by the previously referenced facts Mr. Cabal was entitled as a matter of law to have the jury charged with instructions related to "MISTAKE OF FACT".

C. The trial record in this case appears to have been tampered with in the sense that many of Defendant's objections to the conduct of the prosecutor who was putting words on Mr. Cabal's mouth and/or leading on the state witnesses to make false statements do not appear on the transcripts in spite of the fact that Mr. Cabal had raised timely objections to the questions asked. Such was the case on **pages 124 and 125** of a Ms. Monica Boone's testimony. **Page 237** of policeman Seidenberger's testimony when prosecutor was trying to lead him on into saying that Mr. Cabal had referred to the alleged victim and her friend as "girls" and not young women. **Page 20 and 21** of detective San Miguel testimony before the jury when the prosecutor was again trying to lead him on to say that Mr. Cabal had used the word "girls" *instead of "women" or "lose women"*. **Page 218 lines 1-25** shows the prosecutor again trying to lead on officer Seidenberger to say that Defendant had referred to the alleged victim and her friend as "girls" and not "*young women*". **Page 89** of detective Soliz's testimony shows that when Mr. Cabal confronted the detective with his own affidavit exposing his contradictions then the prosecutor and the judge jumped in to protect him from further exposing his dual testimony. **Page 83 lines 1-12** of Toni Tristan's testimony shows the judge denying Mr. Cabal his right to impeach Tristan's credibility with his own affidavit which had been given to the Sequin police department obviously under oath. **Page 69 and 70** of Tony Tristan's testimony show the judge and the prosecutor intimidating the Defendant about not to bring forward the sexual promiscuity history of the alleged victim and Tristan's himself, or "else", that is, to be

sent to jail. **Page 20 of detective San Miguel’s testimony** show that Mr. Cabal’s objections to the prosecutor’s attempt to lead the witness on to say things which were not corroborated by the record, and that already had been contradicted by the same police officers were completely overruled.

D.) THE CHALLENGED TEXAS STATUTE 22.021(a)(1)(B)(3) IS PRIMA FACIE UNCONSTITUTIONAL, SUCH LAW DEPRIVES A DEFENDANT OF THE BASIC RIGHT TO RECEIVE A FAIR TRIAL. IT DENIES COMPULSORY PROCESS TO OBTAIN WITNESSES IN HIS FAVOR, AND NO LESS IMPORTANT, DEPRIVES A DEFENDANT OF HIS RIGHT TO THE EQUAL PROTECTION OF THE LAWS AND TO RECEIVE THE FULL PROTECTION OF THE CRIMINAL RULES OF EVIDENCE.

The law at issue is unconstitutional as currently drafted since it deprives a defendant of his most basic human rights and constitutional protections something that the U.S. Constitution states *can not be done no matter what*. The “rules of evidence” and the “bill of rights” can not be bent or twisted in any shape or manner as to give more protection to one litigant over another and this principle is very well set forth in the Federal Constitution.

The questions raised within this appeal are of extreme national importance since it deals with a state’s authority² or right to deprive an accused defendant of his most basic constitutional rights, as protected by the Federal Constitution, such as to set forth affirmative defenses against criminal charges filed against him by the state, and thereafter to prevail on the merits of the case:

The Appellant-Defendant, Jesus Alberto Cabal, is a person of Hispanic origin, and of Colombian national origin who at the time had been a lawful permanent resident of the United States for 28 years. He respectfully submits to this Court of Appeals for the Fourth District that the Texas Penal Code: **22.021 (a)(1)(B)(3)** has been enacted in violation to the Equal Protection clause of the **14th**

² In this case the State of Texas.

Amendment to the United States Constitution. Among other things, the bulk of the prison population of those individuals charged and convicted under this law are either Hispanics (mainly of Mexican origin), or African-Americans. Furthermore, the law is unconstitutional because it is also in conflict with the provisions of **Article-I sections 9(cl.3) and 10** of the Constitution, which clearly outlaws *Bills of Attainder*, and any kind of tampering with a person's right to set forth affirmative defenses to the charges at issue. Article-I also prohibits tampering with the rules of evidence in a criminal proceeding. The Texas statute unfairly allows a judge or a prosecutor to instruct the jury that there is no defense whatsoever to the charges of *aggravated sexual assault of a child* even in a situation when the evidence shows **that the accused person is in fact the true victim** in the whole affair. The law does allow a jury trial, yet, such fact becomes *meaningless* once the judge is allowed to instruct the jury in that there is no defense whatsoever to the charges at issue, and that any type of sexual contact even if it was initiated and/or welcomed by the alleged victim herself *after deceiving the defendant* about her true identity, are grounds for a conviction. In other words, defendant's trial before a jury becomes a charade since due to the restrictions imposed as to deny a fair trial, it becomes really a "*trial by the legislature*" which is outlawed by **Article-I sections 9(cl.3) and 10** of the Constitution as previously stated.

In summary it appears that the reasoning behind not allowing "affirmative defenses" to the charges under this law is just a "gimmick" to ensure that the state can literally railroad any defendant belonging to a racial minority, and send him either to prison or to have deported from the United States. A good example that state officials do have a secret agenda when prosecuting cases under this law is given by Mr. Cabal's case in which there was no prosecutorial discretion whatsoever before filing such charges. According with the prosecution they had to indict Mr. Cabal because the

law does not allow him to plead any affirmative defense to the charges at issue.

Furthermore, Petitioner has alleged throughout this litigation that federal and state law enforcement officials do have videotaped evidence of what happened that evening in his home, given the fact that since the year of 1982 he has been involved in civil rights litigation against private corporations and officials of the Executive branch of the Federal Government alike. Plaintiff has been told during the past 20 years by close friends, acquaintances, and by former employers that in fact he has been kept under electronic surveillance around the clock. The wiretapping seems to have been carried out under the excuse of National Security by the **F.B.I.** and by the **U.S. Secret Service** not only at his place of residence, but also in his places of employment attempting to monitor his daily activities. As Petitioner has sets forth in his law suits filed against the U.S. Department of Justice *et. al.*, such surveillance on several cases led to the loss of his employments in the state of Missouri, and of course in Texas since as a result of the charges of ***aggravated sexual assault*** of a child he lost his job at Daley International as a Production Manager and Plant Chemist.

THE LAW:

The Fourteenth Amendment to the United Constitution states in part:

“ 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 his jurisdiction the equal protection of the laws.”

Petitioner respectfully submits that the state of Texas already has a record of using state laws to suppress the rights of minorities. In a decision rendered by the United States Supreme Court **in Batson v. Kentucky**, (U.S. Supreme Court), 476 U.S. 79, 1986; Justice Powell in page 5 of his opinion does give as an example a case in Texas in which a book used by the prosecutor’s office in

Dallas County, explicitly advised prosecutors that they conduct jury selection as to eliminate “*any member of a minority group*”. He goes on to say about that Texas case that in 100 felony trials in Dallas County between 1983 and 1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; according with Justice Powell the chance of a qualified black sitting on a jury was 1 in 10 compared to 1 in 2 for a white.

It is Appellant’s understanding from conversations he had with many Texas residents who either have relatives or friends charged under the statute 22.021 (a)(1)(B)(3), that probably as much as 70% of the individuals charged and convicted under this law are indeed Blacks or Hispanics. Therefore, Mr. Cabal respectfully submits to this Honorable Court of Appeals that judge Peschall was in error when failing to instruct the jury that Mr. Cabal was entitled to have the jury charged with instructions for ENTRAPMENT, and also with instructions dealing with MISTAKE OF FACT as Mr. Cabal had requested. In summary, the law at issue is *prima facie* unconstitutional since it has tremendous conflict with the Equal Protection clause of the 14th Amendment to the U.S. Constitution reason why it can be challenged in federal court without proof of any special damages. **Yick Wo vs. Hopkins, Sheriff, 118 U.S. 356 (1886)**; see **Swain v. Alabama**; also **Strauder v. West Virginia, 100 U.S. 303 (1880)**; and **United States vs. Carter (C.A. 8th Circuit), 1975**. The clause of allowing no “affirmative defenses” to the charges at issue indeed appears to be a tool introduced to selectively persecute minorities and nothing else.

Furthermore, **Article 1 sections 9(cl.3) and 10** of the United States Constitution confirms the unconstitutionality of the Texas statute at issue when it sets forth that the states of the Union *do not have* the authority to pass any *Bills of Attainder* or *Ex Post Facto laws*. The Texas statute is very well known **to deny** the accused his most basic right to present a defense to the charges at issue and

thereafter to prevail on the merits of such defense. 404 U.S.496, 503, 504. Moreover, the law does not allow a defendant to depose the alleged victim, nor to depose potential witnesses whose testimony will clear him of the charges against him, and who could provide evidence thereafter that the alleged crime may actually have been a fabrication in furtherance of a conspiracy.

In fact, such statute goes as far as stating that a defendant must be convicted if sexual intercourse has occurred, **regardless of the facts of the case**. In other words, if a legally blind man is seduced by a promiscuous young woman who claims to be 19 years old when in fact she is only 13 and 1/2 years old, he is not allowed under this law to establish an affirmative defense not even if the alleged victim is a *promiscuous and rather deformed dwarf* whose physical appearance **causes her to look many years older than she actually is**, and therefore impossible for the legally blind man to discern.

This deprivation is indeed unconstitutional and in total violation to the rules of evidence since the person who really has been deceived and victimized is then made out to be the criminal by placing restrictions on the manner that the accused is allowed to proceed to trial, and to conduct his defense of the charges filed against him. This is something that the 5th, 6th, 8th, and 14th Amendments to the United States Constitution do prohibit, or outlaw.

The state of Texas can not even argue that the greater good of the community has been taken into account when enacting this unconstitutional law because convicting innocent people of crimes for which they are not liable can hardly be considered an act that benefits a community. Particularly, during these times when on a monthly basis throughout the United States young men and women of 13 and 14 years old are tried as adults due to the severity of their crimes.

CONCLUSIONS

For the reasons given by Mr. Cabal within this brief on appeal, he respectfully requests that the Court of Appeals for the Fourth District of Texas *does reverse* the conviction unlawfully obtained by a jury from the 25th judicial District of Texas in the case of the State of Texas vs. Jesus Alberto Cabal and entered on/or about April 2, of the year 2003 under the Texas penal code 22.021(a)(1)(B)(3) as currently drafted.

The record of this trial does show that the Defendant Mr. Cabal *is not guilty of the charges at issue*, and that in fact he was the person victimized and deceived by the alleged victim and her friend during the night of April 28 of the year of 2001 when the prosecution alleged that a rape took place. *The jury in this case was misled and misinformed in regard to the law and the constitution as to force them to come up with a fraudulent conviction against Mr. Cabal in violation of Texas and Federal laws and also their respective Constitutions.* The jury was given erroneous and unfair instructions in spite of Mr. Cabal's objections that his rights were being violated because the evidence was in support of his argument that no rape had taken place, and that on the contrary the charges and the events surrounding the accusations were in furtherance of a conspiracy against him as shown by all the record in the case.

.This fact is further corroborated by the stiff censorship which was imposed surrounding the trial of this case.

This fact is just too much to be disregarded and *proves that the judge and the prosecutor knew that the law at issue is in total conflict with Amendments 5, 6, 8, and 14th , and with Article-I, Sections 9(cl.3) &10 of the United States Constitution causing the conviction against Mr. Cabal to be void.*
Smith vs. State of Texas, 689 S.W.2d 227 (Texas Crim. App. 1985).

In fact, the mockery and injustice of the treatment received by the Defendant during the trial of this criminal case prove Mr. Cabal's assertion that the statute at issue falls within the category of "Trial by legislature" as outlawed in **U.S. vs. Brown, 381 U.S. 437 (1965)**, and **Cummings vs. Missouri, 4 Wallace 277 (1866)**. This law without a doubt fails the "rational basis test" as defined in 220 U.S. 61, 78 since the state of Texas can not possibly explain in a logical manner how convicting an innocent person would be an act that benefits the community in this state.

In summary, Mr. Cabal respectfully requests herein that the Court of Appeals for the Fourth District of Texas **does reverse his conviction** on the grounds that:

A. the Texas penal code 22.021(a)(1)(B)(3) has been enacted by the Texas legislature in violation of the United States Constitutional Amendments 5, 6, 8, 14, and Article-I sections 9 and 10. The law in question represents nothing else than a "Bill of Attainder" as referred to in **Ex Parte Garland, 4 Wallace 333 (1886)**; **Cummings vs. Missouri (1866)**; **U.S. vs. Brown, 381 U.S. 437 (1965)**; please, in this regard do refer as well to Lawrence H. Tribe, American Constitutional law s.10-4, at 642, n.9 (2nd ed. 1988).

B. That The evidence supports Defendant's arguments that no rape took place as he was charged with, that there was ENTRAPMENT by police officers, that there was deception by the alleged victim and her friend and therefore MISTAKE OF FACTS, and

C. That the jury was tampered with and/or was not properly instructed since the defendant Mr. Cabal was entitled as a matter of law to have the jury charged with instructions for ENTRAPMENT, and also instructions dealing with MISTAKE OF FACT based on fundamental fairness and impartiality.

WHEREFORE, Petitioner respectfully prays that the Honorable Court of Appeals for the Fourth

District of Texas based on the authorities and evidence submitted herein does reverse the conviction against him entered on/or about June 11 of the year 2003 by judge Dwight Paschal from the 25th judicial District of Texas.

Respectfully submitted,

Jesus Alberto Cabal .

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this **Brief on Appeal** has been served on/or about September the 16th, 2004, via electronic mail at the office of the Texas attorney General as shown below:

Guadalupe county district attorney at:

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113 South River, Suite: 206
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Jesus Alberto Cabal .

Jesus Alberto Cabal
Appellant