

**No. 14-24-00755-CR**

**In the Court of Appeals  
for the Fourteenth District  
Houston, Texas**

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<b>Antonio Ortiz-Banuelos</b>	<b>§</b>	<b>Appellant</b>
	<b>§</b>	
<b>vs.</b>	<b>§</b>	
	<b>§</b>	
<b>The State of Texas</b>	<b>§</b>	<b>Appellee</b>

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**Appellant's Brief**

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**Appeal from the 176th District Court  
Trial Cause No. 1656291  
Harris County, Texas**

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**Oral Argument Requested**

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## Statement of the Case

Appellant was charged by a complaint filed on December 9, 2019, charging him with continuous sexual abuse of a child, A.S., between August 1, 2006 and January 31, 2007. (CR 8).<sup>1</sup> The complaint alleges that:

The complainant stated that she did not like going to the house because **the defendant, her step-grandfather**, would come in to the room while she was supposed to be sleeping and touch her in the genitals over her clothes.

(CR 8) (emphasis added).

Mark Thering filed a notice of appearance as Appellant's attorney on December 13, 2019. (CR 24).

On March 10, 2022, Appellant's attorney filed a Motion to Dismiss the charges based on a violation of Article 32.01 of the Texas Code of Criminal Procedure, where it was alleged that Appellant had not been indicted and 26 months had passed since his arrest. No ruling was obtained. (CR 40, 42).

Appellant was indicted on March 15, 2022, for the felony offense of

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<sup>1</sup> The Harris County District Clerk filed two distinct appeals in this Court. The first pertained to the judgment of conviction. The second pertained to the denial of Appellant's motion for new trial. Appellant will refer to the transferred record "TCR" and the transferred reporter's record as "TRR".

indecent with a child wherein it was alleged that he engaged in sexual contact with A.S. on or about August 1, 2006.

A defense subpoena was issued to the Houston Police Department on September 20, 2024, for all calls for service to 924 East Anderson, TX 77047 for the calendar year 2018. (CR 178). A jury was selected on September 27, 2024. The jury found Appellant guilty on October 2, 2024 and sentenced him to fifteen years in the Texas Department of Criminal Justice. (CR 207).

The trial court certified that Appellant had the right to appeal. (CR 214). Notice of Appeal was filed. (CR 215). Scott Pope was appointed to represent Appellant on appeal on October 8, 2024. (CR 220). Mr. Pope issued a subpoena requesting the production of Appellant's jail card and attorney visitation records. (CR 221).

Despite withdrawing from further representation (CR 216) and appointment of counsel (CR 219), trial counsel filed a Motion for New Trial on October 10, 2024, in which he alleged that the "jury verdict went against the weight of the evidence presented at trial." (TCR-MNT 11).

On October 16, 2024, appellate counsel filed a motion to substitute to replace appointed appellate counsel. Appointed appellate counsel's

motion to withdraw was granted by the trial court. (CR 251).

On October 31, 2024, Appellant filed a Motion for New Trial (TCR 15), wherein he alleged that:

1. Defendant asserts that trial counsel had a conflict of interest based on his long standing representation of the complainant's stepfather while representing the Defendant that requires the granting of a new trial.

2. Defendant asserts that his right to testify was abrogated by trial counsel's refusal to allow him to testify which impacted the Defendant's right to effective assistance of counsel.

3. Defendant asserts that trial counsel failed to investigate the facts of the allegations by not interviewing members of the complainant's family including her aunts and uncles who would contradict the complainant's version of events as those allegations evolved since the complaint was filed.

4. Defendant asserts that trial counsel failed to obtain a ruling and failed to present a constitutional challenge to the prosecution based upon a two year delay between his arrest and indictment.

On November 1, 2024, Appellant presented the Motion for New Trial

to the trial court who ordered that a hearing be held by affidavit. (TCR 72). The trial court held a hearing on Appellant's Motion for New Trial. After hearing witnesses, the trial court denied the Motion for New Trial. (TCR 128).

Appellant filed a Notice of Appeal of the judgment, sentence and denial of the motion for new trial. (TCR 137).

### **Statement Regarding Oral Argument**

Appellant believes that oral argument in this case would benefit the court in consideration of his issues raised. Ineffective assistance of counsel is a difficult issue to present on direct appeal. Oral arguments will assist this Court in its view of the factual intensive assertion of deficient conduct. The issues presented involve trial counsel assigning the responsibility to locate witnesses to Appellant's family without conducting his own independent investigation. Appellant would show in oral arguments how trial counsel's deficient conduct prejudiced Appellant.

## **Issues Presented**

### **Issue Number One**

**The trial court abused its discretion in denying Appellant's Motion for New Trial based on trial counsel's failure to conduct an independent investigation of the facts underlying the allegations and his failure to interview and subpoena witnesses to testify and controvert the allegations and testimony of the complainant, A.S. and her mother.**

### **Issue Number Two**

**The trial court abused its discretion in denying Appellant's Motion for New Trial based on trial counsel's conflict of interest arising from his representation of the complainant's step-father at the same time as representing Appellant and not informing Appellant of trial counsel's long term relationship with him as evidence by the fact that trial counsel was being referred clients in 2013-2014 and he was advised by the State Bar of Texas that he had to withdraw from representation of A.S.'s step-father.**

### **Issue Number Three**

**The trial court abused its discretion in denying Appellant's Motion for New Trial based on trial counsel failure to conduct an independent investigation of the law and fact necessary to provide a complete defense and by failing to file and challenge the Appellant's deprivation of a constitutional speedy trial based on the two year delay resulting from Appellant's arrest and indictment.**

**TO THE JUSTICES OF THE COURT OF APPEALS:**

**COMES NOW ANTONIO ORTIZ-BANUELOS**, Appellant herein, by and through his attorney, **STANLEY G. SCHNEIDER**, and pursuant to TEX. R. APP. P. 38, files this Appellate Brief and would show the Court as follows:

**Statement of Facts**

**A. Introduction**

A.S.<sup>1</sup> is Appellant's niece. He is married to the sister of A.S.'s mother. The alleged offense occurred at Appellant's home when A.S. was between the ages of 5 to 7 years old, when A.S., her mother and brother moved to Houston. Her outcry of abuse occurred when she was 17 years old. There was a 12 year delayed outcry.

A.S. and her mother testified that they lived with her Aunt Veneda but stayed at Appellant's house with her aunt when her mother went to work on weekends. A.S. stated that Appellant entered the bedroom she shared with Appellant's son and her brother and touched her. She stated that the bedroom had two beds and there were two children in each bed.

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<sup>1</sup> Appellant will substitute the complainant's initials, A.S., when she is referred to by her name in the record.

Appellant's defense was that A.S. had to ask her mother for information to complete her memory and that Appellant's wife never cared for A.S. Appellant's wife and A.S.'s aunt and Appellant's son testified that A.S. did not stay at their house when her mother went to work. They stated that there were two bunk beds in Appellant's son's bedroom.

The jury believed the complainant, A.S.

Appellant filed a motion for new trial wherein he alleged that his lawyer failed to investigate the facts underlying the allegations and presented among other witnesses the testimony of A.S.' uncle, Rigoberto and her aunt, Paula Pompa. Both A.S.'s uncle and aunt testified that A.S. was not cared for by Appellant's wife and that Paulina cared for A.S. while her mother worked. Trial counsel admitted that he never spoke to any family members of A.S. prior to the trial and relied on Appellant's son to obtain witnesses for trial.

## **B. Pretrial**

Prior to the commencement of jury selection, the prosecutor informed the trial court that new information had been received from the complaining witness. (2 RR 4). The new information pertained to the charged offense and was not pertaining to a new offense. (2 RR 4-5). Trial



counsel asserted that it was not a new offense but an extraneous offense but he had not researched the difference.

The State informed the Appellant on the morning of the trial that Appellant swiped a shower curtain open when the complainant was showering. (2 RR 6). And, Appellant and his wife argued when Appellant's wife told him to leave the room where the complainant was showering. The shower incident had not previously been reported. The prosecutor also reported that the complainant told them that the Appellant touched her after swiping the shower curtain.

The State also informed the trial court that the complainant's prior statement was that she was asleep in bed and Appellant would come into the room and touch her. (2 RR 6). The State suggested that the new information was "additional details" about the same date. (2 RR 7). Appellant argued that this was a completely new allegations and not related to the initial outcry. The new information included Appellant standing behind the complainant and rubbing his penis against her. (2 RR 8).

Appellant asked that the new allegations or information about the offense be excluded. The original allegation was the touching of her

vagina while she was in bed with Appellant's hand. The new allegation was the rubbing of Appellant's penis from behind. Appellant argued that it changed the manner and means of the commission of the offense.

The State argued that it believed that the new allegations were committed as part of the same transaction alleged in the indictment. The State clarified that the complainant said that there were instances when Appellant would be affectionate and he would give her a hug and she could feel his penis. The State argued that the complainant's statement was not a new allegation. The trial court ruled anything that's within the same transaction would not be excluded. (2 RR 10).

No objections were presented during the complainant's testimony.

Appellant's attorney gave an opening statement wherein he stated:

You will hear testimony that there are other people involved in "A.S.'s" life: Her stepfather, convicted felon; her biological father, convicted felon of human trafficking.<sup>2</sup>

(3 RR 18).

### **C. Trial Evidence**

The State's first witness to testify was Jason Woodard, a Houston

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<sup>2</sup> No such evidence was presented.

Police Officer. Officer Woodard testified that on February 18, 2019, A.S. walked into the Southeast Substation to make a report which was then assigned to the Special Victims Division. (4 RR 15). Over a hearsay objection, A.S. told the officer that the offense occurred when she was around 6 years old. (4 RR 18). The alleged offense occurred between 2008 and 2009. (4 RR 19). A.S. reported that her date of birth was May 19, 2001. (4 RR 19). A.S. provided details of her account and the location of the alleged offense to be 8300 Sands Point Drive. (4 RR 21). Officer Woodard state A.S. was accompanied to the police station by her mother and father. Officer Woodard did not know whether the father figure who accompanied A.S. was her biological father or stepfather. Officer Woodard assumed that he was her father. (4 RR 26).

The State's next witness to testify was Laura Wilcox. Ms. Wilcox testified that she worked at Paetow High School from 2017 to 2022 as an assistant athletic trainer and taught a number of different classes. Eventually, she became the head athletic trainer. In 2017, she met A.S. as a sophomore, probably 15 or 16 years old, when she started in the training program. She described A.S. as a strong young woman, determined to make a good start in the world. Education was very

important to her as was strong family values. (4 RR 37-38). A.S.'s mother cleaned Ms. Wilcox's house.

One day, A.S. stopped Ms. Wilcox in the school hallway because she wanted to tell her something. A.S. appeared to be in distress, seemed scared and "pretty sad" (4 RR 41). A.S. was wringing her hands, her shoulders slumped, she appeared anxious and timid as she approached her to talk. The conversation lasted three minutes. (4 RR 44). Ms. Wilcox reported the conversation to her superior as required.

After that encounter, Ms. Wilcox noticed a change in A.S.'s behavior.

Ms. Wilcox was asked about A.S.'s family dynamics. She knew that her mother was married but knew nothing about her husband. Ms. Wilcox's wanted to believe A.S.

The State's next witness to testify was A.S.'s mother, Idalia Pompa Nunez, (4 RR 56). She stated that A.S. was the oldest of her three children. At the time of trial, her daughter was 23 years old. Her son A.S. was 21 and her youngest daughter M.G. was 13.

Idalia testified that A.S. was born in Brownsville and that she separated from A.S.' father in 2002 when A.S. was 1 1/2 years old. A.S.

did not see her father again until she was about 11 years old. Idalia moved to Houston with her children because she had four sisters living in Houston. (4 RR 58). Idalia stated that at first, she lived with her sister, Veneda Pompa. Idalia stated that while she worked, her children stayed with a different sister, Alejandra Pompa. Alejandra lived fifteen minutes away from her and was married to Appellant. (4 RR 59). Sometimes her children stayed with Veneda and sometimes with Alejandra.

Idalia testified as to their living arrangements when she and her children moved to Houston. Idalia stated that she and her children lived with her sister, Veneda and her husband, and Veneda's four daughters. She explained that Alejandra lived with her husband, Appellant, and their two sons. (4 RR 60). Idalia's children stayed with Alejandra only on weekends.

When A.S. was in the 12th grade, she told her mother that someone touched her. The trial court sustained a hearsay objection but requested no other relief. (4 RR 71). A.S. and her mother had an emotional conversation. Idalia was angry and hugged her daughter. She told her daughter that they were going to go to the police.

Idalia then called Alejandra because she felt that Alejandra needed

to know what A.S. said. (4 RR 73). She needed to know because she was going to file a lawsuit. (4 RR 73). She identified Appellant as Alejandra's husband. Idalia accompanied A.S. to the police with her ex-husband, Armando Soto. Her husband, Xavier Gomez stayed outside. (4 RR 74).

Prior to A.S. making her accusation, she had good relationship with Appellant. As a result of A.S.' accusation, Idalia's relationship with her sisters changed. A.S.'s behavior changed after the outcry and she began to have panic attacks.

After A.S. made the accusation against Appellant, Idalia called her ex-husband, Armando Soto and then she called her husband, Javier Gomez.<sup>3</sup> Javier Gomez's father is German Gomez. (4 RR 80). Xavier Gomez got involved in A.S.' life towards the end of 2007. At some point, A.S. got to know her father and her step-grandfather, German Gomez. (4 RR 105).

Idalia would not drop off her daughter at Alejandra's house. A friend would take her or Veneda would take her. (4 RR 107). Aracely Gomez, Xavier's cousin would take her to work. The only place that her

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<sup>3</sup> The record spells his name Javier Gomez (4 RR 80) and Xavier Gomez (4 RR 74).

children would go was to Alejandra's house when she was working. (4 RR 109).

Idalia lived in Mexico in 2010 and 2011. While she was gone, A.S. lived at times in Appellant's home. (4 RR 110). Other times she lived with Paula Pompa, her sister. After living with Veneda, Idalia later lived with her sister Paula and then got her own apartment. (4 RR 111). Veneda was married to a man named Rigoberto.

When Idalia was in Mexico in 2010 and 2011, she did not decide where her children would live. Her children would divide their days between different homes. (4 RR 119). Idalia testified that she played no part in the decision where her children would live in 2010 and 2011. She had no personal knowledge of where her children were living. (4 RR 120).

In 2006, when A.S. stayed with Idalia's sister on weekends, Alejandra would drop her off at Veneda's house so that she could go to school. A.S. only stayed at Alejandra's house on Saturday night. On weekends, she would spend the night at Alejandra's house and the days at Veneda's house. (4 RR 121).

Idalia only worked on weekends selling corn. She would leave Veneda's house around 3 p.m. Veneda would be working and her husband

wasn't around so no one could care for her children.

**The trial court ruled that Appellant could not question Idalia about a party on Easter Sunday in 2019. (4 RR 131).**

The State's next witness to testify was A.S. She stated that she was born on May 19, 2001. Her stepfather, Xavier Gomez came into her life when she was six years old. He died two months prior to the trial. He married her mother when A.S. was 12 years old. (4 RR 139). Xavier Gomez was her rock and the rock for the entire family.

A.S. stated that she had an extensive extended family and they were always together. (4 RR 142). The extended family celebrated birthdays, holidays, graduations or some important school event. (4 RR 143). A.S. testified that she would stay at Alejandra's house and Veneda's house while her mother worked. (4 RR 144). She stated that she would stay at Alejandra's house all of the time. (4 RR 144).

When she first moved to Houston, she lived with her Aunt Veneda. (4 RR 146). Living at Veneda's house were her aunt's five daughters, her husband and dog. (4 RR 146). Veneda lived in a big house and her daughters had everything.

A.S. remembers staying at her Aunt Alejandra's house on weekends.



(4 RR 148). Her Aunt Veneda did not want her staying at her house without her mother being present. (4 RR 148). A.S. would be dropped off at Alejandra's house or Alejandra would pick her and her brother up. (4 RR 149). She would only go to Alejandra's house on the weekends. Alejandra had a two bedroom apartment. A.S. would stay in Alejandra's son's bedroom. (4 RR 152). There were two beds in their bedroom. She would sleep with her brother and her two cousins would sleep in the other bed. (4 RR 153). The beds were not against any wall.

Alejandra took good care of her and she felt safe during the day but not at night. (4 RR 159). Her uncle (Appellant) would come into the room where she was sleeping. He would check on his children. He then would make sure that A.S. would be asleep. He would smell like sweat and beer. (4 RR 160).

A.S. testified that Appellant would make sure that she was asleep. He would pull on the cover and give a little shove. Then he would pull her cover down. (4 RR 162). When he would tug on the blankets she would hold onto it tightly. When one of the other kids would move, it would scare her uncle. (4 RR 163). Appellant would rub her stomach under her shirt and then he would touch her vagina. (4 RR 164). When he touched

her, she wanted to throw up. She was disgusted by the touch. (4 RR 164). She remembers hearing a noise of satisfaction. (4 RR 165). A.S. did not remember if Appellant touched her anywhere else beside the vagina or whether he touched her with his whole hand. (4 RR 166). When Appellant would tug on the blanket, A.S. would be uncovered from her waist up. (4 RR 167).

A.S. did not tell anyone. She did not talk to Appellant. She knew that her being quiet helped her mother out. She felt like she had to let it happen. It happened only one time. (4 RR 169). Appellant's behavior did not change and he acted friendly and nice towards her. A.S. stated that he was a little kinder toward her. She did not feel comfortable at Alejandra's home. (4 RR 171). A.S. did not say anything to her mother because she did not want to mess up the arrangement that allowed her mother to work. She didn't tell anyone until she was 17 years old. The first person she told was her 14 year old friend Jody. She told Jody when Jody told her about something that happened to her. A.S. did not want Jody to feel alone. (4 RR 172).

When she got home after talking with Jody, she started asking her mother questions about going to Tia Alejandra's house. (4 RR 173). Her

mother then asked if somebody did something to her. Her mother started naming names and when she said Antonio's name, A.S. nodded "yes". She identified Appellant as Antonio. Her mother immediately called Alejandra to tell her what A.S. said and told her that she was going to do whatever was needed to protect her and get her justice. (4 RR 174). Her mother then called her father and stepfather and told them. They came to the house and they all went to the police station.

A.S. spoke to several different officers and then she told Ms. Wilcox at school. She told Ms. Wilcox because she needed help writing an essay for her college application. (4 RR 181). She attended therapy with Dr. Santana. State's Exhibit 9 was identified as letters that were written after her sessions. (4 RR 182).

A.S. stated that after she was five years old, Appellant touched her and she did not go back to his house until she was about 10 years old, when her mother got deported. (4 RR 186). She stayed there for two nights and then stayed with other aunts. (4 RR 186). She told her mother that they were late for school when she stayed at Alejandra's house. One time Appellant came into her room and but did not touch her.

The cross-examination of A.S. began with the creation of a timeline.

A.S. stated that there was one act when she was five years old and then one attempted act when she was 10 years old. (5 RR 8). In February 2019, she spoke to a police officer at the police station. In November 2019, she spoke to two detectives. (5 RR 9).

When she spoke to the detectives, she did not mention the event when she was 10 years old. (5 RR 10). A.S. explained that once she started therapy, she began to remember more stuff. (5 RR 10). The therapy was unrelated to the allegations of abuse. (5 RR 11). The therapist started telling her things that she could do for herself. In January 2024, she told a prosecutor that things happened to her multiple times but never specified any event other than the one event in 2006 and one event in 2010. (5 RR 13).

In April 2019, A.S. attended a family Easter party and Appellant was present. (5 RR 14).

When asked about her statement to law enforcement, A.S. did not remember what she said in November 2019 and she did not want to refresh her memory with what she said. A.S. stated that it did not surprise her that she said something different to the detectives. (5 RR 17).

After talking to Jody, she had to ask her mother a lot of questions because her memory of events was not “super clear.” (5 RR 17). The only thing that was clear was what happened to her. She asked questions of people to fill in the blanks in her memory.<sup>4</sup>

She stated that she did not have full memories of what happened to her. She felt that Appellant was not a good person but not why. (5 RR 23). When she talked to the police in February 2019, she didn’t have full memories of the events when she was five years old. It was only after the Easter party where she had a panic attack that she began to have specific memory. The full details of the events were not clear in November 2019 or January 2024. (5 RR 24).

In November 2019, she told the police that she was not allowed to stay at her Aunt Veneda’s house because she and her brother would get into arguments with Veneda’s kids. (5 RR 26). She told the police that she remembered Appellant coming home from work and then he would be gone when she woke up. (5 RR 27). After a while, her mother hired a babysitter to take care of A.S. and her brother while she worked. (5 RR

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<sup>4</sup> No testimony was presented concerning the concept of created memories nor was expert testimony presented by the defense concerning memory.

27).

During her junior year in high school, she started having problems. Her grades started going down and then she started therapy. (5 RR 30). The failing grades started in 11th grade.

When A.S. turned 17, she had a birthday party at Benihana's and Appellant his family were invited. (5 RR 33). She invited Appellant to the party which was in May 2018, despite telling the police that after the incident when she was 10 years old she made it clear to her family that she did not want to be around Appellant.

The State's next witness to testify was Dr. Whitney Crowson, a clinical psychologist working for the Children's Assessment Center. Dr. Crowson described some general concepts involving sexual abuse of children and memory. She had no specific knowledge of this case.

The State rested after the testimony of Dr. Crowson. The trial court denied Appellant's request for a directed verdict. (5 RR 72).

The first Defense witness to testify was Appellant's wife, Alejandra Ortiz Pompa. She and Appellant had been married for 28 years and had three children. Humberto, the oldest was 27, Miguel was 24 and Alejandro was 10 years old. (5 RR 75). She stated that she had four sisters and four

brothers. (5 RR 75). Her brothers lived in Mexico. Her sister Veneda was the oldest, then Paula and Idalia was the youngest. She was two years older than Idalia. (5 RR 76).

When Idalia came from Mexico in 2006, she had two children. Paula had six children. Rigoberto Gomez was married to Veneda and had four daughters. When Idalia moved to Houston, she lived with Veneda in a house. (5 RR 78). Idalia was working when she first arrived. Defense Exhibit 3 was introduced into evidence that depicted her sons' bedroom which consisted of bunk beds and not full beds as described by A.S. (5 RR 85). Defense Exhibit 2 was a picture of her bed as it was placed in her bedroom in 2006. Alejandra explained that in order for Appellant to get out of bed at night he would have to crawl over her. (5 RR 87). She was never concerned about Appellant's behavior in their house.

Alejandra testified that in 2006-2007, she and her husband owned only one car. She would walk to work. (5 RR 89). She never picked up A.S. at school or at Veneda's house. Appellant worked construction six days a week. Alcohol was not allowed in the house.

Alejandra stated that she and her family had a good relationship with A.S. and her family from 2006-2008. She saw no indication that A.S.

was afraid to visit. (5 RR 90). A.S. would cry because she wanted to come to her house.

In 2010, Veneda lived in the same house. In 2019, Idalia and her children moved to an apartment that was closer to Paula.<sup>5</sup> According to Alejandra, Idalia lived first with Veneda and then she moved into Paula's apartment in 2006 and 2007. (5 RR 92). When the family got together, they would typically get together at Paula's house.

When Idalia got deported in 2010, A.S. and her brother lived with Paula. They never lived with her. (5 RR 92).

The State began its cross-examination asking Alejandra for the specific date that A.S. stayed at her house as she had previously testified that A.S. had stayed at her house only once. Alejandra was questioned about the sleeping arrangement in her home, the location of the bed she shared with Appellant and her being a light sleeper. She made absolute statements concerning her memory of the sleeping patterns of her family.

Alejandra remembers that A.S. spent the night at her house one time. That night, Humberto was not present. (5 RR 104). Her son, Miguel

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<sup>5</sup> The question asked referred to Idalia and Rigoberto who was Veneda's husband and not related to Idalia. (5 RR 91).



slept in the top bunk and A.S. and her brother, Armando slept in the bottom bunk. (5 RR 103). Armando stayed at her house many times. (5 RR 103). She remembered that Humberto had something at school that night and he was gone for 2 or 3 days. (5 RR 104). She also stated that Humberto would wake up and want her to turn on a light for him. (5 RR 105).

Alejandra testified that in 2018, she and Appellant were invited to attend a dinner at Benihana's to celebrate A.S.'s birthday. (5 RR 109). A.S. and Appellant interacted. She never observed any fear or hesitation on the part of A.S. in being around Appellant. (5 RR 110).

The next Defense witness to testify was Appellant's son, Humberto Ortiz Pompa. At the time of the trial, Humberto was 27 years old. Humberto stated that in 2006-2007, he was 9 or 10 years old. He remembers having a good relationship with A.S. (5 RR 117). He described a very large extended family. On his father's side he has "20-ish" cousins and on his mother's side there are like "30- or 35-ish" cousins. A.S. would have been 5 or 6 years. (5 RR 117).

Humberto identified Defense Exhibit 1, as a floor plan of the apartment that his family lived in back in 2006-2007. (5 RR 118). He

stated that he and his brothers slept on bunk beds. (5 RR 119). Defense Exhibit 2 was a picture of his bedroom as it was set up in 2006 and 2007. The only time that he did not sleep at home during that time period was when he went on a school trip to Camp Olympia. (5 RR 121).

Humberto stated that A.S. never spent the night in his room when he was at the house. (5 RR 121).

In 2006 and 2007, A.S. was living with his Aunt Veneda. She then moved into her Aunt Paula's house. (5 RR 122).

Humberto testified that at some point his mother got a phone call from his Aunt Idalia. His mother started crying and he thought that Xavier Gomez did something to her. (5 RR 125). Prior to that phone call, there was never any problems within the family. Humberto stated that A.S. loved Appellant. (5 RR 126).

Humberto was questioned by the State about whether Appellant would drive himself to work or whether he would be picked up by his job. The State without objection as to the form of the question asked Humberto to comment as to the accuracy of his mother's testimony.<sup>6</sup> (5

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<sup>6</sup> Alejandra Ortiz Pompa testified that:

Q. And did he walk to work, or did he have to take the car to work?

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A. Sometimes he would take the car, or sometimes they would come pick him up.  
(5 RR 89)

The “they” was never identified.

During the cross-examination of Humberto Ortiz, the following occurred:

Q. And so if your mom testified that your dad would drive himself or she would drive him, would that not be true?

A. That would be true.

Q. And so if she left out the fact that his job would also come and pick him up, would that be not true?

Q. When your mom testified about your dad going and coming from work, she said that she would either take him to work or he would either drive himself to work. If she --

MR. THERING: Judge, I object. He’s testifying to incorrect testimony and misleading the witness. That is not what the mom testified to. We can have it read back.

THE COURT: No speaking objections.

MR. THERING: Yes.

THE COURT: What’s your objection, Counsel? Okay. Do you want to respond?

MR. ARNER: Yes, Judge. He’s testified that he has personal knowledge of his dad going and coming from work, and I’m just --

THE COURT: It’s overruled. He can ask -- answer. Ask the question. Thank you.

Q. (By Mr. Arner) And so if your mom testified that your dad would either drive himself or she would take him, would the fact that the job would also come and pick him up, if she left that part out, would that be untrue?

A. You are asking me that if my mom would drive my dad to work and if he drove

RR 138).

Humberto stated that A.S. and her family would visit their apartment twice a month. (5 RR 141). Humberto described his father as a poor communicator. The State asked the trial court to take judicial notice that Appellant was indicted on March 15, 2022. (5 RR 144).

The Court read the jury charge to the jury. (5 RR 146).

According to trial counsel's final argument, the sole question for the jury was whether the jury believed A.S. (5 RR 151).

#### **D. Motion for New Trial**

Appellant filed a Motion for New Trial wherein he alleged that he was denied effective assistance of counsel. The trial court ordered an evidentiary hearing.

Paula Pompa testified on behalf of Appellant. She stated that she had five sisters. One of her sister's is Idalia Pompa, who had three

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himself to work and if she left out that sometimes he would -- he would be picked up by work, that that would be all untrue? Is that what you are asking me?

Q. No. The last part.

A. That if she left out that the job would come and pick him up, that that would be untrue?

(5 RR 138-139).

children including A.S. (1 TRR 14).<sup>7</sup> Paula stated that A.S. was born in Brownsville, Texas. When Idalia moved to Houston with two of her children A.S. and A.S., they lived with her sister Veneda. (1 TRR 14). Veneda was married to Rigoberto. Idalia would work on weekends and she would leave her children with Veneda who would take care of them. (1 TRR 16).

At some point Idalia stopped living with Veneda and they moved in to her house. (1 TRR 17). Paula stated that she took care of A.S.'s brother and not A.S., because A.S. was in school. Paula clarified that only took care of the children for a month because Idalia got her own apartment nearby. (1 TRR 17). Paula stated that the Appellant lived about 40 minutes away from her house. Paula testified that Alejandra did not take care of A.S. while her mother worked because Appellant's house was 30-40 minutes away.

Paula stated that she knew Mark Thering. Her family hired him in 2013 or 2014. Idalia's second husband, Xavier Gomez, was her husband's half-brother. (1 TRR 19). She met Mr. Thering through Xavier Gomez.

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<sup>7</sup> The record of the motion for new trial hearing was transferred to this cause. Appellant will refer to it as TRR representing Transferred Reporter's Record.

(1 TRR 19).

Paula stated that over the years, Alejandra did not take care of Idalia's children even though they might visit her. Idalia did not tell her about the accusations, Alejandra told her. She stated that she did not want to get involved because it was two of her sisters.

Paula gave a statement after the conviction. Defense Exhibit1 was introduced. (2 TRR 14). Paula stated that if Mr. Thering had called her she would have talked to him. (1 TRR 25). She received a subpoena to come to court and testify. She did not want to testify. She would have come to court if asked and subpoenaed. (1 TRR 26).

In Defendant's Exhibit 1, Paula Pompa Nunez stated:

I am Antonio's sister in law and A.S.'s aunt. A.S.'s mother is my sister. When the accusation against Antonio was first made, I did not want to get involved because it was an accusation involving two of my sisters. I never talked to his lawyers. They never called me. My sister, Antonio's wife, asked me for help but I did not talk to the lawyers.

A.S. was born in Brownsville. When her father got arrested and sentenced to prison, her mother returned to Mexico. Eventually, her mother brought her back to the United States from Mexico to live in Houston. When they arrived here, A.S., her mother, Idalia Pompa Nunez, and brother lived with my sister Veneda. It was Idalia who cared for A.S., her brother along with and Veneda's kids while Veneda worked. The arrangement was for Idalia to live with her sister Veneda and help take care of Veneda's children. Veneda

had daughters. Veneda's older daughter helped care for A.S. and her brother. The arrangement did not work out with Idalia because of A.S. and her brother. Idalia lived with Veneda for two or three months.

Idalia moved into my apartment for a month or two after the living arrangements with Veneda didn't work out. Idalia then got her own apartment in the same complex where I lived. There was another woman in the complex that took care of Idalia's children. Idalia did not take A.S. to Alejandra's house so that Alejandra could take care of her while Idalia worked. A.S. always wanted to go to Alejandra's house. A.S. loved being at Alejandra's house. Idalia would not take her to Alejandra's house because Alejandra's sons did not want A.S. at their house. Alejandra's sons would complain about A.S. Idalia would tell A.S. that she was not wanted at Alejandra's house. When Idalia first moved to Houston with her children, she did not have a car. She depended on other people to transport her. Idalia only worked on the weekends when Veneda was off work. Idalia did not start working right away when she returned from Mexico.

When Idalia first started working, she worked out of town and her kids stayed with Veneda and not with Alejandra.

When Idalia got deported, I took care of A.S. and Armando. None of the other family members wanted to take care of A.S. and her brother. After Idalia was deported, Alejandra would help out with Idalia's kids by picking them up for a few hours. But the kids would never spend the night at Alejandra's house.

(2 TRR 14).

Rigoberto Gomez testified that he knew Appellant since they were children. Rigoberto was married to Veneda Pompa for 27 years. He and Veneda had four children together. Rigoberto stated that Veneda's sister,

Idalia, came to live with them along with her two children. (1 TRR 29). They lived in their home for about 3 months. Rigoberto helped Idalia get a job with his brother. His brother would pick her up and take her to work. Sometimes Idalia would take her children to work with her and sometimes she left them at the house. His wife Veneda would take care of Idalia's children. (1 TRR 30).

Rigoberto did not remember if Idalia ever took her children to Appellant's home when she went to work. (1 TRR 31). He was contacted before the trial by Appellant's son and asked if he could help. Rigoberto told Berto that he would but no lawyer ever contacted prior to the trial. (1 TRR 31).

Defendant's Exhibit 2 was admitted into evidence wherein Rigoberto stated that:

I was married to Veneda Pompa Nunez who is the sister of A.S.' mother, Idalia. We are no longer married. We were married when A.S. came to Houston when she was five or six years old. A.S., her brother, Armando, and mother came to live with us. Our house was at 11406 Hornbrook Drive; Houston, Texas 77096. They lived with my four daughters, my wife, Veneda and me. We had three bedroom in our house. A.S, her brother and mother shared one of the bedrooms.

My wife and I took care of the A.S. and her brother while her mother worked. To the best of my memory, A.S. never stayed at



Antonio's house while her mother worked. A.S.' mother worked for my brother, Gersain Gomez Cardenas. I don't remember her work schedule. I do remember that A.S. and her brother would often go to work with her mother. I do not remember Idalia taking her children to Antonio's house because Antonio lived across town from our home, Paula's home and then where her apartment was. We all lived in Southeast Houston, east of IH 45 near Hobby Airport. Antonio lived in Southwest Houston near Fondren and Gessner. I remember that when she worked for my brother, he would pick Idalia up and take her to work and then bring her home.

A.S. was a normal kid. Armando was a handful as a kid. Idalia was very strict.

A.S., Idalia and her brother, Armando, lived with us for three or four months. Idalia then went to live with her other sister Paula and her family. Idalia lived with Paula for some time. I don't remember how long Idalia lived with Paula. They did not stay long at either house because my nephew Annando was a handful and caused problems.

Idalia then got her own apartment. I know was in a relationship with her husband Xavier Gomez for at least ten years. I don't remember exactly when they got together.

I heard about the legal problems of Antonio a few months ago. I was no longer in the family. I was shocked because A.S. never lived with Antonio and his family and A.S. never spent a lot of time with Antonio and his family.

Antonio's lawyer never talked to me. Antonio's son, Humberto, reached out to me and asked if I would talk to Antonio's lawyer. I agreed. I recently called Humberto and asked what was going on because no one ever called me. I then went Antonio's lawyer's office and gave this statement.

(2 TRR 6).

Rigoberto testified that to the best of his knowledge, A.S. never stayed with Alejandra. (1 TRR 36). Humberto asked Rigoberto if he would talk to his lawyer. Humberto told him that he was going to give his name and phone number to his father's lawyer. Rigoberto stated that no one ever called him. Rigoberto testified that if a lawyer had called him and asked him to come to court, he would have come. (1 TRR 37).

Humberto Ortiz Pompa testified that he provided a list of names and phone numbers to trial counsel of possible witnesses a couple months prior to Appellant's trial. (1 TRR 40). Humberto included on the list the names of family members including Veneda, Rigoberto and Paula along with many cousins. (1 TRR 40). A few weeks before Appellant's trial, he spoke to Rigoberto and asked if he would testify about Idalia's living arrangements when she moved to Houston. (1 TRR 41).

Humberto stated that Veneda did not want to get involved. To his knowledge, Humberto stated that trial counsel never spoke to any of his aunts, uncles or cousins, including Veneda. About a week after Appellant's trial, Rigoberto called and asked what was going on. (1 TRR 42). He asked if trial counsel was ever going to call him. (1 TRR 42).

Humberto was surprised that trial counsel never contacted any

members of his extended family to testify. Prior to the trial, Humberto spoke to Paula and gave her name and phone number to trial counsel. (1 TRR 43). Trial counsel never contacted her prior to the trial.

Defendant's Exhibit 3 was admitted into evidence wherein Humberto stated that:

My father is Antonio Ortiz Banuelos. I testified at my father's trial.

I went to my father's lawyer's office on two or three occasions concerning my testimony. It was only within the month prior to trial. Prior to the immediate trial preparation, I did not talk Mark about anything material. I gave him the names of potential witnesses including phone numbers and addresses including Rigoberto Gomez Cardenas, Veneda Pompa Nunez, Paula Pompa Nunez, German Gomez Serrato, Itzel Gomez Pompa, Lillibeth Gomez Pompa. Each of these people were related to our family and knowledge of the relationship that A.S. had with my father and our family.

When my father was charged with indecency, I had very little contact with the lawyers. I spoke to my father about the accusations but I did not know the details of the story.

A few months prior to my father's trial, I heard that at sometime Mark Thering, my father's lawyer represented A.S.'s stepfather, Xaiver Gomez. My mother learned about Mr. Thering's relationship with Gomez either from Mr. Thering or from his assistant Candy.

Prior to the trial, my mother and I sent to pictures of A.S. that had been taken over the years. During the trial, I was told by Mr. Thering that he never received the pictures. He said that he did not

have anything else to present because nothing else was given to him. After jury selection, my father told me that Mr. Thering did not have any pictures or diagrams of the apartment. Mr. Schneider showed me pictures that were in a file he had received from Mr. Thering that contained the pictures that Mr. Thering denied possessing. I resent the email to Mr. Thering on September 29, 2024. Attached to this affidavit is a copy of the email that I sent to Mr. Thering with the attachments. The information was previously given to his legal assistant.

I testified about my relationship with A.S., my relationship with my father and the description of our apartment.

I know that my brother, Miguel, also had memories of A.S. and her brother. I had no memory of her staying at our house or my mother caring for her even on weekends. During the week my mother and father worked and on weekends she was at home. We lived a long way from my mother's sisters, Veneda and Paula. I remember A.S. lived with my aunt Veneda for sometime and then with aunt Paula.

It was not uncommon for Armando to sleep over at our house because he was closer to my brother Miguel's age. While A.S. visited, she rarely spent the night at our house. I repeatedly complained to my mother that I did not want A.S. at my house. She was annoying and caused trouble at the house.

After the trial was over, I went to my aunt's house and heard stories about A.S. I asked my aunt to investigate herself because of the stories that were told. To my knowledge, no one ever talked to either of my aunts about A.S. and how they raised her. I know that my aunt Veneda was A.S.'s primary caregiver. I know that A.S. lived with my aunt Paula. She lived at their houses while her mother worked and did not stay at our house. Her mother did not want A.S. to spend the night at our house because we were boys.

(2 TRR 12).

Defense Exhibit 8 was admitted into evidence and is an email that Appellant's son, Humberto sent to trial counsel along with text messages with the names, addresses and phone numbers of his aunts, uncle and cousins. (1 TRR 44). Humberto testified that he emailed the names once or twice and that they provided the list to trial counsel in person as well. Humberto also testified that trial counsel kept saying to them that he never received the names of possible witnesses. Humberto sent the list again prior to the commencement of the trial. (1 TRR 44).

Humberto stated that some of the information was given directly to trial counsel and some of it was given to his legal assistant Candy.

Humberto stated that he found out about the relationship between trial counsel and A.S.'s stepfather after the trial was over. Prior to the trial, that relationship had been mentioned to family members. (1 TRR 46).

Defense Exhibit 9 was admitted into evidence and identified as the complaint filed in the instant case. In the complaint, A.S. identified her step-grandfather as the person who would touch her genitals over her clothes while she was sleeping. (1 TRR 48). A.S.' step-grandfather would be Xavier Gomez's father. (1 TRR 48).

Humberto stated that he was given instruction by trial counsel to meet at his office and that he would contact Rigoberto about testifying. Trial counsel never told Humberto to have them ready for trial.

Humberto stated that he knew that trial counsel had a long standing relationship with Xavier Gomez and that he was representing Xavier Gomez at the same time that he was representing Appellant. The list of family members was given to trial counsel on three or four occasions but trial counsel never contacted a single one. Humberto talked to trial counsel about possible witnesses at least half a dozen times. (1 TRR 65).

Trial counsel was told by Humberto that Veneda and Paula were the caregivers of A.S. when she was 5 or 6 years old. They were the people that cared for A.S. when her mother was working. They were never contacted by trial counsel. (1 TRR 65).

Defendant's Exhibits 4, 5, and 6 were introduced into evidence which included the affidavits of Appellant, his wife and son.

Alejandra Ortiz Pompa's affidavit states:

**Family Background:** I am Antonio's wife. I am the aunt of A.S. Idalia Pompa Nunez, A.S.'s mother is my younger sister.

A.S. and her brother were both born in Brownsville, Texas. Both children were very young when their father got arrested and

sentenced to prison. Because of that my sister Idalia and her two children returned to Mexico. Eventually, Idalia and her children returned back to the United States from Mexico and came to live in Houston. When they came back, my sister Idalia, A.S. and her brother went to live with my sister Veneda. An arrangement was made between my sisters Veneda and Idalia for them to go and live with my sister Veneda. The arrangement was also for my sister Idalia to help take care of Veneda's four daughters. Veneda's oldest daughter also helped at times in the care for A.S. and her brother while they lived with Veneda. Idalia's living arrangement did not work out with my sister Veneda because of A.S. and her brother. Idalia, A.S. and her brother only lived with my sister Veneda for about two or three months.

Idalia and her children then moved in with my sister Paula at her apartment for about a month or two. Idalia then got her own apartment within the same apartment complex as my sister Paula. I do not recall the name of the woman who help take care of A.S. and her brother once Idalia got her own apartment.

My sister Idalia did not take A.S. to my house so that I could take care of A.S. while she worked. I would regularly bring A.S.'s brother to my house because I had two sons. My niece A.S. always wanted to go to my house but my sister Idalia would not allow A.S. to come my house because my sons did not want to be around A.S. My sons would complain about A.S. because she was a tattle-tale, very whiny and annoying.

When my sister Idalia first moved to Houston with her children, she did not have anything, much less own a car. Idalia depended on other people for transportation. Idalia did not start working right away when she returned from Mexico and she only worked on the weekends. When Idalia did begin working, she worked out of town and her kids stayed at my sister Veneda's house and not with me.

Approximately in 2010, my sister Idalia got deported. After

Idalia's deportation, my sister Paula took in and cared for A.S. and her brother. None of our other family members wanted to take on the responsibility of caring for A.S. and her brother because they were both a handful. During the time after my sister was deported, I would help out my sister Paula by picking up Idalia's kids and spending time with them for a few hours. I would have frequent outings with A.S. and her brother but they would not spend the night.

**Husband's trial preparation:** I met with my husband's lawyer approximately three times in preparation of his trial. These meetings were about an hour each. Also present at these meetings was Candy, the lawyer's assistant. She was the interpreter. I also testified at my husband's trial.

During one of the trial preparation meetings with my husband's lawyer, he said that in the complaint, A.S. makes an abuse outcry against her step-grandfather. My husband is not A.S.'s step-grandfather. My husband is A.S.'s uncle. The lawyer wanted to know family member's names and their relationship to A.S. That is how the name of Xavier Gomez came up. The lawyer was told that Xavier was A.S.'s step-dad and husband to my sister Idalia. The attorney wanted to get more information on Xavier and got on the computer to try searching more information on his criminal history and see what else he could find on him. It was during this online search that the lawyer discovered that Xavier Gomez was also his client. The lawyer told us that he could not represent the both of us because it was not right. The lawyer told us he would withdraw from Xavier's case and keep representing my husband. His assistant made it obvious that she was in disagreement with the lawyer's decision to withdraw from Xavier's case. She questioned the lawyer as to why he would get off Xavier's case since he was the lawyer's client first before my husband. Nonetheless, the lawyer stayed firm in his decision to get off Xavier's case and keep representing my husband.

In June-July 2024, my husband's bond was revoked because of



a bond violation. The judge ended up raising his bond. I was in the process of posting my husband's new bond when I was informed that an immigration hold was placed on my husband. Due to the immigration hold, I was not able to post his new bond.

Some time afterwards, I had gone to visit my husband's lawyer because I wanted to talk to him about my husband's case. During my wait, I was making small talk with Candy, the lawyer's assistant. During our conversation, Candy asked me how everything was going and how was sister doing ... the bad one (referring to A.S.'s mom). And I told Candy that her husband "El Gordo" had died. "El Gordo" was the nickname we called Xavier. Candy asked again, "El Gordo? The one from before?" Making reference to the Xavier Gomez that was the lawyer's former client. We kept talking about Xavier Gomez's death. Xavier had died of a heart attack shortly after my husband's bond was revoked. It was at this time that Candy told me that she, her mom and sister were all very sad about Xavier's passing. Candy said that she and Xavier had been childhood friends and that her mother loved Xavier as a son. Candy also said that she was unable to attend the funeral because she was busy at work. I told Candy that I felt sad for my sister that her husband died and that God would be the one to judge him because he did things in his past that weren't good. I expressed that I hoped that God had forgiven him. Candy's response was that she believed that people were entitled to second chances. That was how my conversation ended with Candy regarding Xavier's death.

I gave Candy pictures of A.S. which my husband's lawyer said that he never received. My son also emailed the lawyer during trial with relevant material.

(2 TRR 9).

Trial counsel Mark Thering testified. He stated that he first represented Appellant on a DWI in Ft. Bend County when he became

aware of the instant charges. He did not interview any of A.S.'s aunts or uncles. (1 TRR 70). He was told that A.S. lived with her Aunt Veneda and Uncle Rigoberto when she first moved to Houston. He did not talk to either of them. He did not get their phone numbers. Trial counsel stated that the family said that Veneda and Paula would not be helpful. Trial counsel made no effort to contact them. (1 TRR 72).

Trial counsel admitted that sometimes people say they don't want to get involved and a lawyer talks to them and the lawyer, who is conducting an independent investigation gets information from reluctant individuals and the individual cooperates. (1 TRR 72). And, sometimes reluctant witnesses become good witnesses once a lawyer interviews them. He tries to get family members to get reluctant family witnesses involved. (1 TRR 75).

Trial counsel also admitted that juries are sometimes suspect of a defendant's immediate family as witnesses. Trial counsel stated he never has hired a private investigator to talk to reluctant witnesses.

While Appellant was in jail, trial counsel visited him twice. Once for 30 minutes and the other for 6 minutes. A lawyer that worked for trial counsel visited Appellant four times.

Defense Exhibit 13 was admitted into evidence as the motion to dismiss filed by trial counsel. The motion alleged a violation of Appellant's statutory right to a speedy trial based on the two year delay resulting from the failure of the State to present Appellant's case to a grand jury and obtain an indictment. (1 TRR 79). Trial counsel was aware that there is a presumed prejudice under the United States Constitution resulting from a lengthy delay in proceeding to trial. (1 TRR 80). Trial counsel never presented a constitutional speedy trial motion despite a more than two year delay between Appellant's arrest and indictment.

Trial counsel did not contest the testimony of Paula Pompa Nunez that Xavier Gomez referred her family to trial counsel in 2013 or 2014.

Defense Exhibit 10 was admitted into evidence as the notice of appearance filed by trial counsel pertaining to charges filed against Xavier Gomez on January 4, 2023.

Defense Exhibit 12 was admitted into evidence as the plea papers pertaining to the charges against Xavier Gomez filed in September 2023. During that same period of time, trial counsel was representing Appellant. Trial counsel was aware that Xavier Gomez was married to Idalia Pompa.

(1 TRR 84).

Trial counsel never spoke to Xavier Gomez about the allegations against Appellant before his death. The only time that trial counsel ever filed a motion to withdraw from a case after a defendant has plead guilty was in regards to Xavier Gomez in January 2024. He stated that the State Bar instructed him to withdraw from the representation of Xavier Gomez. (1 TRR 87).

After Appellant's conviction, a notice of appeal was filed in which trial counsel asked that he be allowed to withdraw from representing Appellant. (CR 215). Trial counsel told the Ortiz family that the judge would appoint someone to represent Appellant on appeal after the conviction. (1 TRR 89). A pauper's oath was filed on October 2, 2024. (1 TRR 89).

Defense Exhibit 16 was admitted into evidence as a copy of the motion for new trial filed by trial counsel on October 10, 2024, after Scott Pope was appointed on October 8, 2024 to represent Appellant and after notice of appeal was filed and a free record was ordered for Appellant. (1 TRR 91). The motion for new trial alleged only that the verdict went against the weight of the evidence presented at trial. Trial counsel stated

that he filed the motion for new trial to preserve Appellant's right to file one and he did not know if the trial court had appointed counsel. (1 TRR 92).

The State did not question trial counsel.

The trial court denied Appellant's motion for new trial by written order on December 13, 2024. (1 TCR 128).

### **Issue One Restated**

**The trial court abused its discretion in denying Appellant's Motion for New Trial based on trial counsel's failure to conduct an independent investigation of the facts underlying the allegations and his failure to interview and subpoena witnesses to testify and controvert the allegations and testimony of the complainant, A.S. and her mother.**

### **Issue Number Two Restated**

**The trial court abused its discretion in denying Appellant's Motion for New Trial based on trial counsel's conflict of interest arising from his representation of the complainant's step-father at the same time as representing Appellant and not informing Appellant of trial counsel's long term relationship with him as evidence by the fact that trial counsel was being referred clients in 2013-2014 and he was advised by the State Bar of Texas that he had to withdraw from representation of A.S.'s step-father.**

## Summary of the Argument in Support of Issues One and Two

The trial court abused its discretion in denying Appellant's Motion for New Trial based on trial counsel's admission that he contacted none of the potential family members of A.S. who would have refuted her testimony that Appellant's wife took care of her while her mother work. Trial counsel abdicated his duty to conduct an independent investigation of the facts necessary to refute the allegation of abuse made by A.S. expecially where A.S. had to get information from her mother to create a memory of events that occurred when she was 5 or 6 years old.

Based on *Strickland v. Washington*, 466 U.S. 668, 690 (1984)), "[t]o obtain a reversal of a conviction under the *Strickland* test, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense, resulting in an unreliable or fundamentally unfair outcome of the proceeding." *Davis v. State*, 278 S.W.3d 346, 352 (Tex. Crim. App. 2009)

In this case, trial counsel failed to conduct an independent investigation while he was representing the stepfather of A.S. He was serving two distinct master. His failure to conduct an independent

investigation constitutes deficient conduct that prejudiced Appellant.

### **Statement of Facts in Support of Issues One and Two**

Appellant adopts the statement of facts heretofore presented.

### **Argument and Authorities in Support of Issues One and Two**

#### **A. Standard of Review**

Appellant's claim of ineffective assistance of counsel was presented to the trial court in a motion for new trial. This Court must review the issue on appeal as a challenge to the trial court's denial of his new-trial motion and review it under an abuse-of-discretion standard. *Charles v. State*, 146 S.W.3d 204, 208 (Tex. Crim. App. 2004); *Starz v. State*, 309 S.W.3d 110, 118 (Tex. App.—Houston [1st Dist.] 2009, pet. ref'd). Thus, Appellant's conviction may be reversed only if the trial court's decision to deny the motion for new trial was arbitrary or unreasonable, viewing the evidence in the light most favorable to the trial court's ruling. *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012); *Starz*, 309 S.W.3d at 118; *Shamim v. State*, 443 S.W.3d 316, 321 (Tex. App. 1st, 2014) (PDR refused).

Appellant asserts that given the trial record, the evidence presented

at the motion for new trial, the decision by the trial court to deny his motion for new trial was unreasonable based on trial counsel's failure to conduct any investigation of the living arrangements of A.S. when she was five or six years old to substantiate the testimony of Appellant's wife and son. The relationship between trial counsel and the complainant's family compromised his duty to Appellant and prejudiced his representation by trial counsel's failure to conduct an independent investigation of the facts.

## **B. General Rule**

"A defendant has a Sixth Amendment right to effective assistance of counsel," and counsel's "function 'is to make the adversarial testing process work in the particular case.'" *Ex parte Martinez*, 330 S.W.3d 891, 900 (Tex. Crim. App. 2011) (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). "To obtain a reversal of a conviction under the *Strickland* test, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense, resulting in an unreliable or fundamentally unfair outcome of the proceeding." *Davis v. State*, 278 S.W.3d 346, 352 (Tex. Crim. App. 2009) (citing *Strickland*, 466 U.S. at



687). “Deficient performance means that ‘counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Ex parte Napper*, 322 S.W.3d 202, 246 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 687). “To establish deficient performance, ‘the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Id.* (quoting *Strickland*, 466 U.S. at 688). “The prejudice prong of *Strickland* requires showing ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 248 (quoting *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* (quoting *Strickland*, 466 U.S. at 694).

“It is not enough that counsel’s errors could have had ‘some conceivable effect on the outcome of the proceeding,’ but a defendant does not have to show that counsel’s deficient conduct ‘more likely than not altered the outcome of the case.” *Id.* at 248-49 (quoting *Strickland*, 466 U.S. at 693).

In this regards, a determination of deficient conduct in this case is

premised on two separate concepts: an attorney's duty to conduct an independent investigation of the facts and to identify and subpoena witnesses to testify on an accused behalf.

### **1. Duty to Conduct Independent Investigation**

A criminal defense lawyer has a duty to conduct an independent investigation of the facts of a case, which includes seeking out and interviewing potential witnesses. *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App.1990). A breach of the duty to investigate may result in a finding of ineffective assistance “where the result is that any viable defense available to the accused is not advanced.” *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex. Crim. App. 1982). In defining the duty to investigate, the United States Supreme Court has stated that “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate *must be directly assessed for reasonableness* in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Strickland*, 466 U.S. at 691; *Guerrero v. State*, 2008 Tex. App. LEXIS 1862, \*11-12, 2008 WL 4724431; *Henry v.*

*State*, 2008 Tex. App. LEXIS 9403, \*10-11, 2008 WL 5244849.

## **2. Failure to Call Witnesses**

A claim of ineffective assistance of counsel may not be predicated upon a failure to call witnesses unless appellant shows such witnesses were available and their testimony would benefit the appellant. *See King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App.1983). Additionally, the proffered evidence must be more than cumulative of other evidence at trial to raise the spectre of ineffective assistance. *Holland v. State*, 761 S.W.2d 307, 319 (Tex. Crim. App. 1988); *Ketchum v. State*, 199 S.W.3d 581, 597 (Tex. App.--Corpus Christi 2006, pet. ref'd).

## **C. Application of Law to the Facts**

The record reflects that there were two distinct narratives presented to the jury. First, according to the complainant and her mother, Appellant's wife, Alejandra Pompa Nunez, took care of A.S. when she first moved to Houston and spent the weekends at Appellant's home when A.S.'s mother was working. The opposing narrative presented by Appellant's wife and son Humberto was that A.S. never stayed with them and that Alejandra did not take care of A.S. while her mother worked on

weekends.

From the witnesses, the jury heard that A.S.' aunts Veneda and Paula cared for A.S. But the question became who's testimony was accurate and truthful.

A.S. testified that she had to ask her mother lots of questions because her memory of events when she was five or six was sketchy. Her memory was then created.

The record reflects that the complaint (2 TRR 9) filed December 9, 2019, Defendant Exhibit 2, alleges that the complainant stated in the forensic interview that her mother did not want her to go to her aunt's house since she was scared of Appellant but she never disclosed the sexual assault. She stated that her mother took her to her aunt's house because she had no other option for child care when her mother worked.

Trial counsel stated that Appellant's wife, Alejandra told him that A.S. did not stay with her while her mother worked but stayed with her sisters, Veneda and Paula. Alejandra told him that her sisters did not want to get involved but he never attempted to talk to them about the family's history.

Paula, A.S.'s aunt testified at the motion for new trial hearing that

Veneda took care of A.S. when she first came to Houston and Alejandra did not. She also testified that she did not want to testify but she came to court because she was subpoenaed and asked to tell the truth. She also detailed the fact that she hired Mark Thering to represent a member of her family based on a referral from Hector Gomez, Idalia's second husband, who was also a client of Thering.

From the outset, trial counsel knew that any defense he could present depended on the jury not believing the complainant's story. Trial counsel tried to establish that A.S.'s description of Appellant's son's bedroom was wrong and the layout of the apartment was also wrong. Trial counsel also presented the testimony of one of Appellant's sons and his wife, both who denied the factual basis of A.S.'s story.

The importance of the testimony of Paula Pompa and Rigoberto Gomez is evident, as they took care of A.S. when her mother worked. They were independent witnesses whose independent memories conflicted with the creative memories of A.S. Both Paula and Rigoberto testified that A.S. was taken care of by Veneda when Idalia first moved to Houston with her children and went to work.

The only reason Rigoberto did not appear was that Appellant's trial

lawyer did not call him and ask him to come to court.

Trial counsel admitted that he did talk any outside witnesses and depended on Appellant's son to bring witnesses to the courthouse to testify. Trial counsel was also going call witnesses to testify without talking to them.

The evidence presented two versions of events. A.S. and her mother testified that A.S. would spend weekends at Appellant's home while her mother worked. A.S. and her mother testified that while living with her Aunt Veneda during the week, she would go to her Aunt Alejandra's home on weekends because Veneda could not care for her on the weekends when she was gone.

A contrary version of events was presented by the defense. Appellant's wife and son, Humberto, testified that A.S. did not spend the night at their house. They testified that A.S.'s brother spent the night but not A.S.

Trial counsel testified that he was aware of the Appellant's wife's extensive family and was told that A.S. never lived or stayed at her home. Trial counsel was also told that Appellant's wife's family was reluctant to get involved.

Trial counsel thought that Appellant's brother-in-law was going to show up to testify but he never interviewed him and did not know what he was going to say. Trial counsel had no knowledge of what relevance anything he might say would benefit Appellant's defense.

Trial counsel admitted that sometimes reluctant witnesses could become beneficial witnesses after a lawyer interviews them and explains the importance of their testimony. Without attempting to investigate, a lawyer abdicates his duty to conduct an independent investigation of the facts that are necessary to present a defense.

In this case, Appellant's sister-in-law Paula Pompa and his ex brother-in-law, Rigoberto Gomez testified at the motion for new trial hearing that A.S. and her mother, Idalia's account of child care arrangements when they first moved to Houston in 2005 or 2006 was not accurate. Both testified that: Alejandra, Appellant's wife did not care for A.S. when her mother worked; and that Rigoberto specifically stated that his wife, Veneda cared for A.S. when Idalia went to work at a job that he helped her get with his brother.

Trial counsel blamed Appellant's son for not rounding up witnesses and bringing them to court to testify. Appellant asserts that the

abdication of his duty to investigate as required by the Sixth Amendment was compromised by his prior existing relationship with the complainant's stepfather.

The uncontradicted testimony was that A.S.'s stepfather, Xavier Gomez was Paula Pompa's brother-in-law and that Xavier Gomez referred Paula's husband to trial counsel as an attorney in 2013-2014. Trial counsel actively represented Xavier Gomez while representing Appellant. And, the only time that trial counsel ever withdrew from a case was after his client entered a plea of guilty, which involved Xavier Gomez.

Trial counsel did not conduct an independent investigation. He was immersed into the complainant's family and ignored his duty to Appellant as a zealous advocate. Trial counsel suggested in his opening statement that A.S.'s stepfather was a convicted felon and that her biological father was a convicted felon of human trafficking. (3 RR 19). No evidence was presented during the trial to support the allegation nor was it shown to be factual relevant.

No attempt was made to link Xavier's Gomez's father, as stated in the complaint as an alternative suspect.



### **Issue Three Restated**

**The trial court abused its discretion in denying Appellant's Motion for New Trial based on trial counsel failure to conduct an independent investigation of the law and fact necessary to provide a complete defense and by failing to file and challenge the Appellant's deprivation of a constitutional speedy trial based on the two year delay resulting from Appellant's arrest and indictment.**

### **Summary of the Argument in Support of Issue Three**

Trial counsel filed a motion to dismiss the indictment based on the more than two year delay between Appellant's arrest and indictment based on a violation of a state statute but failed to address the impact of the delay based on Appellant's constitutional right to a speedy trial. While he professed to be aware of the law he failed to address the claim that could have resulted in the dismissal of the charges against him with prejudice. Given the facts of this case, trial counsel's representation of Appellant was deficient and Appellant was prejudiced by that deficient conduct.

### **Statement of Facts in Support of Issue Three**

The record reflects that Appellant was charged by complaint on December 19, 2019, with the felony offense of continuous sexual assault

of a child. (CR 8). He was released on bond on December 14, 2019. (CR 27). An order for pretrial supervision was entered on January 30, 2020. On March 10, 2022, trial counsel filed a motion to dismiss the charges based on a violation of Tex. Code Crim. Proc. article 32.01 based on the failure of the State to obtain an indictment. (CR 38). Appellant was indicted on March 15, 2022, for the felony offense of indecency with a child. (CR 43).

The record also reflects that Xavier Gomez, A.S.'s stepfather died in June 2024. (1 TRR 87).

The case had been set for trial repeatedly and the record is silent as the reason for the delay. The record does reflect that charges were originally continuous sexual assault of a child in the 338th Judicial District Court of Harris County, Texas. At some point, the case was transferred to the 488th Judicial District Court of Harris County, Texas. The case was then transferred to the 176th Judicial District Court. (CR 120).

### **Argument and Authorities in Support of Issue Three**

As previously stated, the United States Supreme Court has established a two-pronged test for determining whether there was

ineffective assistance of trial counsel. *Strickland v. Washington, supra*. This requires that trial counsel have a firm command of the facts and law necessary to present a defense after a complete investigation.

Trial counsel stated that while familiar with the law concerning a violation of an accused constitutional right to a speedy trial, he did not present that issue in this case. (1 RR 80). Trial counsel stated that he was aware that prejudice to the accused is presumed if there is a one year delay in initially presenting a case for trial. In his affidavit, regarding the filed motion to dismiss, trial counsel stated that Appellant did not want the charges dismissed for a statutory speedy trial violation because he might be rearrested or he would remain in custody because of his lack of legal status in this country. (2 TRR 3, State's Exhibit 1). Trial counsel did not address the constitutional speedy trial issue raised in Appellant's motion for new trial nor did he discuss with Appellant.

While professing to have knowledge of an accused right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution, trial counsel failed to challenge the proceedings and seek the dismissal of the charges with prejudice as a result of the more than two

year delay between arrest and indictment.

The right to a speedy trial is guaranteed by the Sixth Amendment and applies to state criminal proceedings through the Fourteenth Amendment. U.S. Const. amend. VI; *Klopfer v. North Carolina*, 386 U.S. 213, 223-26 (1967); *Vermont v. Brillon*, 556 U.S. 81, 89 (2009); *Torres v. State*, 2017 Tex. App. LEXIS 11053 (Tex. App. – San Antonio, 2017). A violation of that speedy trial right, if found, requires dismissal of the indictment with prejudice. *See Strunk v. United States*, 412 U.S. 434, 439-40 (1973); *Shaw v. State*, 117 S.W.3d 883, 888 (Tex. Crim. App. 2003) (speedy trial violation results in dismissal of the prosecution with prejudice); *Garcia v. State*, 2017 Tex. App. LEXIS 11638, \*3. 14-16-00262 (December 14, 2017).

In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the Supreme Court prescribed several factors to be considered when evaluating a speedy trial claim:

- (1) the length of the delay,
- (2) the reason for the delay,
- (3) the defendant's assertion of his right to speedy trial, and

(4) prejudice to the defendant.

None of these factors are either necessary or sufficient to find a speedy trial violation; “[r]ather, they are related factors and must be considered together with such other circumstances as may be relevant.” *Id.* at 533. This Court’s speedy trial inquiry therefore involves a “difficult and sensitive” balancing of these factors under the particular circumstances of a given case. *Id.* at 530, 533; *see Goodrum v. Quarterman*, 547 F.3d 249, 257 (5th Cir. 2008). As the Court of Criminal Appeals noted in *Hooper v. State*, 520 S.W.3d 915, 924 (Tex. Crim. App. 2017) that [T]he speedy trial right is amorphous, slippery, and necessarily relative.”

To trigger a speedy trial analysis, the defendant must make an initial showing that “the interval between accusation and trial has crossed the threshold dividing ordinary from ‘presumptively prejudicial’ delay.” *Doggett v. United States*, 505 U.S. 647, 651-52 (1992)); *see also Barker*, 407 U.S. at 530-32 (holding that length of delay is “triggering mechanism” for analysis of other factors). *See State v. Conatser*, 645 S.W.3d 925, 929 (Tex. App. 2022).

Each of the first three *Barker* factors are favorable to Appellant. The fourth and final *Barker* factor we consider is the prejudice caused to the defendant as a result of the State's delay. The defendant has the burden of showing prejudice. Unmistakenly, the three interests the right to a speedy trial is intended to protect: (1) preventing oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. *Hopper v. State*, 520 S.W.3d 915, 924 (Tex. Crim. App. 2017).

In this case, the obvious prejudice resulting to Appellant is the death of Xavier Gomez, A.S.'s stepfather, who died in June or July 2024. He would have been a material witness this case where there are inconsistencies in A.S.' story as well as inconsistencies in Idalia's memory of her relationship with her sisters. Xavier Gomez was present when A.S. went to the police station.

Also, the complaint in this case alleges that A.S.'s step-grandfather committed the sexual assault. Xavier Gomez was a material witness to the alternative suspect defense that could have been presented as well as the factual allegations presented. *State v. Conatser*, 645 S.W.3d 925,

930-931 (Tex. App.2022).

In this case, trial counsel failed to investigate the facts and law necessary to present a defense and failed to pursue a constitutional speedy trial violation resulting from the two year delay from Appellant's arrest to indictment. The fallacy of trial counsel's explanation is that he blamed Appellant for his failure to present the motion to dismiss to the trial court but he failed the address the fact that the harm from the failure to indict Appellant was cured by the return of the instant indictment within five days of the motion's filing.

The statutory violation was cured by the indictment. Trial counsel abandoned the violation of Appellant's Sixth Amendment right to a speedy trial.

### **Conclusion**

Appellant has clearly established that trial counsel's conduct in this case were deficient and that deficient conduct prejudice Appellant. In assessing the norms of adequate investigation in preparing for trial or to advise a defendant how to plead, defense counsel's job is to assess the factual allegations and apply those facts to the law. *Cooks v. State*, 240

S.W.3d 906, 912 (Tex. Crim. App. 2007). It is just as important for defense counsel to interview witnesses as it is to understand the law that makes certain conduct criminal.

In judging defense counsel's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to "counsel's perspective at the time" investigative decisions are made, and by giving a "heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 688, 691. A standard of reasonableness is applied as if one stood in counsel's shoes spawns few hard-edged rules. *Rompilla v. Beard*, 545 U.S. 374, 381 (2005).

Strategic choices made after a thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on further investigation. *Strickland*, 466 U.S. at 690-691.

Any strategic decision by counsel must be informed by a reasonable preliminary investigation. *Ex parte Bowman*, 533 S.W.3d 337, 350 (Tex.



Crim. App. 2017). If counsel neglects to investigate a particular aspect of the State’s allegations, this decision “must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.’ *Bowman*, 533 S.W.2d at 350)(quoting *Wiggins*, 539 U.S. at 521-522); *see also Andrus v. Texas*, 140 S.Ct. 1875 (2020).<sup>8</sup>

“An attorney who represents a criminal defendant is bound by professional duty to present all available evidence and arguments in support of his client’s position, and to contest with vigor all adverse evidence and views.” *Gagnon v. Scarpelli*, 411 U.S. 778, 787 (1973). Trial counsel failed in that duty. He failed to pick up a phone to call A.S.’s family members and Appellant’s wife’s family. Trial counsel was told that Rigoberto Gomez would testify but he never bother to find out what he had to say or to verify that he was going to come to court. Trial counsel left Appellant with no corroboration of his son and wife’s testimony. Trial counsel abandoned his right to pursue a constitutional speedy trial

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<sup>8</sup> In *Andrus*, the Court reiterated the long standing principle that “***In any ineffectiveness case***, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Wiggins v. Smith*, 539 U. S. 510, 521-522 (2003) (emphasis added).

violation. Clearly, trial counsel's conduct was deficient and Appellant was prejudiced by that conduct so that a new trial must be granted.

### **Prayer**

Wherefore premises considered, Appellant prays that this Court reversed the judgment of the trial court and enter a judgment of acquittal. Alternatively, Appellant prays that this Court reverse the judgment of the trial court and grant a new trial.

Respectfully submitted,

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### **Certificate of Service**

This is to certify that a true and correct copy of the attached and foregoing Appellant's Brief has been served on Harris County Assistant District Attorney Jessica Caird at [caird\\_jessica@dao.hctx.net](mailto:caird_jessica@dao.hctx.net) via electronic filing on June 9, 2025.

/s/ Stanley G. Schneider  
Stanley G. Schneider

### **Certificate of Compliance**

I certify that this document contains 13,138 words exclusive of the those portions excluded pursuant to TEX. R. APP. P. 9.4(i)(1).

/s/ Stanley G. Schneider  
Stanley G. Schneider

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