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**DENIAL OF PETITION
FOR DISCRETIONARY REVIEW,
TEXAS COURT OF CRIMINAL APPEALS
(OCTOBER 9, 2024)**

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

CAYETANO, MIGUEL ADAN

COA Case No. 01-23-00463-CR

Tr. Ct. No. 1235418

PD-0707-24

On this day, the Appellant's petition for discretionary review has been refused.

/s/ Deana Williamson
Clerk

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**MANDATE,
FIRST COURT OF APPEALS OF TEXAS
(NOVEMBER 15, 2024)**

IN THE FIRST COURT OF APPEALS OF TEXAS

MIGUEL ADAN CAYETANO,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

No. 01-23-00463-CR

Appeal from the 230th District Court Harris County,
(Tr. Ct. No. 1235418)

Before: ADAMS, Chief Justice,
GUERRA and FARRIS, Justices.

MANDATE

**TO THE 230TH DISTRICT COURT OF HARRIS COUNTY,
GREETINGS:**

Before this Court, on the 25th day of July 2024,
the case upon appeal to revise or to reverse your judgment was determined. This Court made its order in these words:

This case is an appeal from the final judgment signed by the trial court on February

23, 2023. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that the trial court's judgment contains no reversible error. Accordingly, the Court affirms the trial court's judgment.

The Court orders that this decision be certified below for observance.

Judgment rendered July 25, 2024.

Panel consists of Chief Justice Adams and Justices Guerra and Farris. Opinion delivered by Justice Guerra.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf and in all things to have it duly recognized, obeyed, and executed.

/s/ Deborah M. Young
Clerk of the Court

Date: November 15, 2024

[SEAL]

**MEMORANDUM OPINION,
FIRST COURT OF APPEALS OF TEXAS
(JULY 25, 2024)**

IN THE FIRST COURT OF APPEALS OF TEXAS

MIGUEL ADAN CAYETANO,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

No. 01-23-00463-CR

On Appeal from the 230th District Court Harris
County, Texas Trial Court Case No. 1235418

Before: ADAMS, Chief Justice,
GUERRA and FARRIS, Justices.

MEMORANDUM OPINION

A jury convicted appellant Miguel Adan Cayetano of aggravated sexual assault of a child less than fourteen years of age, and the trial court sentenced him to sixty years' confinement. *See* TEX. PENAL CODE § 22.021(a)(2)(B). In seven issues, Cayetano contends that the State violated his due process rights by presenting false or misleading testimony and statements; the trial court erred in admitting certain testimony and evidence and denying his motion for new

trial; and he received ineffective assistance of counsel at trial. He further argues that the cumulative effect of these alleged errors amounts to reversible error. We affirm.

Background

Because Cayetano does not challenge the sufficiency of the evidence, only a brief recitation of the facts is necessary to the disposition of this appeal. During the relevant time period, J.T. lived with her mother (Mother), siblings, maternal aunt, and her aunt's boyfriend (Cayetano) in Katy, Texas. J.T. contends that while her aunt was in Mexico and Mother was at work, Cayetano sexually assaulted her four or five times when she was twelve years old.¹

Following trial, the jury convicted Cayetano of aggravated sexual assault of J.T. The trial court assessed punishment at sixty years' confinement and entered its judgment on February 23, 2023.

Cayetano filed a motion for new trial on March 24, 2023, arguing that new evidence demonstrated that he was in Mexico, not Texas, at the time of the alleged assault. He further contended that the State misled the jury or engaged in prosecutorial misconduct by providing a date of assault that was contradicted by other evidence in the case and showing the jury a photo of J.T. at age eight instead of age twelve. Cayetano also raised ineffective assistance of counsel in his motion, arguing that trial counsel failed to adequately investigate his case. Cayetano pointed to his lawyer's failure to (1) present a competing expert

¹ Though a warrant was issued for Cayetano's arrest in 2009, he was not apprehended until 2021.

to rebut the testimony of the Sexual Assault Nurse Examiner (SANE), (2) object to the SANE's qualifications as an expert, and (3) call witnesses to testify concerning Cayetano's residency in Mexico at the time of the alleged assault. Lastly, the motion challenged the trial court's admission of testimony from the SANE and J.T.'s brother (Brother).

Cayetano filed an amended motion for new trial on April 21, 2023 arguing that more new evidence showed that Cayetano was apprehended in September 2009 while attempting to enter the United States from Mexico. Cayetano contended that this evidence bolstered his position that he could not have assaulted J.T. because he was living in Mexico at the time.

The trial court conducted a hearing on the motion for new trial on May 9, 2023. At the hearing, Cayetano only presented one witness: Lucero Hernandez, his brother's common-law wife, who lived with the family at the time in question and testified concerning the photograph of J.T. Cayetano did not present any testimony or evidence concerning trial counsel's strategy. The trial court orally denied the motion for new trial at the conclusion of the hearing, and this appeal followed.²

False-Evidence Claims

In his first issue, Cayetano contends that the State violated his due process rights by presenting false

² The record does not contain a written order denying the motion for new trial, but the hearing on the motion was conducted on the seventy-fifth day after the judgment. Thus, the motion was deemed denied by operation of law on that day in any event. Tex. R. App. P. 21.8.

or misleading testimony from SANE Ashley Hovar and J.T. He also argues that certain remarks made by the State in closing arguments concerning the date of the alleged sexual assault and J.T.'s complaints at the hospital were false. Relatedly, in his fourth issue, Cayetano contends that the State had a responsibility to introduce the CPS records to correct false statements made by J.T., Mother, and Brother.³

In response, the State argues that Cayetano failed to preserve any such error for our review because he did not object to any of the complained-of testimony at trial. At least as it concerns Hovar's testimony, Cayetano claims that because the falsity of her testimony was undiscoverable at the time of trial, he can raise the issue for the first time on appeal. *See Estrada*, 313 S.W.3d at 288 (excusing defendant's failure to object at time of admission of false testimony into evidence because defendant did not know and could not reasonably have been expected to know testimony was false at time it was made).

³ Cayetano's fourth issue refers to *Brady* violations and describes the CPS records as "exculpatory evidence." *See Brady v. Maryland*, 373 U.S. 83 (1963). Reviewing all of his appellate briefing, we understand Cayetano to be referring to the State's obligation to correct false testimony, not, as the State contends, its duty to disclose exculpatory information under *Brady*. *See Estrada v. State*, 313 S.W.3d 274, 288 (Tex. Crim. App. 2010) (noting "State's duty to correct 'false' testimony whenever it comes to the State's attention"). Cayetano clarifies in his reply brief that "[a]fter providing the Defense exculpatory evidence from the 2009 CPS Record, the STATE is not required to admit that evidence at Trial." However, Cayetano alleges, "the STATE cannot violate the Defendant's due process rights by [knowingly] [solicit] diametrically opposed [false testimony] from (4) witnesses." (brackets appearing in original).

A. Standard of Review and Applicable Law

“The use of material false testimony to procure a conviction violates a defendant’s due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.” *Ukwuachu v. State*, 613 S.W.3d 149, 156 (Tex. Crim. App. 2020) (citing *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015)). In reviewing a claim alleging the use of material false testimony, we must determine whether: (1) the testimony was actually false, and (2) whether it was material. *Id.* (citing *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014)). “To establish falsity, the record must contain some credible evidence that clearly undermines the evidence adduced at trial, thereby demonstrating that the challenged testimony was, in fact, false.” *Ex parte Reed*, 670 S.W.3d 689, 767 (Tex. Crim. App. 2023) (citing *Ukwuachu*, 613 S.W.3d at 156). The evidence of falsity must be definitive or highly persuasive. *Id.* (citing *Ukwuachu*, 613 S.W.3d at 157); see *Estrada*, 313 S.W.3d at 286 (taking judicial notice of prison regulation regarding classification system for incarcerated capital murderers and holding that regulation was sufficient to establish falsity of contradictory expert testimony at trial).

The evidence need not demonstrate perjured testimony, only that the testimony left the jury with a false or misleading impression. *Ex parte Reed*, 670 S.W.3d at 767 (citing *Ukwuachu*, 613 S.W.3d at 156); see *Ex parte Chaney*, 563 S.W.3d 239, 263 (Tex. Crim. App. 2018) (“Whether evidence is false turns on whether the jury was left with a misleading or false impression after considering the evidence in its entirety.”). False testimony is material if there is a reasonable likelihood that it could have affected the

jury's judgment. *Ex parte Reed*, 670 S.W.3d at 767 (citing *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Ex parte Chavez*, 371 S.W.3d 200, 206–07 (Tex. Crim. App. 2012)).

B. Hovar's Testimony

Cayetano first complains that certain testimony from Hovar concerning the Tanner Puberty Stages was false. Hovar explained to the jury that the Tanner Stages are used to describe breast and genital development in adolescents. Hovar further testified that a higher Tanner Stage correlated with a higher level of estrogen. She testified that the higher level of estrogen causes the vaginal wall and hymen to become more elastic and heal more quickly, generally within twenty-four hours. Hovar therefore concluded that a sexual assault examination of an adolescent at a higher Tanner stage may not reveal physical signs of injury. Hovar opined that J.T. was at Tanner Stage 4 and that if she had been sexually assaulted on May 19th, it was possible that any vaginal injuries could have fully healed by the time of Hovar's examination on May 20th.

When asked whether she had read any peer-reviewed studies regarding such injuries in children, Hovar further testified:

Specifically for this case I did review an article that has been present throughout my career that's relevant. It was written by Dr. Nancy Kellogg in 2004 and its titled Genital Anatomy of the Pregnant Adolescents. It is based on a study of 36 teenage girls within the age of 15 but ages 11 through 16. Out of the 36 of the pregnant females only two have

visible injury on their female genitalia on exam.

Cayetano argues that this testimony is false or fraudulent because it “lead the jury to believe that it is a natural consequence of an adolescent sexual assault to show no injuries.” Cayetano further points to additional medical articles which he contends “directly contradict” Hovar’s review of sexual assault injuries in female adolescents.

Cayetano did not object to any of the aforementioned testimony at trial. On appeal, he argues that because of the specialized nature of Hovar’s testimony, he could not have known it was false at the time. Even if we assume that his failure to object is not fatal to his false evidence claim, *see Estrada*, 313 S.W.3d at 288, we nevertheless conclude that the record does not support such a claim.

Cayetano did not introduce the medical articles he references now on appeal at any point in the proceedings below.⁴ Further, Cayetano did not present any expert testimony analyzing Hovar’s testimony or demonstrating that her discussion of the Tanner Stages was false or misleading. “Accordingly, because the record does not contain any evidence that persuasively undermines the evidence adduced at trial, [Cayetano] cannot satisfy the falsity prong of a false-evidence claim.”⁵ *See Ukwuachu*, 613 S.W.3d at 157–

⁴ By separate order, we previously granted the State’s motion to strike Cayetano’s original brief, in part because it included an appendix containing these extra-record materials.

⁵ False-evidence claims are typically raised in habeas proceedings following the discovery of new evidence. *See Tennard v. State*, No. 14-19-00557-CR, 2020 WL 6072830, at *2 (Tex. App.—Houston

59 (rejecting claim that unadmitted phone records used to cross-examine witnesses at trial created false impression with jury where (1) appellant failed to identify any specific testimony that left false impression, (2) appellant did not point to credible evidence showing State’s interpretation of records was incorrect, (3) records were never admitted or made part of record with motion for new trial, and (4) appellant did not present any expert testimony analyzing State’s use of records to prove testimony was false or misleading).

C. J.T.’s Testimony

In his reply brief, Cayetano also argues that J.T. falsely testified concerning the time and place of the alleged assault. He claims that her testimony that an assault occurred in the bathroom on May 19, 2009 is contradicted by medical records from May 20, 2009 noting (1) an assault date of May 15, 2009; (2) J.T.’s report that “yesterday [May 19, 2009] he wanted to do that but somebody knocked on the door, [so] he only hugged me”; and (3) that “an attempt was made the day before [May 19, 2009] but ‘she refused to take her clothes off.’”⁶ Cayetano did not object to the allegedly false testimony from J.T. at trial.

[14th Dist.] Oct. 15, 2020, pet. ref’d) (mem. op., not designated for publication) (citing *Ex parte Chabot*, 300 S.W.3d 768, 772 (Tex. Crim. App. 2008)).

⁶ The medical record that Cayetano identifies as containing this third statement is handwritten and not entirely clear. Hovar (who did not author the record) read it into the record as follows: “During assault patient refused to take her clothes off. On 5/19/2009.” This interpretation would not support Cayetano’s position that this record only describes an *attempted* assault on

Unlike his false-evidence claim concerning Hovar’s medical testimony, there is nothing to suggest that Cayetano did not know or could not have known that J.T.’s testimony regarding the date of the assault was false at the time it was given. *Compare Estrada*, 313 S.W.3d at 288 (holding that defendant had not waived due-process complaint regarding false evidence by failing to timely object because he “could not reasonably be expected to have known that the testimony was false at the time that it was made”), *with Valdez v. State*, No. AP-77,042, 2018 WL 3046403, at *7–8 (Tex. Crim. App. June 8, 2018) (not designated for publication) (holding that defendant waived due-process complaint where he was aware of inconsistent statements and failed to object). In fact, the State gave notice that it intended to use the medical records at trial.⁷ The notice averred, and Cayetano does not dispute, that copies were provided to the defense at least fourteen days before trial. Thus, we determine that because Cayetano did not object to the allegedly false testimony at trial, he has failed to preserve this issue for our review. *See Saldano v. State*, 70 S.W.3d 873, 891 (Tex. Crim. App. 2002) (declining to address merits of State’s confession that complained-of evidence was erroneously admitted because defendant “did not make an objection to the testimony as our law has always required”); *see also Aquino Calderon v. State*, No. 01-22-00513-CR, 2023 WL 8262710, at *10 (Tex. App.—Houston [1st Dist.] Nov. 30, 2023, no pet.) (mem. op., not designated for publication) (holding that

May 19, 2009.

⁷ These medical records were in fact admitted at trial during Hovar’s testimony.

appellant waived false evidence claim by failing to object at trial where appellant knew witness had made prior statements inconsistent with trial testimony, and State timely disclosed those prior inconsistent statements).

D. Remarks During Closing Arguments

Cayetano further alleges that during closing arguments, the State made false or misleading statements to the jury concerning Hovar's testimony and the date of the alleged assault. Again, Cayetano did not object to these allegedly false remarks at the time they were made. Nevertheless, the Court of Criminal Appeals rejected a similar argument in *Ukwuachu*, concluding that complaints that a prosecutor's remarks during cross-examination and argument were false or misled the jury "[did] not fall within the scope of [its] false-evidence jurisprudence." 613 S.W.3d at 157. The court explained that to demonstrate the falsity requirement, there must be both an allegation of falsity of some specific testimony and proof of that falsity with highly persuasive evidence that undermines the evidence presented at trial. *Id.* The court ultimately concluded that "a prosecutor's questions of a witness and his arguments to the jury are not 'evidence' within the meaning of a false-evidence claim." *Id.* at 157–58 (citing *Coble v. State*, 871 S.W.3d 192, 206 (Tex. Crim. App. 1993); *Barrientez v. State*, 487 S.W.2d 97, 101 (Tex. Crim. App. 1972)). For the same reasons, we reject Cayetano's false-evidence claim as to the remarks made by the State during closing arguments.

We overrule Cayetano's first issue.

E. Testimony Contradicted by CPS Records

Cayetano's fourth issue likewise concerns the State's alleged use of false evidence or testimony, so we discuss it here. Cayetano contends that the State presented false testimony from J.T, Mother, and Brother concerning the sexual assault. Specifically, Cayetano points to the following:

- Testimony from J.T. concerning a sexual assault by Cayetano that occurred in the bathroom of their home, despite absence of any reference to the bathroom as the location of the assault in the CPS records;
- Mother's testimony that on the date in question, she remembered calling home, speaking with Lucero, and learning that J.T. was locked in the bathroom, contrary to her 2009 statement recounting that she spoke with *Brother* on the date in question who informed her that J.T. was locked in the *bedroom*; and
- Brother's testimony that he was speaking with Mother on the phone while J.T. was locked in the bathroom and that Cayetano broke the bedroom door down and beat Brother with his fists, though the CPS records do not mention a telephone call, broken doors, or injuries to Brother.

Cayetano argues that because these areas of testimony were directly contradicted by the CPS records, the State was obligated to correct it. Again, Cayetano failed to object to any of the complained-of testimony on this basis at trial. As with the portions of J.T.'s testimony complained of in his first issue, Cayetano failed to preserve for our review any false-evidence

claim as to these portions of testimony. *See Saldano*, 70 S.W.3d at 891; *see also Valdez*, 2018 WL 3046403, at *7–8; *Aquino Calderon*, 2023 WL 8262710, at *10. Cayetano had reason to know of the alleged falsity at the time J.T., Mother, and Brother testified. To the extent that their testimony contradicted the CPS records from the time of the alleged assault, the State previously provided those records to Cayetano.

Even if preserved, Cayetano’s false-evidence claim as to the testimony supposedly contradicted by the CPS records lacks merit. First, we disagree with Cayetano’s argument that the absence in the CPS records of certain information testified to at trial necessarily means the testimony was false. “The question is whether the testimony, taken as a whole, gives the jury a false impression.” *Ex parte Chavez*, 371 S.W.3d at 208; *see also Hocko v. State*, 590 S.W.3d 680, 697 (Tex. App.—Houston [14th Dist.] 2019, pet. ref’d) (witness’s failure to mention that appellant kicked complainant during 911 call “[did] not require a conclusion” that witness lied when she testified to such at trial; trial testimony as compared to 911 call “did not necessarily give the jury a false impression”).

Additionally, the Court of Criminal Appeals has held that minor inconsistencies in a witnesses’s trial testimony do not, without more, show that the witness’s testimony is false. *See Ex parte De La Cruz*, 466 S.W.3d at 867–68, 871 (finding that inconsistencies in eyewitness’s trial testimony compared with expert witness’s opinion, with respect to number of times victim was shot and location of shooting, did not, without more, support finding that witness’s testimony was false) (citing *United States v. Croft*, 124 F.3d 1109, 1119 (9th Cir. 1997) (stating that fact that witness may have given

earlier inconsistent statement, or that other witnesses may have conflicting recollection of events, does not establish that witness's testimony was false)). Instead, contradictory witness testimony during trial "merely establishes a credibility question for the jury" to decide and "does not suffice to demonstrate" that the evidence gave the jury a false impression. *Id.* at 871 (quoting *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990)). The jury is the sole judge of witness credibility and the weight to be afforded to witness testimony, especially where the record contains conflicting testimony. *Lancon v. State*, 253 S.W.3d 699, 707 (Tex. Crim. App. 2008) (holding in case involving contradictory testimonial evidence that it was for jury to determine whether two witnesses were lying or telling truth); see also TEX. CODE CRIM. PROC. art. 38.04 ("The jury, in all cases, is the exclusive judge of the facts proved and of the weight to be given to the testimony. . . .").

We overrule Cayetano's fourth issue.

Expert Testimony

In his second issue, Cayetano argues that the trial court erred in admitting testimony from three of the State's experts: SANE Hovar; Claudia Mullin, a forensic examiner at the Children's Assessment Center; and Dr. Whitney Crowson, a child psychologist. As to Hovar and Mullin, Cayetano contends that the trial court failed to ensure the witnesses were properly qualified. Regarding Dr. Crowson, Cayetano argues that the trial court erred in allowing her to observe J.T.'s testimony and then testify because this improperly bolstered J.T.'s credibility, and Crowson's testimony was neither reliable nor relevant under Texas Rule of Evidence 702.

A. Failure to Object at Trial

The State argues that Cayetano's complaints regarding the qualifications of Hovar and Mullin are not preserved for our review because he failed to object to their testimony on this basis at trial. In response, Cayetano argues that as the gatekeeper of the evidence, the trial court was required to conduct a "gatekeeper hearing" outside the presence of the jury for each expert. Cayetano suggests the trial court had an affirmative duty to do so regardless of whether an objection was raised regarding the expert's testimony. He points to no case law supporting such an assertion.

The Texas Court of Criminal Appeals has "consistently held that the failure to object in a timely and specific manner during trial forfeits complaints about the admissibility of evidence." *Saldano*, 70 S.W.3d at 889. "This is true even though the error may concern a constitutional right of the defendant." *Id.* It is also true when a party challenges the reliability of expert testimony pursuant to the rules of evidence. *Stephens v. State*, 276 S.W.3d 148, 153 (Tex. App.—Amarillo 2008, pet. ref'd) (holding appellant failed to preserve error when he did not object to expert's testimony at trial or request *Daubert* hearing). Because he failed to object to the qualifications of either Hovar or Mullin at trial or request a *Daubert* hearing, he has failed to preserve his complaints concerning their testimony for our review. TEX. R. APP. P. 33.1(a); *see also Dolard v. State*, Nos. 01-13-00094-CR, 01-13-00095-CR, 01-13-00097-CR, 01-13-00098-CR, 2014 WL 3607514, at *5–6 (Tex. App.—Houston [1st Dist.] July 22, 2014, pet. ref'd) (mem. op., not designated for publication) (holding that appellant's failure to object

to expert's testimony at trial waived any complaint regarding testimony on appeal).

B. Dr. Crowson's Testimony

Cayetano's arguments concerning the trial court's admission of Dr. Crowson's testimony are not entirely clear. In his principal brief, Cayetano seems to focus on the trial court's overruling of defense counsel's objection to the State's request that Crowson be permitted to observe J.T.'s testimony at trial. In his reply brief, Cayetano argues that Crowson should not have been permitted to testify following her observation of J.T. because her testimony was not reliable or relevant. We address each argument below.

1. Allowing Dr. Crowson to Observe J.T.'s Testimony

At trial, Cayetano invoked Texas Rule of Evidence 614, otherwise known as "the Rule." *See* Tex. R. Evid. 614 (providing that, at party's request, trial court must order witnesses excluded from hearing other witnesses' testimony). The State requested an exception to the Rule for Dr. Crowson pursuant to Rule 614(c), which exempts from "the Rule" "a person whose presence a party shows to be essential to presenting the party's claim or defense." *Id.* at 614(c). The trial court granted the State's request over Cayetano's objection.

On appeal, Cayetano argues that the trial court abused its discretion by allowing Dr. Crowson "to sit in the courtroom [during J.T.'s testimony] and be observed by the Jury which would give her instant credibility." He also argues that portions of Dr. Crowson's testimony impermissibly bolstered J.T.'s credibility. We disagree.

The Court of Criminal Appeals has held that a trial court is vested with discretion and may permit expert witnesses to be exempt from “the Rule,” so that they may hear other witnesses testify and then base their opinions on such testimony. *Lewis v. State*, 486 S.W.2d 104, 106 (Tex. Crim. App. 1972); *Martinez v. State*, 867 S.W.2d 30, 40 (Tex. Crim. App. 1993); *see also Caron v. State*, 162 S.W.3d 614, 618 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Considering this line of cases, we hold that the trial court’s exemption of Dr. Crowson from “the Rule” does not amount to an abuse of discretion. The stated reason for Dr. Crowson’s exemption provided by the State—allowing a clinical psychology expert to take J.T.’s testimony into consideration when offering her opinion—falls within the exemptions provided in Rule 614. *See* TEX. R. EVID. 614; *see also Martinez*, 867 S.W.2d at 39–40; *Lewis*, 486 S.W.2d at 106; *Caron*, 162 S.W.3d at 618; *Garcia v. State*, No. 01-17-00171-CR, 2018 WL 827452, at *6 (Tex. App.—Houston [1st Dist.] Feb. 13, 2018, pet. ref’d) (mem. op., not designated for publication); *Gonzales v. State*, Nos. 03-13-00333-CR & 03-13-00334-CR, 2015 WL 3691180, at *2 (Tex. App.—Austin June 11, 2015, no pet.) (mem. op., not designated for publication) (“We believe the purpose articulated by the State—providing expert testimony based upon observations of the children’s testimony to explain exhibited behaviors not readily understood by those not familiar with the dynamics of child sexual abuse—is consistent with the exception provided for in the Rule.”).

2. Admissibility of Dr. Crowson's Testimony

As it concerns Cayetano's arguments that Dr. Crowson's testimony should have been excluded because it was not subject to a gatekeeper hearing or not sufficiently reliable or relevant, we conclude that Cayetano failed to preserve such arguments for our review because he did not object to Crowson's testimony on that basis at trial. In fact, Cayetano stipulated to Crowson as an expert:

[DEFENSE COUNSEL]: Would the Court – and I – would the Court – can I voir dire her just to see if – what kind of – well, I guess, we'll just object if–

THE COURT: I tell you what. Let's give the State the opportunity to see if they can prove this witness up as an expert.

[DEFENSE COUNSEL]: All right.

THE COURT: If you have some objection to that, you can take her on a voir dire as to whether or not she's an expert.

[DEFENSE COUNSEL]: Okay. No. I'm pretty sure she's going to be an expert in the field. She does –

. . . .

THE COURT: Do you wish to stipulate that she's an expert?

[DEFENSE COUNSEL]: She's a psychiatrist, right?

[PROSECUTOR]: A clinical psychologist.

[DEFENSE COUNSEL]: Yes, I would.

THE COURT: All right. Then by the stipulation of the defense, this will be an expert in clinical psychology.

As with his arguments concerning Hovar and Mullin, we determine that by failing to object to Dr. Crowson's testimony on the basis of reliability or relevance or request a gatekeeper hearing, Cayetano did not preserve any such complaints for our review on appeal. *See* TEX. R. APP. P. 33.1(a); *Stephens*, 276 S.W.3d at 153; *Saldano*, 70 S.W.3d at 889; *Dolard*, 2014 WL 3607514, at *5–6.

We overrule Cayetano's second issue.

Admission of Brother's Testimony

In his third issue, Cayetano contends the trial court violated his due-process rights in admitting testimony from Brother concerning the alleged sexual assault. Cayetano argues that the trial court erred in admitting this testimony because Brother had no first-hand knowledge of the alleged assault. In support of his argument, Cayetano points to records from the CPS investigation following J.T.'s outcry. Specifically, the notes from a CPS interview with Brother on May 21, 2009 indicate that Brother told the interviewer that his family slept in a hotel the night prior because "they were having problems with their uncle" but "he [did] not know what kind of problems" and "he did not know what happened."

The State points out (and Cayetano does not dispute) that Cayetano did not object to Brother's testimony on this basis at trial. Under Texas law, "if, on appeal, a defendant claims the trial judge erred in

admitting evidence offered by the State, this error must have been preserved by a proper objection and a ruling on that objection.” *Martinez v. State*, 98 S.W.3d 189, 193 (Tex. Crim. App. 2003). Due to Cayetano’s failure to object to Brother’s testimony on the basis that he lacked firsthand knowledge of the assault, we hold that Cayetano has failed to preserve error on this point. *See* TEX. R. APP. P. 33.1 (to preserve complaint for appellate review, record must show “the complaint was made to the trial court by a timely request, objection, or motion” on which trial court ruled or refused to rule); *Davis v. State*, 313 S.W.3d 317, 352 (Tex. Crim. App. 2010) (“An appellant is obligated to point out to this Court where the record shows that he has preserved error on his claim.”).

We overrule Cayetano’s third issue.

Ineffective Assistance of Counsel

In his fifth issue, Cayetano contends he received ineffective assistance of counsel at trial. Specifically, Cayetano argues that his attorney should have: (1) called witnesses who could testify that at the time of the alleged assault, Cayetano was living in Mexico; and (2) called experts to rebut the State’s experts’ testimony.

A. Standard of Review and Applicable Law

The Sixth Amendment of the United States Constitution and the Texas Constitution guarantee a criminal defendant the right to reasonably effective assistance of counsel. U.S. CONST. amend. VI; TEX. CONST. art. 1, § 10; *see Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011). The right to effective assistance of counsel requires objectively reasonable representation,

not errorless performance. *Lopez*, 343 S.W.3d at 142 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Robertson v. State*, 187 S.W.3d 475, 483 (Tex. Crim. App. 2006)).

To establish that trial counsel provided ineffective assistance, an appellant bears the burden to demonstrate by a preponderance of the evidence that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *Lopez*, 343 S.W.3d at 142. An appellant must establish both prongs before an appellate court will find counsel's representation to be ineffective. *Lopez*, 343 S.W.3d at 142 (citing *Strickland*, 466 U.S. at 687); see *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) ("An appellant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other prong.").

To satisfy the first prong, an appellant must show that his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms. *Strickland*, 466 U.S. at 687–88; *Lopez*, 343 S.W.3d at 142. Under the second prong, an appellant must demonstrate prejudice or "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; see *Lopez*, 343 S.W.3d at 142. A reasonable probability is one sufficient to undermine confidence in the outcome. *Lopez*, 343 S.W.3d at 142.

For an appellate court to find that counsel was ineffective, "counsel's deficiency must be affirmatively demonstrated in the trial record; the court must not engage in retrospective speculation." *Id.* "It is not

sufficient that appellant show, with the benefit of hindsight, that his counsel's actions or omissions during trial were merely of questionable competence." *Id.* at 142–43 (quoting *Mata v. State*, 226 S.W.3d 425, 430 (Tex. Crim. App. 2007)). Furthermore, a claim of ineffective assistance of counsel also requires proof of prejudice. *Bone v. State*, 77 S.W.3d 828, 837 (Tex. Crim. App. 2002).

In most cases, the record on direct appeal is undeveloped regarding the motive behind counsel's actions and thus inadequate to prove a claim of ineffective assistance.⁸ See *Menefield v. State*, 363 S.W.3d 591, 592–93 (Tex. Crim. App. 2012); *James v. State*, 506 S.W.3d 560, 569 (Tex. App.—Houston [1st Dist.] 2016, no pet.); see also *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (“A substantial risk of failure accompanies an appellant’s claim of ineffective assistance of counsel on direct appeal.”). The Court of Criminal Appeals has repeatedly stated that trial counsel “should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.” *Menefield*, 363 S.W.3d at 593 (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)). When trial counsel is not provided an opportunity to explain his actions, we will not find that counsel’s performance was deficient unless the challenged conduct was “so outrageous that no competent attorney would have engaged in it.” *Id.* (quoting *Goodspeed*, 187 S.W.3d at 392).

⁸ Claims of ineffective assistance of counsel rejected on direct appeal “due to lack of adequate information may be reconsidered on an application for a writ of habeas corpus.” *Lopez v. State*, 343 S.W.3d 137, 143 (Tex. Crim. App. 2011).

B. Failure to Call Alibi Witnesses

Cayetano first claims that he received ineffective assistance of counsel at trial because his attorney failed to call as witnesses other adults living in the home at the time of the alleged assault, who he claims could have testified that Cayetano was no longer living there and could not have assaulted J.T. because he had moved to Mexico.⁹ He also contends that counsel could have called various witnesses from Mexico who could attest that Cayetano was residing in Mexico during the relevant timeframe. With his motion for new trial, Cayetano presented affidavits from the following: (1) his common-law wife, J.T.'s aunt, who stated that the couple left for Mexico on April 5, 2009 and arrived on April 7, 2009; (2) a Mexican official attesting to Cayetano's residency in Mexico from April 9, 2009 to August 2013; (3) three neighbors in Mexico who confirm the dates given by Cayetano's wife; (4) an individual who avers that Cayetano purchased a piece of equipment from him on April 15, 2009; and (5) an employer stating Cayetano worked there from April 14, 2009 to August 28, 2009.

A defendant in a criminal case is entitled to reasonably effective assistance of counsel, including investigation of the defendant's case. *Strickland*, 466 U.S. at 690–91. Trial counsel's duty to investigate includes seeking out and interviewing potential witnesses.

⁹ Counsel did call one such witness at trial: Lucero Hernandez. As mentioned earlier, Hernandez is the girlfriend or common-law wife of Cayetano's brother and was undisputedly living in the home at the time in question. Lucero testified that Cayetano left for Mexico with his wife and that there was not a time when Cayetano lived in the home without his wife.

Butler v. State, 716 S.W.2d 48, 54 (Tex. Crim. App. 1986). To demonstrate ineffective assistance of trial counsel based on an uncalled witness, an appellant must show that: (1) the witness would have been available to testify, and (2) the witness's testimony would have been of some benefit to the defense. *Ex parte Sanchez*, 667 S.W.3d 324, 329 (Tex. App.—Houston [1st Dist.] 2022, pet. ref'd) (citing *Everage v. State*, 893 S.W.2d 219, 222–23 (Tex. App.—Houston [1st Dist.] 1995, pet. ref'd)). To establish the availability prong, proposed witnesses must testify or swear in an affidavit that they were available to testify at the defendant's trial. *Id.* (citing *Ex parte Ramirez*, 280 S.W.3d 848, 853 (Tex. Crim. App. 2007)). An ineffectiveness claim based on the failure to call witnesses may be established through either testimony on the record or an affidavit from the uncalled witness. *Id.* (citing *Ex parte White*, 160 S.W.3d 46, 52 (Tex. Crim. App. 2004) (applicant provided affidavit from uncalled witness)).

Acknowledging that his would-be witnesses were living in Mexico at the time of trial, Cayetano summarily contends that “they could have been witnesses by obtaining *Visitor Visas* through the United States Citizenship and Immigration Services.” Fatal to his claims, however, not one of the affidavits includes information regarding the individual's willingness or ability to testify at trial. For this reason, Cayetano did not meet his burden to demonstrate that trial counsel's failure to call any of these individuals as witnesses rose to the level of ineffective assistance of counsel. *Ex parte Sanchez*, 667 S.W.3d at 329–30 (rejecting ineffective assistance claim on availability prong for two of three potential witnesses because

those affidavits were silent as to availability to testify at trial); *see also Ex parte Ramirez*, 280 S.W.3d at 853; *Ex parte White*, 160 S.W.3d at 52.

C. Failure to Call Expert Witnesses

Cayetano also argues that he received ineffective assistance of counsel at trial because his attorney failed to call any expert witnesses to rebut testimony provided by the State's experts, particularly the SANE's testimony concerning the Tanner Stage and J.T.'s lack of apparent injury. The same standard discussed above applies in the context of expert witnesses. In order to prove ineffective assistance in failing to call expert witnesses, Cayetano must demonstrate that experts were available to testify and that their testimony would have benefitted his defense. *See Washington v. State*, 417 S.W.3d 713, 725 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd); *Brown v. State*, 334 S.W.3d 789, 803 (Tex. App.—Tyler 2010, pet. ref'd); *see also Starr v. State*, No. 01-18-00947-CR, 2020 WL 4006447, at *5–6 (Tex. App.—Houston [1st Dist.] July 16, 2020, no pet.) (mem. op., not designated for publication) (holding appellant could not demonstrate ineffective assistance in failing to present expert to refute State's case where record contained no evidence that such an expert was available to testify or would have benefited appellant's defense).

Cayetano relies on *Ex parte Overton*, 444 S.W.3d 632 (Tex. Crim. App. 2014) to support his position that trial counsel's failure to present competing experts amounts to deficient performance. The facts of *Ex parte Overton* are markedly different from the present case. In *Ex parte Overton*, the defense had retained a leading expert in the relevant field, who gave a lengthy

deposition. *Id.* at 637. Thus, the reviewing court had the benefit of the expert's testimony in determining that it would have been beneficial to the defense. *Id.* at 638–39. Further, the record contained information concerning trial counsel's reasons (or lack thereof) in not using the deposition testimony at trial. *Id.* at 640.

Here, unlike in *Ex parte Overton*, nothing in the record suggests that an expert witness was contacted and was willing to testify or what testimony such an expert would have provided. Likewise, the record is silent as to trial counsel's strategy in failing to retain his own experts. Therefore, based on the record before us, we cannot say that counsel's performance was deficient in failing to present expert testimony. *Washington*, 417 S.W.3d at 725; *Brown*, 334 S.W.3d at 803; *see also Rylander v. State*, 101 S.W.3d 107, 109–11 (Tex. Crim. App. 2003) (reversing court of appeal's determination of ineffective assistance for failing to present expert testimony, among other alleged deficiencies; court held that appellant failed to establish deficient performance prong of *Strickland* where record was silent as to trial counsel's strategy).

We overrule Cayetano's fifth issue.

Denial of Motion for New Trial

We interpret Cayetano's sixth issue as challenging the trial court's denial of his motion for new trial on the basis of newly discovered evidence—the statements from Mexico. *See* TEX. CODE CRIM. PROC. art. 40.001 (“A new trial shall be granted an accused where material evidence favorable to the accused has been discovered since trial.”). As discussed earlier, Cayetano's motion for new trial included statements from various individuals in Mexico, all essentially stating that

Cayetano was living or working in Mexico during the time period he allegedly sexually assaulted J.T. in Texas.

A. Standard of Review and Applicable Law

We review a trial court's decision to deny a motion for new trial asserted on a new-evidence claim for abuse of discretion. *State v. Arizmendi*, 519 S.W.3d 143, 148–49 (Tex. Crim. App. 2017); *Wallace v. State*, 106 S.W.3d 103, 108 (Tex. Crim. App. 2003). We view the evidence in the light most favorable to the trial court's ruling and will not reverse its decision to deny a new-trial motion unless it falls outside the zone of reasonable disagreement. *Henley v. State*, 493 S.W.3d 77, 83 (Tex. Crim. App. 2016). The trial court has broad discretion to make credibility and weight determinations in deciding whether the new evidence will bring about a different result in a new trial. *Olsen v. State*, 606 S.W.3d 342, 352 (Tex. App.— Houston [1st Dist.] 2020, no pet.) (citing *Colyer v. State*, 428 S.W.3d 117, 122 (Tex. Crim. App. 2014); *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995)). Motions for new trial on newly discovered evidence grounds are disfavored by courts and viewed with great caution. *Margraves v. State*, 56 S.W.3d 673, 685 (Tex. App.— Houston [14th Dist.] 2001, no pet.).

To obtain relief under article 40.001, the defendant must satisfy the following four-part test:

1. The newly discovered evidence was unknown or unavailable to the defendant at the time of trial;

2. The defendant's failure to discover or obtain the new evidence was not due to the defendant's lack of due diligence;
3. The new evidence is admissible and not merely cumulative, corroborative, collateral, or impeaching; and
4. The new evidence is probably true and will probably bring about a different result in a new trial.

Arizmendi, 519 S.W.3d at 149; *Wallace*, 106 S.W.3d at 108. Unless the defendant satisfies all four requirements, he is not entitled to a new trial. *Margraves*, 56 S.W.3d at 685.

B. Analysis

At a minimum, Cayetano has failed to meet the first and second elements.¹⁰ If Cayetano was actually in Mexico at the time J.T. claims he assaulted her, he necessarily would have been aware of this fact at the time of trial. *See Drew v. State*, 743 S.W.2d 207, 227 (Tex. Crim. App. 1987) (concluding that if potential witness's testimony that he, not appellant, committed murder were true, "then the matter of non-participation was certainly known to the appellant at the time of trial" and noting appellant could have testified on his own behalf to this fact). Cayetano cannot demonstrate that the information from the individuals in Mexico as to his residency was unknown or unavailable to him

¹⁰ Cayetano focuses on the third element—the admissibility of the alleged new evidence. Because we determine that he cannot establish the first or second element, we do not reach his arguments concerning admissibility. *See Margraves v. State*, 56 S.W.3d 673, 685 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

at the time of trial. *See Hamilton v. State*, 563 S.W.3d 442, 448–49 (Tex. App.—Houston [1st Dist.] 2018, pet. ref’d) (holding that affidavits from appellant’s family members concerning his difficult childhood and various diagnoses, among other things, did not establish that such information was unknown to him at time of trial); *Marines v. State*, 292 S.W.3d 103, 111 (Tex. App.—Houston [14th Dist.] 2008, pet. ref’d) (holding evidence, including appellant’s own affidavit, that someone other than appellant was shooter was known to appellant at time of trial and thus not newly discovered).

Further, Cayetano does not argue that the failure to present the alibi witnesses at trial was not due to his lack of diligence. *See Ho v. State*, 171 S.W.3d 295, 307 (Tex. App.—Houston [14th Dist.] 2005, pet. ref’d) (determining that appellant was on notice of State’s intention to introduce evidence of murder and that appellant did not exercise diligence in procuring testimony of alibi witness); *Zamora v. State*, 647 S.W.2d 90, 95 (Tex. App.—San Antonio 1983, no pet.) (finding lack of diligence when appellant knew about witness but chose not to inform attorney).

Additionally, even if true, Cayetano’s alibi evidence does not disprove the fact that he sexually assaulted J.T. Instead, it merely suggests that Cayetano returned from Mexico and assaulted J.T., or that the assault may not have occurred on April 15, 2009 (the date alleged in the complaint). Because J.T. testified that Cayetano sexually assaulted her four or five times within a three-or four-month period in 2009, and Cayetano’s charging instrument alleged he committed the offense “on or about” April 15, 2009, the State was not required to prove Cayetano’s sexual assault of J.T.

happened on April 15—only that it occurred prior to presentment of the charging instrument and within the limitations period. *See Schoenbauer v. State*, 85 S.W.3d 400, 405 (Tex. App.—Tyler 2002, no pet.); *Sledge v. State*, 953 S.W.2d 253, 256 (Tex. Crim. App. 1997); *Moore v. State*, 4 S.W.3d 269, 277–78 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

We overrule Cayetano’s sixth issue.

Cumulative Error

In his seventh issue, Cayetano urges this Court to consider the cumulative effect of the alleged errors presented above. While a number of errors may be deemed harmful in their cumulative effect, *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999), we hold cumulative error has not been shown here. We have determined that appellant failed to show error in his six preceding points of error. “Therefore, there is no error to cumulate.” *Jenkins v. State*, 493 S.W.3d 583, 613 (Tex. Crim. App. 2016).

We overrule Cayetano’s seventh issue.

Conclusion

Having overruled each of Cayetano’s issues, we affirm the judgment of the trial court.

Amparo Monique Guerra
Justice

Panel consists of Chief Justice Adams and Justices Guerra and Farris.

Do not publish. Tex. R. App. P. 47.2(b).

**JUDGMENT,
FIRST COURT OF APPEALS OF TEXAS
(JULY 25, 2024)**

FIRST COURT OF APPEALS OF TEXAS

MIGUEL ADAN CAYETANO,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

No. 01-23-00463-CR

Appeal from the 230th District Court Harris County,
(Tr. Ct. No. 1235418)

Before: ADAMS, Chief Justice,
GUERRA and FARRIS, Justices.

JUDGMENT

This case is an appeal from the final judgment signed by the trial court on February 23, 2023. After submitting the case on the appellate record and the arguments properly raised by the parties, the Court holds that the trial court's judgment contains no reversible error. Accordingly, the Court **affirms** the trial court's judgment.

The Court **orders** that this decision be certified below for observance.

Judgment rendered July 25, 2024.

Panel consists of Chief Justice Adams and Justices Guerra and Farris. Opinion delivered by Justice Guerra.

**JUDGMENT OF CONVICTION BY JURY
(FEBRUARY 23, 2023)**

IN THE 230TH DISTRICT COURT
HARRIS COUNTY, TEXAS

THE STATE OF TEXAS

v.

CAYETANO, MIGUEL ADAN

Cause No. 123541801010

Incident No./TRN: 926899173XA001

DIJG (999)

Before: CHRIS MORTON, Presiding Judge.

JUDGMENT OF CONVICTION BY JURY

Judge Presiding: CHRIS MORTON

Date Sentence Imposed: 2/23/2023

Attorney for State: SIMONE COLSON, STEVEN BELT

Attorney for Defendant: MARTINEZ, RALPH R.

Offense for which Defendant Convicted:

AGGRAVATED SEXUAL ASSAULT OF CHILD
<14 YRS OLD

Charging Instrument

INDICTMENT

Date of Offense:

4/15/2009

Plea to Offense:

NOT GUILTY

Degree of Offense:

1ST DEGREE FELONY

Verdict of Jury:

GUILTY

Findings on Deadly Weapon:

N/A

1st Enhancement Paragraph:

N/A

Finding on 1st Enhancement Paragraph:

N/A

2nd Enhancement Paragraph:

N/A

Finding on 2nd Enhancement Paragraph:

N/A

Punishment Assessed by:

COURT

Date Sentence Commences:

2/23/2023

Punishment and Place of Confinement:

60 YEARS TDCJ, CORRECTIONAL INSTITUTIONS DIVISION

THIS SENTENCE SHALL RUN: CONCURRENTLY.

- ☒ Defendant is required to register as sex offender in accordance with Chapter 62, Tex. Code Crim. Proc.

(For sex offender registration purposes only)
The age of the victim at the time of the offense
Was 12 years.

Fines: \$N/A

Restitution: \$N/A

Restitution Payable to: \$N/A

Court Cost: \$290.00

Reimbursement Fees: \$20

Was the victim impact statement returned to
the attorney representing the State? N/A

(FOR STATE JAIL FELONY OFFENSES ONLY) Is
Defendant presumptively entitled to diligent participation credit in accordance with Article 42A.559, Tex. Code Crim. Proc.? N/A

Total Jail Time: Credit: 566 Days

If Defendant is to serve sentence in county jail or is given credit toward the fine and costs, enter days credited below.

N/A Days NOTES: N/A

This cause was called for trial by jury and the parties appeared. The State appeared by her District Attorney as named above.

Counsel/Waiver of Counsel (select one)

- ☒ Defendant appeared with counsel

Punishment, Assessed by Jury/Court/No election (select one)

- ☒ Court. Defendant elected to have the Court assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

Punishment Options (select one)

- ☒ Confinement In State Jail or Institutional Division. The Court ORDERS the authorized agent of the State of Texas or the County Sheriff to take and deliver Defendant to the Director of the Correctional Institutions Division, TDCJ, for placement in confinement in accordance with this judgment. The Court ORDERS Defendant remanded to the custody of the County Sheriff until the Sheriff can obey the directions in this paragraph. Upon release from confinement, the Court ORDERS Defendant to proceed without unnecessary delay to the District Clerk's office, or any other office designated by the Court or the Court's designee, to pay or to make arrangements to pay any fines, court costs, reimbursement fees, and restitution due.

Execution of Sentence

- ☒ The Court ORDERS Defendant's -Sentence Executed. The Court FINDS that Defendant is entitled to the jail time credit indicated

above. The attorney for the state, attorney for the defendant, the County Sheriff, and any other person having or who had custody of Defendant shall assist the clerk or person responsible for completing this judgment, in calculating Defendant's credit for time served. All supporting documentation, if any, concerning Defendant's credit for time served is incorporated herein by this reference.

Furthermore, the following special Findings or orders apply:

SEE THE ATTACHED FIREARM ADMONISHMENT

/s/ Chris Morton

Judge Presiding

Date Judgment Entered: 2/23/2023

Clerk: A ZUNIGA-RIVERA

Notice of Appeal Filed: 03/24/2023



Thumbprint

Case Number: 1235418 Court: 230TH
Defendant: CAYETANO, MIGUEL ADAN

**WRITTEN ADMONITION ON INELIGIBILITY
TO POSSESS FIREARM OR AMMUNITION**

In accordance with Texas Administrative Code § 176.1, the Court hereby admonishes you of the following:

1. You are, by entry of order or judgment, ineligible under Texas law to possess a firearm or ammunition.
2. Beginning now, if you possess a firearm or ammunition it could lead to charges against you. If you have questions about how long you will be ineligible to possess a firearm or ammunition, you should consult an attorney.

3. Under Texas Penal Code § 46.01(3):

- a. “Firearm” means any device designed, made, or adapted to expel a projectile through a barrel by using the energy generated by an explosion or burning substance or any device readily convertible to that use.
- b. “Firearm” does not include a firearm that may have, as an integral part, a folding knife blade or other characteristics of weapons made illegal by Penal Code Chapter 46 and that is (1) an antique or curio firearm manufactured before 1899 or (2) a replica of an antique or curio firearm manufactured before 1899 but only if the replica does not use rim fire or center fire ammunition.

The statutes listed below are a starting point for ineligibility to possess a firearm or ammunition. For more information about the laws that make you ineligible to possess a firearm or ammunition, or for more information on how long your ineligibility to possess a firearm or ammunition lasts, the Court recommends you contact an attorney.

- Code of Criminal Procedure Article 17.292 - Magistrate’s Order for Emergency Protection
- Code of Criminal Procedure Article 42.0131 - Notice for Persons Convicted of Misdemeanors Involving Family Violence
- Penal Code § 46.02 - Unlawful Carrying Weapons
- Penal Code § 46.04 -Unlawful Possession of Firearm

- Penal Code § 25.07 - Violation of Certain Court Orders or Conditions of Bond in a Family Violence, Child Abuse or Neglect, Sexual Assault or Abuse, Indecent Assault, Stalking, or Trafficking Case
- Family Code § 85.026 - Warning on Protective Order

Date: 02/23/2023

Defendant: /s/ Cayetano, Miguel Adan

Case Number: 123541801010

Defendant Name: Cayetano, Miguel Adan

**PETITION FOR DISCRETIONARY REVIEW,
FILED IN THE TEXAS COURT OF
CRIMINAL APPEALS
(SEPTEMBER 3, 2024)**

PD-0707-24

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

MIGUEL ADAN CAYETANO,

Appellant,

v.

THE STATE OF TEXAS,

Appellee.

Appeal from Harris County
No. 01-23-00463-CR

John J. Tripodi
Texas Bar Number #24111347
Houston, Texas 77002
(Telephone)(713) 474-7702
(Fax) (281) 516-5529
John@tripodilawfirm.com

Pursuant to Rule 39.1,
Appellant requests Oral Argument.

**Pursuant to Tex. R. App. P. 38.1(a), the following
are Interested Parties:**

Jury Trial

Jury (Guilt phase)

Trial Judge

Honorable Chris Morton
District Court #230 1201 Franklin St.
Houston, Texas 77002

(Sentencing/Punishment Phase)

Appellant

Miguel Adan Cayetano
Texas Department of Criminal Justice
TDCJ Number: #02436742
Coffield Unit
2661 FM 2054
Tennessee Colony, TX 75884

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Texas Court of Criminal Appeals Attorney for Appellee

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Stacey M. Soule
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Texas Court of Criminal Appeals Attorney for Appellant

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Houston, Texas 77002

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1. Did the Court of Appeals commit reversible error in failing to analyze Appellant's argument regarding *Sufficiency of Evidence* for a conviction?
2. Did the Court of Appeals error and violate Defendant's right to a fair Trial under the 14th Amendment Due Process Clause of the United States Constitution and Due Course of Law Clause under the Texas Constitution, in *Holding*

that Appellant's Arguments regarding falsified testimony, falsified medical evidence, perjury, and other statements could not be argued on Appeal because the Trial attorney failed to make a timely objection to *undiscoverable medical information* and *preserve* it for Appeal?

3. Did the Court of Appeals error in failing to address Appellant's arguments that the falsified testimony, falsified medical evidence, perjurious *Closing Argument* and other statements were *Structural Constitutional errors* allowing for automatic reversal or in the alternative subject to a *Harm Analysis* under *Marin* and a Constitutional Error under *Texas Rule of Appellate Procedure 44.2(a)*?

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360 S.W.3d 446, (Tex. Crim.App. 2011)

Ex parte Weinstein,
421 S.W.3d 656 (Tex. Crim. App.2014)

Flores v. State,
NO. 01-17-00959-CR (Tex. App. Mar 05, 2019)

Freeman v. State, 3
40 S.W.3d 717 (Tex. Crim. App. 2011)

Friend v. State,
473, 482 S.W.3d 470 (Tex. App. 2015)

Gardner v. State,
733 S.W.2d 195 (Tex. Crim. App. 1987)

Greer v. Miller,
483 U.S. 756, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987)

Hammack v. State,
622 S.W.3d 910 (Tex. Crim. App. 2021)

Herring v New York,
422 U.S. 853 95 S. Ct. 2550

Hooper v. State,
214 S.W.3d 9 (Tex. Crim. App. 2007)

Jackson v. Virginia,
443 U.S. 307 (1979)

King v. State,
125 S.W.3d 517 (Tex. Crim. App. 2003)

Lake v. State,
532 S.W.3d 408 (Tex. Crim. App. 2017)

Marin v. State,
851 S.W.2d 275 (Tex. Crim. App. 1993)

Sartin v. State,
680 S.W.3d 663 (Tex. App. 2023)

Snowden v. State,
353 S.W.3d 815 (Tex.Crim.App.2011)

Stahl v. State, 7
49 S.W.2d 826 (Tex. Crim. App. 1988)

Tuazon v. State,
661 S.W.3d 178 (Tex.App.2023)

Ukwuachu v. State,
613 S.W.3d 149 (Tex. Crim. App. 2020)

United States v. Davila,
569 U.S. 597, 133 S.Ct. 2139, 186 L.Ed.2d 139 (2013)
United States v. Davis,
993 F.2d 62 (5th Cir. 1993)
United States v. Santiago,
96 F.4th 834 (5th Cir. 2024)
Weatherford v. State,
828 S.W. 2d 12 (Tex. Crim. App. 1992)
Wyborny v. State, 209 S.W.3d 285 (Tex. App.—
Houston [1st Dist.] 2006, pet. refd)

STATUTES, RULES REGULATIONS

Texas Rule of Appellate Procedure 9.4
Texas Rule of Appellate Procedure 33.1
Texas Rule of Appellate Procedure 38.1(a)
Texas Rule of Appellate Procedure 44.2(a)
Texas Rule of Appellate Procedure 66.3(b)
Texas Rule of Appellate Procedure 66.3(c)
Texas Rule of Appellate Procedure 66.30
Texas Rules of Appellate Procedure Rule 47.1

DISCIPLINARY RULES AND REGULATIONS FOR MISCONDUCT ATTORNEYS

Texas Disciplinary Rules of Professional Conduct 3.01
Texas Disciplinary Rules of Professional Conduct,
8.04(a)(3)

NURSES

Nursing Practice Act, Sec. 301.452. (b)(10)
Texas Admin. Code, Reg §217.12 (6)(H)

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

STATEMENT REGARDING ORAL ARGUMENT

Appellant contends there are (2) two issues closely related that have *Global Texas Statewide Significance* under *Degrade v. State*, 712 S.W.2d 755,757. (Tex. Crim. App. 1986) Oral Argument will allow the Court to set forth a *Legal Structure* considering *Policy Considerations* concerning *Texas Law* as it relates to *Ethics* for both Texas attorneys and Nurse Experts such as *SANE Nurses*.

STATEMENT OF THE CASE

On February 12, 2010, Appellant was indicted for the felony offense of aggravated sexual assault of a child less than 14 years of age. A Jury was empaneled on February 22, 2023, and returned a guilty verdict for the offense of aggravated sexual assault of a child less than 14 years of age. On the same day, the Judge assessed Appellant's punishment at (60) sixty years confinement with the Texas Department of Criminal Justice.

STATEMENT OF PROCEDURAL HISTORY

On July 25, 2024, all points of error (*except Sufficiency of the Evidence*) were affirmed by the First Court of Appeals in an Unpublished Opinion. No Motion for Rehearing was filed.

GROUND'S FOR REVIEW

1. Did the Court of Appeals commit reversible error in failing to analyze Appellant's argument regarding ***Sufficiency of Evidence*** for a conviction?

2. Did the Court of Appeals error and violate Defendant's right to a fair Trial under the 14th Amendment Due Process Clause of the United States Constitution and Due Course of Law Clause under the Texas Constitution, *Holding* that Appellant's Arguments regarding falsified testimony, falsified medical evidence, perjury, and other statements could not be argued on Appeal because the Trial attorney failed to make a timely objection to *undiscoverable medical information* and *preserve* it for Appeal?

3. Did the Court of Appeals error in failing to address Appellant's arguments that falsified testimony, false medical evidence, *perjurious Closing Argument* and other statements were *Structural Constitutional errors* allowing for automatic reversal or in the alternative subject to a *Harm Analysis* under *Marin* and a Constitutional Error under *Texas Rule of Appellate Procedure 44.2(a)*?

REASONS FOR REVIEW

1. Whether the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings by failing to address and analyze Appellant's argument that the ***Sufficiency of Evidence*** standard for a Conviction has not been satisfied, as to call for an exercise of the Court of Appeals power of Supervision. *Texas Rule of Appellate Procedure 66.3(f)*.

2. The Court of Appeals has decided an important issue that conflicts with Defendants Statewide right to a Fair Trial under the 14th Amendment Due Process Clause of the United States Constitutions, Due Course of Law under the Texas Constitution, along with the Texas Court of Criminal Appeals precedent. *Texas Rule of Appellate Procedure 66.3(c)*. The **Global/Texas Statewide Significance** would allow District Attorneys to *Collude* with *SANE Nurses* and provide false medical information in a Trial *pointing directly* to the *Elements of a Crime*. The medical information would be *undiscoverable* at Trial because the Trial Attorney would not have the medical knowledge to *object* and arguments would be disallowed on Appeal for lack of *preserving* issues.

3. The Court of Appeals has decided an important issue of **State Law** that affects *Ethics as it relates to Brady v. Maryland* for both Attorneys and *SANE Nurses*. It is an *Issue of First Impression* and should be settled by the Court of Criminal Appeals. *Texas Rule of Appellate Procedure 66.3(b)*. The **Global/Texas Statewide Significance** would be a *lack of repercussions and discipline* from the aforementioned *Collusion* in **GROUND #2 and GROUND #3** under the *Texas Disciplinary Rules of Professional Conduct, 8.04(a)(3)*; A lawyer shall not: “engage in conduct involving dishonesty, fraud, deceit or misrepresentation”. *Tex. R. Disc. Prof'l 3.01* “A lawyer shall not bring or defend a proceeding, or assert or controvert [an issue therein], unless the lawyer (reasonably believes) that (there is a basis) for doing so that is not frivolous.”). Under the Texas Board of Nurses *Nursing Practice Act, Sec. 301.452.(b)(10)* “A person is subject

disciplinary action under this subchapter for unprofessional conduct in the practice of nursing that is likely to deceive, defraud, or ***injure a patient or the public***". Under *Texas Admin. Code, Rule § 217.12 (6)(H)* – "Unprofessional conduct, includes providing information, which is false, deceptive, or misleading in connection with the ***practice of nursing***".

Arguments and Authorities

Appellant contends there are a minimum of 7-8 errors committed by the Court of Appeals which would allow for the applicability of the *Cumulative Error Doctrine*. However, *Degrade v. State*, 712 S.W.2d 755, 757 (Tex. Crim. App. 1986) requires errors to have an effect on jurisprudence Globally/Statewide. Therefore, the arguments will be reduced to (1) one error which is *Fraud in the Court* but divided into (2) two parts. This does not include the Court of Appeals error in failing to address Appellant's claim there is a lack of *Sufficiency of Evidence*.

There is no debating that the District Attorney and SANE Nurse provided false medical information and evidence in the Trial Court. This was accomplished on direct examination of (4) four persons and Closing Argument. The Court of Appeals failed to address defendant's Due process rights to a Fair Trial under *Brady v. Maryland*, *Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1993) and *Tex. R. App. P. 44.2(a)*, but instead relies on *Texas Rule of Appellate Procedure 33.1*, *Holding* the Trial attorney failed to object to *undiscoverable medical evidence* at Trial with the end result being a lack of *preservation* for appellate review. The Court of Appeals allowed 33.1 to [OVERRIDE] the 14th Amendment Due Process Clause of the United

States Constitution and Due Course of Law under the Texas Constitution.

1. Did the Court of Appeals commit reversible error in failing to analyze Appellant's argument regarding *Sufficiency of Evidence* for a conviction?

The Court of Appeals Opinion states that the Appellant “does not challenge the Sufficiency of Evidence, only a brief recitation of the facts is necessary to the disposition of this appeal”. *Cayetano v. State*, 01-23-00463-CR (Tex. App. Jul 25, 2024) (Page 2). This is an inaccurate statement because sufficiency of the evidence is argued in the (Appellate Brief Pages 11, 68-71 and Reply Brief Pages 4, 3435).

“In a *Legal Sufficiency Review*, “we consider all the evidence in the light most favorable to the verdict and determine whether, based on that evidence and reasonable inferences therefrom, a rational juror could have found the essential elements of the crime beyond a reasonable doubt.” *Hammack v. State*, 622 S.W.3d 910, 914 (Tex. Crim. App. 2021) (citing *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007)). Because the jury is the trier of fact, we “must defer to the jury’s credibility and weight determinations.” *Id.* This includes resolving conflicts in the testimony. *Carter v. State*, 620 S.W.3d 147, 149 (Tex. Crim. App. 2021) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)”. (Appellate Brief page 68)

Appellant contends there are a multitude of errors, and it would not allow a rational juror to have found the *essential elements* of the

crime beyond a reasonable doubt. ELEMENTS are as follows: Intentionally or Knowingly caused the sex organ of Complainant to contact the sexual organ of the Defendant.” (Appellate Reply Brief page 35)

Appellant contends that under the *Texas Rules of Appellate Procedure Rule 47.1, 66.3(f)* and *Weatherford v. State*, 828 S.W. 2d 12, 12-13 (Tex. Crim.App.1992), his petition should be summarily granted because the Court of Appeals failed to consider arguments concerning sufficiency of evidence.

2. Did the Court of Appeals error and violate Defendant’s right to a fair Trial under the 14th Amendment Due Process Clause of the United States Constitution and Due Course of Law Clause under the Texas Constitution, *Holding* that Appellant’s Arguments regarding falsified testimony, falsified medical evidence, perjury, and other statements could not be argued on Appeal because the Trial attorney failed to make a timely objection to *undiscoverable medical information* and *preserve* it for Appeal?

The Court of Appeals confirms the *SANE Nurse* stated “***the 12-year-old Complainant was at Tanner Stage 4 which correlated with a high level of estrogen causing the vaginal wall and hymen to be more elastic and heal more quickly, generally within (24) twenty-four hours*”.** (Cayetano, 2024 at *6-7) ***Since there is no correlation between Tanner Staging and Estrogen levels, this is a [Lie and Perjury] by the SANE Nurse.*** The perjury by the SANE nurse is in clear violation of the *Nursing Practice Act, Sec. 301.452.(b)(10)* “A person is subject

disciplinary action under this subchapter for unprofessional conduct in the practice of nursing that is likely to deceive, defraud, or *injure a patient or the public*". Under *Texas Admin. Code, Rule § 217.12 (6)(H)* – "Unprofessional conduct, includes *providing information, which is false, deceptive, or misleading* in connection with the *practice of nursing*".(Appendix C)

If *Pediatric Endocrinologists* cannot determine endocrine levels that match Tanner staging, it is fraudulent and mislead the jury. See *Pubertal Development: Correspondence between Hormonal and Physical Development*, Shirtcliff EA, Dahl RE, Pollak SD., *Child Dev.* 2009 Mar-Apr; 80(2):327-37.

"We were surprised that breast development explained such a (small amount of variability) in [Estradiol/ Estrogen]."

The purpose behind this false testimony *collusion* between the *SANE nurse* and District Attorney is to make sure the jury does not factor in doubt because of the *lack of injury* during alleged *forced intercourse* between a 30-year-old male and a 12-year-old adolescent. The Court of Appeals correctly cites the Standard of Review for false testimony and states as follows:

"The use of material false testimony to procure a conviction violates a defendant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution." *Ukwuachu v. State*, 613 S.W.3d 149, 156 (Tex. Crim. App. 2020) (citing *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015)). In reviewing a claim alleging the use of material false testimony, we must determine whether: (1) the testimony

was actually false, and (2) whether it was material. *Id.* (citing *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App.2014)).

(Cayetano, 2024 at 5-6*)

The Appellate Court states the record does not support the falsity prong of a false evidence claim while simultaneously referring to the medical articles cited in the Original Appellate Brief, that *conclusively prove the fraud* by the District Attorney and the *SANE Nurse* but were stricken as not part of the Trial Record. (Cayetano, 2024 at *8 and Footnote #4) *See Relationship of Genital Injuries and Age in Adolescent and Young Adult Rape Survivors*, Baker RB, Sommers MS, *J Obstet Gynecol Neonatal Nurs.* 2008 May-Jun;37(3):282-9, *Correlates of Anogenital Injuries in Adolescents Females*, Bui, Peter V. and Sachs, Carolyn J. and Wheeler, Malinda 2014 *International Journal of Clinical Medicine*, 05 (02) pp. 63-71, *Inaccuracy of age assessment from images of post pubescent subjects in cases of alleged child pornography*, Rosenbloom AL, *Int J. Legal Med.* 2013 Mar; 127(2):467-71 *Genital Anatomy in Pregnant Adolescents: “Normal” does not mean “nothing happened”*, Kellogg ND, Menard SW, Santos A. *Pediatrics.* 2004 Jan; 113 67-69 (1 Pt 1):e67-9.

Although *Texas Rule of Appellate Procedure 33.1* states the Trial attorney must object to issues at Trial or they will be waived and not preserved for Appeal, there are *Exceptions to this Rule*, especially if the evidence is *undiscoverable* at the time of Trial. The Appellate Court *incorrectly interprets* (2) two cases from the Texas Court of Criminal Appeals (Appellant’s Reply Brief Page 16). *Flores v. State*, NO. 01-17-00959-CR (Tex. App. Mar 05, 2019) (Appellant’s Reply

Brief Page 16). “We are mindful that, when the Complaint involves the *falsity of testimony*, an Appellant’s failure to object may be excused if she *could not reasonably have known that the testimony was false at the time it was made . . .*” *Estrada v. State*, 313 S.W.3d 274, 288 (Tex. Crim. App. 2010) (holding that appellant did not waive error by failing to raise timely objection in trial court to testimony of State’s witness, who incorrectly testified about prison classification system at punishment phase, because appellant “*could not reasonably be expected to have known that [the witness’s] testimony was false at the time that it was made*”). (Cayetano, 2024 *9-10)

See Calderon v. State, 01-22-00512-CR (Tex. App. Nov 30, 2023), citing *Estrada* as the law with respect to *undiscoverable evidence* at Trial and mentioned by the Court of Appeals but *improperly distinguished* because the State had prior knowledge (Cayetano, 2024 at *12). *See Sartin v. State*, 680 S.W.3d 663, 668 (Tex. App. 2023) citing *Marin* for (systemic and waivable only rights). *Federal law* is similar as stated in *United States v. Santiago*, 96 F.4th 834, 843 (5th Cir. 2024), if it is *Plain Error (systemic or waivable only under Texas law)* affecting substantial rights to a fair Trial.

The Appellate Court holds steadfast that the Trial attorney failed to object to falsified information and thus lacked preservation for Appeal. (Cayetano, 2024 at *10) Under this rationale, the Court disallows the review of medical articles unequivocally showing the *fraud* committed by the District Attorney and *SANE Nurse* because they were not part of the Trial Record. The *Holding* is *why this Case has Global/Statewide significance*. As set forth above, the Court of Appeals is allowing *Texas Rule of Appellate*

Procedure 33.1 to Supersede the Appellant's right to a Fair Trial under the 14th Amendment Due Process Clause of the United States Constitution and Due Course of Law under the Texas Constitution.

Furthermore, the Court of Appeals fails to address Appellant's arguments that the false testimony is a *Structural Constitutional Error and not waived for Appeal* or in the alternative fails under a *Harm Analysis*.

Appellant makes both arguments in the Appellate Brief and Reply Brief.

"Appellant contends that the falsified evidence is so severe that it is a *Structural Constitutional Error* (violation of Fundamental Fairness and Due Process) and *not be subject to a harm analysis*. "See *Arizona v. Fulminante*, 499 U.S. 279, 309–10, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991) (enumerating so-called '*structural defects*'—violations of federal constitutional prescripts held to be so '*basic*' to the reliable functioning of the criminal justice system that *they are not subject to a harm analysis*)." *Lake v. State*, 532 S.W.3d 408 (Tex. Crim. App. 2017). Also, *United States v. Davis*, 993 F.2d 62, 64 (5th Cir. 1993) ("Given the difficulty of determining the prejudicial impact of the failure to afford summation, the denial of a *request for it is Reversible Error Per Se*.") (citing *Herring v New York*, 422 U.S. 853 (1975) 95 S. Ct. 2550. (Appellate Brief page 43).

Appellant contended, the violation of his due process rights carries the same weight as the *Structural*

Constitutional violation in *Tuazon v. State*, 661 S.W.3d 178 (Tex.App.2023).

On (*Voir dire*) the (Trial Court) stated the following: “The burden of proof is beyond a reasonable doubt. That is the State’s burden. It never shifts to the Defense. . . . The burden always stays with the State to prove their case. And so it’s going to be up to you-all to determine reasonable doubt. What — one easy way to look at it is if you think about a football field, if they can get that football, just the nose of it, over the 50-yard line then they’ve met their burden Okay? They’re not expected to have to take it all the way down to the endzone, spike the football, and convince everybody beyond any shadow of a doubt, no possibility, right? It’s just that little, tiny bit over the 50-yard line.” (Appellate Reply Brief page 19) *See United States v. Davila*, 569 U.S. 597, 611 (2013).

The *Tuazon Court* held that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).661 S.W.3d 187. The *Tuazon Court* concluded he had a *waivable-only, Marin-category-two due process right* not to have the Trial Court define reasonable doubt in a manner that shifted the State’s burden of proof. “Because the record *lacks any indication Tuazon (affirmatively waived)* this right in the Trial Court, we conclude we may consider the trial court’s error in this Appeal”.*id* 192. The *Tuazon Court* held “the trial court’s misstatement regarding reasonable doubt constituted a *Structural Error (NOT) subject to a*

(*Harm*) analysis *id.* 194. See *Gardner v. State*, 733 S.W.2d 195, 210 (Tex. Crim. App. 1987). See *Ex parte Chavez*, 371 S.W.3d 200,207–08 (Tex. Crim. App. 2012) (quoting *Ex parte Robbins*, 360 S.W.3d 446, 459, (Tex. Crim. App. 2011))

Since there was no (*Affirmative waiver*) by Appellant at Trial, Appellant believes the Court of Appeals *should have reviewed the error for the first time*. Appellant deems it unnecessary to construct a *Harm analysis*, but if subject to a *Harm Analysis*, it believes the Court cannot find beyond a reasonable doubt that the *falsified evidence and other medical documentation* by the SANE NURSE and the District Attorney, did not contribute to the verdict. *Tex. R. App. P.* 44.2(a), See *Friend v. State*, 473,482 S.W.3d 470 (Tex. App. 2015), *Snowden v. State*, 353 S.W.3d 815, 818 (Tex. Crim. App. 2011); *see also*; *Wyborny v. State*, 209 S.W.3d 285, 292 (Tex. App.–Houston [1st Dist.] 2006, *pet. ref'd*).

In an effort to further perpetuate fraud in Trial, the District Attorney leads the Complainant, Mother and Brother to confirm that she was sexually assaulted on May 19, 2009, and visited (2) hospitals on May 20, 2009. In an attempt to be salacious, the District Attorney confirms with the Complainant that she was in pain because of the sexual assault on May 19, 2009. The problem with this fraud is the SANE Nurse testified that she reviewed the records of both hospitals, and *no sexual assault* occurred on May 19, 2009. (Volume 9 Exhibits RR 6, Exhibits RR 24-25) (*Cayetano v. State*, 2024 at 9* Footnote #6)

The Court of Appeals argues that there should have been objections at Trial to the falsehoods presented by the District Attorney through direct

testimony of (3) three *Lay witnesses*. Without these objections the Court of Appeals contends the arguments were not preserved and waived on Appeal. (*Cayetano*, 2024 at 9-10*).

Appellant Propounds the Court of Appeals is correct with respect to the (3) three *Lay witnesses*, but the District Attorney is held to a *higher standard*, and this is a violation of the *principles* in *Brady v. Maryland*, 373 U.S. 83 (1963) and under the Due Process Clause where it is his obligation to *pursue justice which includes innocence* and not providing false evidence to the jury. Appellant contends the District Attorney's actions are a clear violation of his due process rights to a Fair Trial. The District Attorney patently violated *Tex. R. Disc. Prof'l. Cond. 8.04(3)*, "A Lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation" and *Tex. R. Disc. Prof'l 3.01* "A lawyer shall not bring or defend a proceeding, or assert or controvert [an issue therein], unless the lawyer (reasonably believes) that (there is a basis) for doing so that is not frivolous."). (Appendix B)

Although the Court of Appeals may consider *Ethics Rules outside the Scope of their review*, the Due Process Clause and Due Course of Law clauses are of great importance. Appellant propounds that this is a matter of *Global/Statewide significance* under *Degrade v. State*, 712 S.W.2d 755,757 (Tex. Crim. App. 1986), *King v. State*, 125 S.W.3d 517,518 (Tex. Crim. App. 2003) and *Bradley v. State*, 235 S.W.3d 808 (Tex. Crim. App. 2007). If the Court of Appeals Opinion is the law in the State of Texas, District Attorneys and *SANE Nurses* could act with *Impunity Statewide*.

3. Did the Court of Appeals error in failing to address Appellant's arguments that the falsified testimony, falsified medical evidence, perjurious *Closing Argument* and other statements were *Structural Constitutional errors* allowing for automatic reversal or in the alternative be subject to a *Harm Analysis* under *Marin* and a Constitutional Error under *Texas Rule of Appellate Procedure 44.2(a)*?

Closing Argument by District Attorney

Court of Appeals Errors in (*Omitting*) Due Process Analysis

Although previously referenced above, Appellant contends that *Weatherford v. State*, 828 S.W. 2d 12, 12-13 (Tex. Crim.App.1992) ("State's petition summarily granted where Court of Appeals failed to consider arguments concerning *Preservation of Error and Harm*"). is applicable here. Appellant opines the Petition for Discretionary Review should be *granted* under *Weatherford*.

Appellant believes that the District Attorney continues to commit fraud on the Court in his Closing Argument. The Court of Appeals rejects the Appellant's false evidence claim as to the remarks made by the District Attorney during Closing Arguments because it *does not fall within the scope of false evidence jurisprudence*. (*Cayetano, 2024* at 10-11*) The Court of Appeals relies on *Ukwuachu v. State*, 613 S.W.3d 149, 156 (Tex. Crim. App. 2020). The Court held that complaints that a prosecutor's remarks during cross-examination and argument were false or misled the

jury “[did]not fall within the scope of [its] false-evidence jurisprudence.” 613 S.W.3d at 157. The Court ultimately concluded *that* “a prosecutor’s questions of a witness and his arguments to the jury are not ‘evidence’ within the meaning of a false-evidence claim.” Id. at 157–58 (citing *Coble v. State*, 871 S.W.3d 192, 206 (Tex. Crim. App. 1993); *Barrientez v. State*, 487 S.W.2d 97, 101 (Tex. Crim. App. 1972). (*Cayetano*, 2024 at 10-11*)

The Court of Appeals correctly cites the case law with respect to false evidence claims but omits any discussion of the Appellant’s Due Process rights to a Fair Trial. See *Greer v. Miller*, 483 U.S. 756, 765, 107 S.Ct. 3102, 97 L.Ed.2d 618 (1987) (observing, in context of claim of improper questioning by prosecutor, that “prosecutorial misconduct may so infect the trial with unfairness as to make the resulting conviction a denial of due process”).

Under the Court of Appeals rationale, District Attorneys statewide can lie about evidence, lie about testimony and lie about every other factual matter but be *immune from Texas law* because the comments were made during *Closing Argument*. The State’s Closing Argument is [directly connected] to Falsified Evidence of the *SANE Nurse* (Appellate Brief pages 41-42)

The District Attorney commits *Perjury* and states as follows: “So you tell me if injuries are a big deal. There’s not going to be injuries Ladies and Gentlemen. Why? Because J.T. was at a (Tanner Stage 4). That is extremely important because (**she’s essentially a 29, 30-year-old woman**) who has the (ESTROGEN level), very high and a vagina, (Vaginal Wall) that can (withstand things). You know being raped, being penetrated by a 30-year-old penis. That a 12-

year-old shouldn't be that high, but she was. That is extremely important". (Volume 6 RR 43)

The statement that the 12-year-old Complainant had Genitalia of a 29 or 30-year-old woman is 100% false and should be considered *Perjury*.

The Court of Appeals should have addressed this perjurious statement by the District Attorney and its effect on the defendant's due process rights but for some unknown reason, it is not discussed by the Court. Furthermore, the Court of Appeals omits analysis under Freeman v. State, 340 S.W.3d 717 (Tex. Crim. App. 2011) "A prosecutor may not use Closing Arguments to present evidence that is outside the record. Improper references to [facts that are neither] in evidence [nor inferable from the evidence] are generally designed to arouse the passion and prejudice of the jury and, as such, are inappropriate". Borjan v. State, 787 S.W.2d 53, 57 (Tex.Crim.App.1990).

Appellate argues the District Attorney's statements were outside the record for the sole purpose of arousing the passion and prejudice of the jury and were inappropriate. *Prosecutorial Misconduct* may require *Reversal* where: (1) the prosecutor deliberately violated an express court order; (2) the misconduct was "so blatant as to border on being contumacious"; or (3) the prosecutor takes action that is "so clearly calculated to inflame the minds of the jury that an instruction to disregard cannot cure the harm." See *Stahl v. State*, 749 S.W.2d 826, 831 (Tex. Crim. App. 1988); see also *Greer v. Miller*, 483 U.S. 756, 765 (1987).

Appellant opines that under the 2nd Prong, the District Attorney's Inaction of condoning Perjury borders on being contumacious and under the 3rd

prong, the District Attorney's action to falsely state the Complainant was sexually assaulted and in severe pain on May 19, 2009, was clearly calculated to inflame the minds of the Jury and that instruction to disregard cannot cure the harm.

In an effort to restate the falsehoods from Direct Examination answers of the family members, for at least the [3rd time], the District Attorney states there was a sexual assault on May 19, 2009. The following are his statements in *Closing Argument*:

“There at the clinic she says it happened on **May 19, 2009**, which tracks and it's consistent with everyone that's testified, and the uncle told her not to tell anybody. Again, here when we get to the Memorial— to the hospital (he put his front part in my front part) and points to the female genitalia. She was crying and in pain.” (Volume 6 RR45) And you heard her testimony from J.T. that even before she got to the Clinic her *genitals hurt* because (not less than 24 hours prior) to that this man had (raped her in that bathroom).” (Appellate Brief page 55-56)

The Appellant sets forth the District Attorney's fraudulent conduct below and the Court of Appeals comments that this record was [difficult to read], not authored by the *SANE Nurse* but read into the Record. The Court of Appeals further states that Appellant's position that the record only describes an attempted assault on May 19, 2009, is not supported by the record. (*Cayetano, 2024 9**, Footnote 6). Appellant strongly disagrees and since there is significant fraud in the case, the excuse of a difficult to read document should carry a minimal amount of weight.

“The fraud is exposed by the medical records of (2) two hospitals from the *Same Day* verifying she was not sexually assaulted the day before arriving at the hospitals. *Memorial Hermann Hospital* records state “yesterday he wanted to but “someone knocked on the door and he only hugged me”. *Falls Memorial Hospital* examined the Complainant on the same day and the medical records show that an attempt was made the day before, but “she refused to take her clothes off”. (Reply Brief page 11) (Volume 9 Exhibits RR6) (Volume 9 Exhibits RR 24-25).

With the same applicability of *Preservation of Error* in GROUND #2, Appellant opines that the falsehoods created by the District Attorney in *Closing Argument* are directly connected to the issue of whether the Appellant received a Fair Trial under the 14th Amendment Due Process clause of the United States Constitution and Due Course of Law under the Texas Constitution.

The Appellant believes these errors are *not infinitesimal* but instead are *Structural Constitutional* errors not subject to a *Harm analysis* used to *bolster the jury’s focus* that the Elements of the Crime were satisfied. *[Elements of the Crime]-Intentionally or knowingly caused the sex organ of Complainant to contact the sexual organ of the Defendant*. If subject to a *Harm Analysis*, Appellant believes the Court cannot find beyond a reasonable doubt that the falsified medical information and documentation provided by District Attorney, did not contribute to the verdict. Since the Appellant did not (*Affirmatively waive*) his rights with respect to the errors at Trial,

the Court of Appeals should have reviewed the ERROR for the first time.

PRAYER FOR RELIEF

For the reasons stated, Appellant prays that the Court grant his Petition For Discretionary Review, and after considering the Grounds for review, reverse the Judgment of the Court of Appeals and grant the relief requested.

Respectfully submitted,

/s/ John J. Tripodi

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**AMENDED MOTION FOR A NEW TRIAL,
FILED IN THE DISTRICT COURT 230
HARRIS COUNTY, TEXAS
(APRIL 21, 2023)**

CONVICTION: First Degree Felony – SENTENCE –
February 23, 2023 Aggravated Sexual Assault of a
Child less than 14 years of age

Cause No. 1235418

STATE OF TEXAS

§ DISTRICT COURT 230

v.

CAYETANO, MIGUEL ADAN

§ HARRIS COUNTY, TEXAS

**AMENDED MOTION FOR NEW TRIAL
TO THE HONORABLE JUDGE OF SAID COURT:**

COMES NOW the Defendant, CAYETANO, MIGUEL ADAN, in the above-styled and numbered cause and moves the Court, under the authority of TEX. PROC. ANN. RULES Tex. R. App. P. 21.1 and Tex. R. App. P. 21.3.

STATEMENT OF FACTS

On March 24, 2023, the undersigned attorney filed a Motion for New Trial with a primary reason being

the defendant was living in the country of MEXICO at the time of the alleged sexual assault. Therefore, he could not be guilty of a sexual assault in Houston, Texas during the months of April and May 2009.

After filing the Motion for New Trial, the undersigned attorney *frantically contacted FEDERAL agencies nationwide* to determine the defendant's ALLEN NUMBER in an effort to determine his BORDER crossings from Mexico to the United States.

LEGAL ARGUMENT

A. Newly Discovered Evidence Resulting in a Verdict Contrary to the Law and Evidence Under Texas Rule of Appellate Procedure 21.3(h) and the Due Process Clause of the United States and Texas Constitutions

On April 3, 2023, the undersigned attorney contacted the Legal Access Team (LAT) in Washington DC summarizing the Case in attempting to locate the Defendant's ALIEN NUMBER. (Exhibit M-EMAIL). On April 18, 2023, Ms. Jessica F, Jones, *Senior Policy Advisor and ERO Parental Interests Coordinator*, along with positions at Immigration and Customs Enforcement (ICE), contacted the undersigned attorney by email. Ms. Jessica F. Jones ability includes accessing U.S. Customs and Border Protection Crossings (USCBP). She determined that the defendant was encountered in Mexico during the Month of September (2009) ATTEMPTING to cross (INTO) the United States. The defendant was apprehended and processed for *Expedited Removal* (Exhibit L-EMAIL).

This New evidence buttresses and reinforces (*Exhibit F*) in the Motion for New Trial wherein the

Mexican public official for *Residency requirements*, states that his records indicate the couple (Defendant and his wife) began their (Residency) on April 9, 2009, and ended in August 2013. Jorge Lopez Valdes (SUBDELEGATE)/ ATTORNEY.

CONCLUSION

If the Jury would have had the available evidence from the MOTION for NEW TRIAL showing the *Residency of the defendant* in Mexico along with the April 18, 2023, Email from Washington DC, *proving* he ATTEMPTED a Border Crossing from Mexico into the United States in September 2009, this would have been sufficient evidence to create reasonable doubt resulting in a verdict of innocence because the defendant could not be committing the alleged crime in Houston, Texas while living in Mexico.

Verification

The undersigned states under oath: I am Movant in this Amended Motion for New Trial. I have read the Motion. The statement[s] contained in paragraph[s] of the Motion are within my personal knowledge and are true and correct.

/s/ John J. Tripodi

Texas Bar #24111347

SIGNED under oath before me on April 21, 2023

/s/ Evelyn Jasso

Notary Public, State of Texas

[SEAL]

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MOTION FOR NEW TRIAL
TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, CAYETANO,
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cause and moves the Court, under the authority of
TEX. PROC. ANN. RULES Tex. R. App. P. 21.1 and
Tex. R. App. P. 21.3

STATEMENT OF FACTS

On October 2, 2009, a Complaint was filed by the
Harris County District Attorney's Office based on the
Harris County Sheriff's Department review of a

Forensic Examination from June 22, 2009. The Complaint alleges a sexual assault by the Defendant beginning on or about April 15, 2009, and ending on April 27, 2009. (Exhibit A). On February 10, 2010, the defendant was *indicted* (based on alleged sexual assault on April 15, 2009) for the above referenced charge. (Exhibit B). In July 2021, the Defendant was arrested on an unrelated incident that was resolved by the arresting officer without charges, but he remained in custody because of the outstanding Warrant from 2009.

On August 8, 2021, (more than 12 years after the alleged crime) the US Consulate for Mexico in Houston, Texas was notified of the pending charge. On the date of February 22, 2023, a Harris County Jury found the Defendant guilty of the First Degree Felony Charge of Aggravated Sexual Assault of a Child less than 14 years of age. On February 23, 2023, the Jury recommended a Sentence of (60) sixty years.

LEGAL ARGUMENT

A. Newly Discovered Evidence & Prosecutorial Misconduct Resulting in a Verdict Contrary to the Law and Evidence Under Texas Rule of Appellate Procedure 21.3(h) and the Due Process Clause of the United States and Texas Constitutions

Since the defendant was living in Mexico at the time of the alleged crime, it is *Factually Impossible* for him to be guilty. The COMPLAINT establishing *Probable Cause* used by the District Attorney's Office sets forth the following: (Probable Cause)

“THE COMPLAINANT STATED THE DEFENDANT

PENETRATED HER VAGINA WITH HIS PENIS WHILE AT THE DEFENDANT'S RESIDENCE LOCATED AT 2800 KATY HOCKLEY CUT OFF RD #1032, HARRIS COUNTY, TEXAS, (ON OR ABOUT 04-15-2009). THE COMPLAINANT STATED THE DEFENDANT WOULD SEXUALLY ASSAULT HER WHEN HER MOTHER WAS AT WORK IN THE EVENING. THE DEFENDANT WOULD SEND OUT THE COMPLAINANT'S SIBLINGS OUTSIDE OF HIS RESIDENCE AND LOCK THE COMPLAINANT INSIDE. THE DEFENDANT WOULD THEN DISROBE THE COMPLAINANT AND ATTEMPT TO PENETRATE HER VAGINA WITH HIS PENIS. THE DEFENDANT WAS SUCCESSFUL ON HIS SECOND ATTEMPT TO PENETRATE THE COMPLAINANT'S VAGINA THE COMPLAINANT STATED SHE SCREAMED AND TOLD THE DEFENDANT TO STOP. THE COMPLAINANT STATED THE DEFENDANT STARTED TO SEXUALLY ASSAULT HER WHEN THE DEFENDANT'S (WIFE) RETURNED TO LIVE IN MEXICO IN APRIL OF 2009. THE (LAST TIME) THE DEFENDANT ATTEMPTED TO SEXUALLY ASSAULT COMPLAINANT WAS (ON OR ABOUT 04-27-2009".)

The date set forth above by the District Attorney's Office are inaccurate and result in *Prosecutorial Misconduct*. The Initial Intake File (Exhibit C) was developed by Texas Department of Family and Protective Services (CPS) on May 20, 2009. The Complainant stated that the last attempted sexual assault was on May 19, 2009. The Complainant's 10-year-old brother was interviewed on May 21, 2009, and stated that there was a problem with the Defendant (2) two days prior and they needed to move to a hotel. The brother had no knowledge of said problem and there

were no indications of sexual abuse towards him. On May 21, 2009, the mother was interviewed and stated that her 10-year-old son telephoned her at work. She was informed that the Complainant and Defendant were in the same room. The mother immediately left work and confronted the Defendant at their place of residence. The mother states as follows: “Ms. T** stated the uncle (Defendant) told her that he does not love his wife, Marisola Meza (the mother’s sister) but loves Complainant as she is there holding his hand. Ms. T** stated Fernando would not admit nor deny that he did anything to Complainant. “The mother further states: Ms. T** stated Fernando has one child, J A-M (3) three is in Mexico. Ms. T** stated Ms. Meza is not coming back from Mexico and stated Fernando is supposed to (go to Mexico in one year.)” (Exhibit C page 11)

The District Attorney’s Office *misinformed* the Jury providing the *Complaint* stating the alleged sexual assault began on or about April 15, 2009, and ended on or about April 27, 2009. This is a MISSTATEMENT of the facts and is misleading because the initial contact by the mother of the Complainant with CPS was on May 20, 2009, and the last *alleged* attempted sexual assault on the Complainant was May 19, 2009. The mother indicated that the Defendant was still living in the mobile home park and would leave in approximately one year to be with his wife and 3-year-old in Mexico.

On May 20, 2009, the Complainant and her mother went to Memorial Hospital in Katy, Texas. The Sexual Assault Examination Forensic Report states that the alleged sexual assault was during the latter part of April and an attempt was made the day

before which would have been May 19, 2009. There were no signs of trauma or sexual assault. (Exhibit D)

As set forth below, the Defendant traveled with his wife 3-year-old child from Houston, Texas on April 5, 2009, and arrived in Mexico on April 7, 2009.

Although the April 2009 dates and May 2009 dates are BOTH FALSE, this does not in any way *lessen the burden on the District Attorney's Office* to provide the Jury with the *most accurate dates available* in the evidence. Instead, the district attorney provides the dates from April 2009 because they are closer to the time when the Defendant traveled to Mexico on April 5, 2009.

In effect, the mother of the Complainant instructs her 12-year-old daughter and 10-year-old son to lie about dates with CPS and Memorial Hermon Hospital using the date of May 19, 2009, as the last attempt of sexual assault because she did not arrive at the hospital until May 20, 2009. How would it look to CPS and the JURY if the mother waited (30 or 40) days to (Report) an alleged sexual assault? The problem with her lying about the dates of the alleged sexual assault is there is no possible way that the Defendant could have committed an attempted sexual assault on May 19, 2009. If the Defendant was still living at the mobile home, the police could have easily arrested him with minimal effort. However, she believed a way to *cover her lies* was by making the complaint (45) forty-five days after the defendant was in Mexico.

Multiple Houston Police Reports were supplied as evidence wherein the Complainant and her mother state that the sexual activity was in mid-April and

ended at the end of April but all the information postdates May 20, 2009.

On June 22, 2009, at approximately 4:15 p.m. CPS conducted a Forensic Interview with the Complainant. In this interview, the Complainant states that the last incident was in May 2009, and she went to the hospital with her mother. On July 14, 2009, CPS (DECLINED), to offer continued services to the family and CPS approved the Case for closure on the date of July 27, 2009. (Exhibit D-2)

If CPS consider this a SEVERE situation, how could they (Deny a 12-year-old) continued coverage in Houston, Texas?

A criminal defendant's due process rights are violated when the prosecutor knowingly elicits false testimony and does not correct the testimony. *See, e.g., Napue v. Illinois*, 360 U.S. 264, 270 (1959). A criminal defendant's due process rights are also violated when the government suppresses material, exculpatory evidence. *See, e.g., Brady v. Maryland*, 373 U.S. 83 (1963).

Under *Napue v. Illinois*, the District Attorney violated the defendant's Due Process rights because he knowingly supplied the incorrect dates from April 2009 to the Jury evidenced from the COMPLAINT and the INDICTMENT. In addition, the Defendant's Due Process rights were violated under *Brady v. Maryland*, by *suppressing exculpatory evidence*, that being *the falsified dates* from May 2009 which *conflict* with the April 2009 dates. If the Jury were aware of the conflicting dates from April 2009 and May 2009, there would have been reasonable doubt and a verdict of innocence. To further emphasize the conflicting evidence (known to the District Attorney's Office)

from April 2009 and May 2009, is the information set forth below.

The proper manner in which to divulge the *Exculpatory Evidence* would be to show the conflicting dates to the (Defendant's TRIAL ATTORNEY) from April 2009 and May 2009. The providing of a 256-page report from CPS and an 89-page report from Memorial Hermon Hospital does not absolve the district attorney's DUTY to provide exculpatory evidence to the defendant.

As set forth in (Exhibit E) (this document was transcribed by Mexican Attorney Sergio Padilla Macedo on March 17, 2023), according to the common law wife of the Defendant, they traveled (together) from Houston, Texas on April 5, 2009, their infant daughter's birthday, and arrived in defendant's home city La Pini, Amealco, Queretaro, Mexico on the date of April 7, 2009. The government official and *Mexican Attorney* with the responsibility and authority as a (public official) to (keep RECORDS of ALL residents), states that his records indicate the couple began their (Residency) on April 9, 2009, and ended in August 2013. C Jorge Lopez Valdes (SUBDELEGATE) (Exhibit F).

After August 2013, the common-law wife Marisela Meza Flores stated they moved to #42 Fresno Street, Nuevo Amaneer, Amealco, Queretaro, Mexico. Queretaro. On March 17, 2023, (3) three neighbors of the defendant and his wife in Mexico provided statements *under oath* to Mexican Attorney Sergio Padilla Macedo regarding the travel from Houston, Texas on April 5, 2009 arriving in Mexico on April 7, 2009. (Exhibit G) On April 15, 2009, a seller of equipment for remodeling homes provided confirmation of a purchase. (Exhibit H).

In addition, there is Mexican work history from April 14, 2009 to August 28, 2009. (Exhibit H-continued)

Furthermore, the undersigned attorney *interviewed the Defendant in Harris County jail on March 19, (2023),* and was informed that jobs were difficult to obtain in Mexico during the month of April 2009. Therefore, he attempted to cross the Mexican/United States border in either late April or sometime in May.

The defendant was apprehended by Immigration and Customs Enforcement (ICE) and signed documentation stating he was barred from entering the United States for (5) five years. I will complete a Freedom of Information Act (FOIA) request on the Defendant's behalf this week but obtaining the Immigration background from the United States Citizenship and Immigration Services (USCIS) will require approximately (2) two months.

If the USCIS records show the Defendant was apprehended in the month of April 2009 at the Border attempting to (ENTER) the United States from Mexico, it is factually impossible that he committed the crime for which he was convicted on or about April 15, 2019, and (ENDED) on or about April 27, 2009. This also applies to the false statements made by the mother of the Complainant to CPS on May 20, 2009.

Since the Jury was not provided information that the Defendant was already in the country of Mexico at the time of the alleged crime, it is not *Harmless Error*. In addition, it is not *harmless error* for the District Attorney's Office to ARGUE that the defendant fled the United States after being charged with the alleged crime. If the Jury knew the Defendant was already in Mexico at the time of the alleged assault, there would

be more than enough for reasonable doubt and for a Verdict of innocence for the Defendant.

We contend defendant's constitutional rights under the Due Process Clause of the United States Constitution and Texas Constitution have been violated and require a new Trial. Under the more stringent *harmless error test*, providing this misinformation to the jury hinders the defense. If the presentation of the evidence including the *correct dates* was properly disclosed to the Jury, the conflicting evidence would have created reasonable doubt forcing the Jury to render a Verdict of innocence. Lastly, we contend that the Constitutional Error principle is applicable in this scenario and the decision of the Court should be *reversed* because it cannot determine beyond a reasonable doubt that the *Error* did not contribute to the conviction or punishment.

B. Prosecutorial Misconduct or Significant Error leading to Misleading of the Jury Resulting in the Verdict Contrary to the Law and Evidence Under Texas Rule of Appellate Procedure 21.3(h).

The Complainant's alleged sexual assault occurred at age 12. The picture used during Trial was the Complainant at the approximate age of 8. We have attached a 2nd picture which was taken when she was (12) twelve years old. (Exhibit I) This can be verified by the sister-in-law of the defendant LUCERO HERNANDEZ because she is in the (Middle) of the 2nd picture and lived with the Complainant during 2009. (See attached letter) (Exhibit J).

Although the District Attorney may contend that it is still sexual assault of a minor because both ages

are underage (14) fourteen, this is a *Due Process* violation of *fundamental fairness* because we cannot determine how the Jury would *internalize* their decision based on *misleading pictures*. The District attorney's approach of generating the EMOTION in the jury so as to *devalue the actual evidence* is not Fundamental Fairness under the Due Process Clause.

In *Brady v. Maryland*, 373 U.S. 83 (1963), for example, the Court has held prosecutors to higher standards of conduct than ordinary counsel because a prosecutor is “the ‘servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.’ The holding in *Brady v. Maryland* requires disclosure only of evidence that is both favorable to the accused (AND) ‘material either to guilt or to punishment.’ 373 U.S., at 87, 83 S.Ct., at 1196.” *United States v. Bagley*, 473 U.S. 667, 87 L.Ed.2d 481, 105 S.Ct. 3375 (1985).

In summary, the District Attorney's Office provided evidence to the Jury stating that defendant committed the crime and *fled to his home country* of Mexico. This is a purposeful misstatement of the facts because the Defendant was already living in Mexico before the alleged assault.

Also, the Defendant attempted to reenter the United States during April or May 2009 and was arrested by ICE. The Defendant was barred from entering the United States for (5) five years. In an effort to locate employment, the defendant entered the United States illegally sometime in 2015 or 2016 and filed an IRS Tax Return for 2017 (Exhibit K).

The only reason the Defendant was apprehended in 2021 was because there was a misunderstanding

between neighbors and a person called the Houston Police Department. When the Houston Police Department arrived in 2021, the dispute was resolved, and no charges were filed against the defendant. However, the officer realized there was an outstanding *Warrant* from 2009 for sexual assault of a minor and apprehended the Defendant.

C. Ineffective Assistance of Counsel Resulting in a Verdict Contrary to the Law and Evidence Under Texas Rule of Appellate Procedure 21.3(h)

C.1 Summary of the Law for Ineffective Assistance of Counsel

The defendant raises the issue of ineffective assistance of counsel in this Motion for a New Trial under the authority of *Reyes v. State*, 849 S.W.2d 812, 815 (Tex. Crim. App. 1993). The United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) established the federal standard for determining whether an attorney rendered reasonably effective assistance of counsel. The Texas Court of Criminal Appeals in *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986) adopted the *Strickland* test as the proper test under State law to gauge the effectiveness of counsel.

Under the two-part test, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance *prejudiced the defense*.

This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. at 687, 104 S.Ct. at 2064. The purpose of the *Strickland* two-part test is to judge whether counsel's conduct so compromised the proper functioning of the adversarial process that the Trial cannot be said to have produced a reliable result. *Thompson v. State*, 9 S.W.3d 808, 812-13 (Tex. Crim. App. 1999) (citing *McFarland v. State*, 845 S.W.2d 824, 843 (Tex. Grim. App. 1992)); *Ex parte Scott*, 190 S.W.3d 672 (Tex. Crim. App. 2006) (reasonable probability of a different outcome means it is sufficient to undermine confidence in the result).

In assessing deficient performance, courts "must determine whether there is a gap between what counsel actually did and what a reasonable attorney would have done under the circumstances." *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002) (*en banc*). In *Ex parte Lilly*, 656 S.W.2d 490 (Tex. Crim. App. 1983), the court stated: "It is fundamental that an attorney must have a firm command of the facts of the Case as well as the law before he can render reasonably effective assistance of counsel. A natural consequence of this notion is that counsel also has a responsibility to seek out and interview potential witnesses and *failure to do so is to be ineffective*, if not incompetent where the result is that any viable defense available to the accused is not advanced."

Although counsel's effectiveness is normally judged by the totality of the representation, a single egregious error can constitute ineffective assistance of counsel. *Ex parte Felton*, 815 S.W.2d 733 (Tex. App. 1991); *Ex parte Raborn*, 658 S.W.2d 602 (Tex. Crim. App. 1983).

Some errors that “are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified” thus making it unnecessary to establish the prejudice prong of *Strickland*. *United States v. Cronin*, 466 U.S. 648, 658, 104 S.Ct. 2039, 2046, 80 L.Ed.2d 657 (1984).

Prejudice is presumed in situations where the likelihood of counsel having provided effective assistance is extremely small such as where counsel failed completely to subject the prosecution’s case to “meaningful adversarial testing.” *Id.* at 660, 104 S.Ct. at 2047.

The burden of proving ineffective assistance of counsel rests on the convicted defendant by a *preponderance of the evidence*. *Haynes v. State*, 790 S.W.2d 824, 827 (Tex. Crim. App. 1990). In order to determine whether the defendant has met this burden, the reviewing court looks to the totality of the representation and the particular circumstances of the case in evaluating the reasonableness of an attorney’s conduct. *See, Ex parte Felton*, 815 S.W.2d 733, 735 (Tex. Crim. App. 1991).

Once a convicted defendant establishes that his attorney’s actions were objectively unreasonable, he must still prove that he was prejudiced by his attorney’s actions. To establish prejudice, he “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the *result of the proceeding would have been different*.” *Strickland v. Washington*, 466 U.S. at 694, 104 S.Ct. at 2068. The State often argues in response to ineffective assistance of counsel claims that the attorney was effective because, in effect, he was there.

The presence of an attorney, however, even one who asks a few questions and makes some sort of argument on the defendant's behalf, is not what the Supreme Court had in mind in *Strickland*. There the Court said:

“That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversary system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair”.

C.2 Ineffectiveness Assistance of Counsel-Defendant's Trial

This Case was the alleged sexual assault of a child under 14 years of age. Therefore, the defendants (TRIAL ATTORNEY) should have been aware that there would be SANE NURSE testifying as well as a psychiatrist. Ms. A.H., RN, (from the witness list) testified as a SANE nurse and attempted to discuss the Tanner Stages by diagram. Dr. W.C. (psychiatrist from the witness list) gave testimony regarding general symptomology of a person subject to sexual assault as a minor. Under *Ex parte Overton*, 444 S.W.3d 632 (Tex. Crim. App. 2014), it is Ineffective assistance of counsel for failure to present testimony of expert physician to refute the State's case.

The Defendant's (TRIAL ATTORNEY) did not call any medical experts on his behalf and his only option was cross-examination which is insufficient under *Ex parte Overton*. The lack of expert testimony from the defense to contest the district attorney's medical witnesses is deficient and led the Jury to believe the Uncontested experts opinions resulting in a guilty verdict. Failure to provide medical experts for the defendants was the proximate cause of the defendant being found guilty by the Jury.

Furthermore, the Jury was given the impression by the District Attorney that a SANE nurse is a *highly qualified medical expert*. In the State of Texas, to become a SANE Nurse, registered nurses must take a Sexual Assault Examiner Class comprised of (40) forty hours of classroom training, followed by an average of (40) forty hours of clinical training. In essence, classroom and clinical training could be completed in the matter of weeks. This is not the qualifications of a highly skilled expert such as a Pediatrician, or an Emergency Room Physician with a bachelor's degree, (4) four years of Medical School, and additional (5) five years of Residency along with a Fellowship. Although the State of Texas may save considerable money by allowing Sane Nurses to perform these critical medical evaluations that are used in a *Legal Setting such as the Case at hand*, that does not lead to the conclusion that it was performed with Competence.

In an analogy from the legal profession, we do not allow law students to be an attorney in a Trial for a first-degree felony because they do not have adequate *experience and competence*.

In *Richards v. Quarterman*, 566 F.3d 553 (5th Cir. 2009), the court found Ineffective assistance based on failure to conduct adequate pre-trial investigation. As set forth above, the defendant was living in Mexico at the time of the alleged sexual assault. A FOIA could provide an *absolute ALIBI* for the defendant. In addition, the wife of the defendant living in Mexico could have been permitted to testify at Trial. There was no attempt by the defense attorney to have the wife testify at his Trial.

Furthermore, the (PUBLIC OFFICIAL) keeping records of current residents in Defendant's hometown in Mexico and is (also a registered *attorney at law*) in Mexico, would have been able to enter the United States on a Visitor Visa, B1-B2 in a short manner. These (2) two witnesses on all behalf of the defendant would have established an ironclad alibi.

We contend there is ineffective assistance of counsel because the defense attorney's actions are clearly deficient and the prejudice is self-evident and significantly above the threshold of *preponderance of the evidence*. Prejudice is apparent because but for the ineffective assistance of counsel, the jury would have found the defendant not guilty. Defendant's ABSOLUTE Alibi based on reasonable investigation by the TRIAL ATTORNEY and hiring the appropriate MEDICAL experts would have created reasonable doubt for the Jury.

D. Expert Testimony v. Lay Testimony-Sane Nurse Testimony Regarding (Tanner Staging) was speculation Not an Expert Opinion Resulting in the Verdict Contrary to the Law and Evidence Under Texas Rule of Appellate Procedure 21.3(c) and (h) AND 21.3 (b) The Court Committed a Material Error Allowing Lay Testimony (Expressed as Expert Testimony) Likely Injuring the Defendant's Constitutional Rights of Fundamental Fairness under the Due Process Clause of the United States and Texas Constitutions

Firstly, we argue that that there was *ineffective assistance of counsel* because the defense counsel was *deficient* in allowing a SANE NURSE to testify as an EXPERT instead of properly qualifying her under TEX. R. EVID Rule 701 (LAY TESTIMONY). If the Jury was informed that there was no VALID underlying Rationale and it was speculation by a *Lay Witness and not an Expert*, there would be more than reasonable doubt which would have allowed for a verdict of innocence.

Secondly, we contend that the Trial Judge is the *Gatekeeper* to determine the difference between LAY testimony and EXPERT testimony.

TEX. R. EVID Rule 702 permits a witness qualified as an Expert by knowledge, skill, experience, training, or education to testify on scientific, technical, or other specialized subjects if the testimony would assist the fact finder in understanding the evidence or determining a fact issue.

In *Texas Mut. Ins. Co. v. Lerma*, 143 S.W.3d 172 (Tex. App. 2004), the court sets forth guidelines for

determining qualified experts. Although this is a Civil Worker's Compensation case, it involves a death and therefore the medical expert is a physician. The Court instructs as follows: "The proponent of the expert bears the burden to demonstrate the expert is qualified under Texas Rule of Evidence 702, which includes showing that the expert's testimony is both relevant and reliable. *Id.* (citing *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 556 (Tex.1995)).

"To be reliable, the scientific evidence must be grounded in scientific method and procedure such that it amounts to more than subjective belief or unsupported speculation." *Id.* (citing *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 720 (Tex.1998)).

In determining the reliability of an expert's opinion, the Texas Supreme Court (Texas's slight modification of *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993) has provided a list of factors to apply:

(1) the extent to which the theory has or can be tested; (2) the extent to which the technique relies upon subjective interpretation of the expert; (3) whether the theory has been subjected to peer review and publication; (4) the technique's potential rate of error; (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and (6) the nonjudicial uses that have been made of the theory or technique. *Texas Mut. Ins. Co. v. Lerma*, 143 S.W.3d 172 (Tex. App. 2004)

The Tanner Puberty Stages (also known as Sexual Maturity Rating (SMR)) were named after James Mourilyan Tanner, a renowned English pediatrician.

Dr. Tanner developed the Tanner Stages to grade the level of sexual maturation for breasts in girls, pubic and axillary hair in boys and girls, and genitalia in males. It is an objective classification system that providers use to document and track the development and sequence of secondary sex characteristics of children during puberty.

According to Arlan L. Rosenbloom, MD of the Department of Pediatrics at the University of Florida College of Medicine, in cases where the defendant has been accused of possession of child pornography, “the Tanner stages have been used to estimate probable chronological age, which isn’t sufficient because there are no equations that exist to estimate age from stages.

Tanner himself has said the Tanner puberty stages should not be used as evidence of the age of a child. The Tanner puberty stages are not applicable in forensics in this way.”

In the article, *Forensic Issues In The Assessment of Sexually Assaulted Adolescents*, by Anne Niec, M.D. FRCPC FAAP, published in the National Library of Science, she states

“Forensic examination is an assessment that is undertaken for the purpose of gathering evidence. This evidence may be used in court proceedings. This evaluation’s therapeutic relevance is believed to be in the “social, psychological and legal management of suspected abuse. The timing of completing the forensic examination is key. It is linked to the probability of obtaining forensic evidence.

Clear guidelines exist for pubertal boys and menstruating girls Namely, *a kit should be completed within (72) hours of a sexual assault. This time limit is based on the average survival time of sperm in the female genital tract, therefore increasing the likelihood of obtaining conclusive evidence if needed for prosecution. Should an adolescent present (after) 72 hours and report a sexual assault, an evaluation is still warranted.* The kind of evaluation to perform differs in that a kit would not be used, but the principles of the forensic evaluation would still prevail. Evaluation of this adolescent would warrant the gathering of a thorough history and completion of a general physical examination. A genital examination, including a Papanicolaou smear test and swabs to rule out sexually transmitted diseases (STDs), would be needed. Laboratory tests may be sent (such as a pregnancy test, an HIV test, Venereal Disease Research Laboratory test and hepatitis screen).”

In the case at hand, the SANE examination was on May 20, 2009. This is at least (20) twenty days after the alleged sexual assault. However, if we believed the falsehoods of the mother, stating the sexual assaults continued as late as May 19, 2009, this would have been within the 72 hour window to check for sperm but it was not done so by the SANE nurse. The Court allowed a SANE Nurse to testify regarding Tanner Staging giving an LAY OPINION (expressed as an Expert) that the Complainant could have possibly matured through puberty at a certain stage

in which sexual trauma would NOT have been readily apparent because of certain hormonal imbalances.

As set forth above, Anne Niec, M.D. FRCPC FAAP, states there are limitations to Tanner Staging and the best results would be obtained within (72) hours after a sexual assault, but valuable information can be gained after the (72) hour window.

For testimony to be valuable in this Case, the SANE examination from 2009 would need to provide the necessary evidence. The SANE examination from 2009 only states that the Complainant was in Tanner Stage 4. There were no signs of trauma on the Complainant at the time of the SANE examination. This would NOT allow a SANE NURSE to form a medical hypothesis in 2023 because it would be considered SPECULATIVE. In addition, there are considerable disagreements within the medical community regarding Tanner Staging in a *Legal Setting* to determine chronological age, but it is a *far reaching analysis* to speculate on whether or not there was a sexual assault based on Tanner Staging or hormonal imbalances (15) fifteen years after the fact.

Firstly, under TEX. R. EVID Rule 702, a SANE nurse is not an expert because she does not have the knowledge, skill, experience or training to testify on scientific, technical, or other specialized subjects. A bachelor's degree in nursing along with (40) forty hours of clinical work and (40) forty hours of classroom study does not qualify a person as an expert in a medical field.

The strongest arguments in Tanner Staging are physical observations to estimate chronological age. This SANE nurse testifies to possible *hormonal*

imbalances that could have been present in 2009. If the Complainant had these hormonal imbalances, she testified that they would hinder the ability to observe physical trauma from a sexual assault.

This is speculation and will not meet any of the (6) six factors set by the Texas Supreme Court. Furthermore, hormonal imbalances are best analyzed by an endocrinologist. This physician must complete a bachelor's degree, a one-year internship, four years of Residency and a one-year Fellowship. If the hospital in 2009 determined that hormonal but imbalances were present, it would have been compelled to have the Complainant evaluated by a general endocrinologist and a follow-up visit by a pediatric endocrinologist.

Failure to have this examination would be malpractice by the physicians on duty and any injuries resulting from failure to perform the proper endocrinology exams would become liabilities of the hospital and physicians.

We opine the Court erred in allowing a SANE nurse *to be qualified as an Expert. The SANE nurse* should have only been qualified to give testimony as a layperson This qualification as an expert substantially *misled the Jury* which violated the Defendant's Constitutional right of Fundamental Fairness under the Due Process Clause of the United States and Texas Constitutions. Since this SANE nurse was incorrectly qualified as an expert, the Jury could have believed her testimony as the ABSOLUTE TRUTH. Furthermore, this testimony in and of itself if expressed as EXPERT OPINION is not *Harmless Error*. If the evidence was properly presented by the District Attorney to the Jury, it would be self-evident that the SANE nurse is speculating on Tanner Staging and hormonal

imbalances and how this would affect the physical appearance of the Complainant. This speculation *without proper foundation and rationale* would have created reasonable doubt for the Jury and compelled a Verdict of innocence.

**21.3(b) The Court Committed a Material
Error Allowing Lay Testimony from the
Complainant's 24-year-old brother
(concerning events when he was age 10)
Likely Injuring the Defendant's Constitutional
Rights of Fundamental Fairness under the
Due Process Clause of the United States and
Texas Constitutions**

TEX. R. EVID Rule 701 permits a lay witness to testify in the form of “opinions or inferences,” subject to two important limitations: (a) the testimony must be “based on firsthand knowledge or observation” and (b) it must be “helpful in resolving issues” related to facts or testimony in the case.

The Complainant's brother was (10) ten years old at the time of the alleged assault. On May 21, 2009, CPS interviewed him at his Elementary school.

The 10-year-old child stated that there was a problem between the defendant and his sister, but he did not know the nature of said problem. Therefore, he did not have first-hand knowledge or an observation in 2009 that would be helpful in resolving issues in the case at hand. The testimony of a (24-year-old) discussing an alleged crime when he was (10) ten years old, can serve no other purpose than to *inflame the jury* and divert it from deciding the Case on the relevant evidence concerning the crime and the Defendant. *Booth v. Maryland*, 482 U.S. 496, 508-09 (1987) (reversing

due to admission of inflammatory opinions of the victim's family about the crime, the defendant, and the appropriate sentence), overruled on other grounds by *Payne v. Tennessee*, 501 U.S. 808, 830 n.2 (1991).

We opine, this admission of the LAY OPINION testimony was not *harmless error*. If the testimony would have been excluded, the Jury would have noted that the 10-year-old brother was not testifying. Why would a 10-year-old at the time of the alleged assault, now being 24-year-old fail to testify on behalf of the sister? The District Attorney knew that he did not have knowledge it at age 10 and certainly cannot generate the knowledge at age 24.

This would have generated reasonable doubt of the alleged crime in the minds of the Jury. Therefore, it would have resulted in a finding of innocence. Furthermore, the court should have excluded the evidence because its probative value is substantially outweighed by unfair prejudice and misleading the jury. TEX. R. EVID Rule 403.

CONCLUSION

If the proper evidence would have been submitted to the Jury, there would have been *more than* reasonable doubt to find the Defendant innocent. The District Attorney did not provide exculpatory evidence to the Jury showing the conflicting dates of April 2009 and May 2009. The possibility of the Jury finding the Defendant guilty would be quite remote if they had the knowledge that the Complaint and Indictment showed alleged sexual assaults in the middle of April 2009 and the CPS Report, and the Memorial Hermann Hospital report indicate the last attempt was May 19, 2009.

We can only conclude that the mother of the Complainant did not have pictures of her at age 12, and supplied the District Attorney a picture from a time when she was 8 years old. The district attorney failed to confirm this misleading information, or it was purposely provided to create an emotional uproar in the Jury allowing them to reach a Verdict based on EMOTION instead of the evidence.

The TRIAL ATTORNEY should have known that the district attorney would be providing expert witness testimony from a psychiatrist and a SANE nurse. The legal representation was deficient because he failed to hire medical experts for the defendant. In addition, he failed to investigate for potential witnesses especially the wife of the defendant living in Mexico and the public official knowing the Mexico address from April 9, 2009 to August 2013. Lastly, he should have objected to the admission of this SANE nurse as an expert. A SANE nurse is not an expert within the meaning of Endocrinology or Emergency Room medicine because she lacks the formal education and clinical training. If the SANE nurse was testifying as a LAY WITNESS, she could have been questioned showing unfounded speculation using Tanner Staging and Hormonal Imbalances to conclude the Complainant did not have physical signs of sexual assault.

Furthermore, we opine the Court Committed a Material Error Allowing Lay Testimony (Expressed as Expert Testimony) injuring the Defendant's Constitutional Rights of Fundamental Fairness under the Due Process Clause of the United States and Texas Constitutions. The SANE nurse could have testified as a LAYPERSON and her conclusions would have been discredited in front of the Jury creating reasonable

doubt. Instead, the Court allowed her to testify as an EXPERT giving the Jury reason to believe that the Complainant was sexually assaulted 2009 but because of Tanner staging and Hormonal Imbalances there was *no detection of injury*.

Although not every sexual assault shows physical injuries on a Complainant, *absence of this type of evidence* allows the Jury to draw an *Inference* or a *Complete Conclusion* that a sexual assault did not take place. This was erased in this Case because of classifying this SANE nurse as an Expert.

Lastly, we contend the Court committed a Material Error allowing Lay Testimony from the Complainant's 24-year-old brother (concerning events when he was age 10) injuring the Defendant's Constitutional Rights of Fundamental Fairness under the Due Process Clause of the United States and Texas Constitutions. Under TEX. R. EVID Rule 701, LAY TESTIMONY the must be "based on firsthand knowledge or observation". The 10-year-old brother did not have did not have first-hand knowledge at age 10 and it cannot be self-generated at age 24. Therefore, he should not have been allowed to testify at the Trial concerning events from 2009.

The only remaining evidence available would have been the testimony of the Complainant and her Mother and this would have been insufficient to find the defendant guilty beyond a reasonable doubt.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court grant this the Defendant's MOTION FOR NEW TRIAL.

App.99a

Respectfully submitted

/s/ John J. Tripodi

The Tripodi Law Firm, P.C.

John J. Tripodi, Esq.

State Bar No. 24111347

Address: 440 Louisiana Street

Suite #900

Houston, Texas 77002

Tel: (713) 474-7702

Fax: (281) 516-5529

Email:

John@Tripodilawfirm.com

March 24, 2023

EXHIBIT LIST

Exhibit A Complaint	Pages 1-2
Exhibit B Indictment	Pages 3-4
Exhibit C CPS Intake File	Pages 5-20
Exhibit D Sexual Assault Examination Forensic Report	Pages 21-31
Exhibit D-2 CPS Denial of Continued Services	Pages 31B-31C
Exhibit E Wife of defendant in Mexico Affidavit	Pages 32-40
Exhibit F Mexican Public Official-Proof of Residence	Pages 41-44
Exhibit G (3) three neighbors in Mexico-Proof of Residence	Pages 45-54
Exhibit H Mexico Proof of purchase of construction equipment	Pages 55-57
Exhibit I pictures of complaint at age 12 and at age 8	Pages 58-59B
Exhibit J Letter stating Trial picture was age 8 not age 12	Pages 60-63
Exhibit 2017 IRS Tax Return	Pages 64-70

Verification

The undersigned states under oath: I am Movant in this Motion for New Trial. I have read the Motion. The statement[s] contained in paragraph[s] of the Motion are within my personal knowledge and are true and correct.

/s/ John J. Tripodi

Texas Bar #24111347

SIGNED under oath before me on March 23, 2023.

/s/ Evelyn Jasso

Notary Public, State of Texas
[SEAL]

**NOTICE OF APPEAL, FILED IN THE
FIRST COURT OF APPEALS OF TEXAS
(MARCH 24, 2023)**



Marilyn Burgess

HARRIS COUNTY DISTRICT CLERK

201 Caroline | P.O. Box 4651 |
Houston, Texas 77210-4651 |
832-927-5800 | www.hcdistrictclerk.com

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
6/21/2023 1:28:31 PM
DEBORAH M. YOUNG
Clerk of The Court

June 21, 2023

JOHN J. TRIPODI
ATTORNEY OF RECORD
440 LOUISIANA STREET
HOUSTON, TX 77002

Defendant's Name: MIGUEL ADAN CAYETANO

Cause No: 1235418

Court: 230TH DISTRICT COURT

Please note the following appeal updates on the
above mentioned cause:

Notice of Appeal Filed Date: 3/24/2023

Sentence Imposed Date: 2/23/2023

App.103a

Court of Appeals Assignment:
First Court of Appeals
Appeal Attorney of Record: JOHN J. TRIPODI
Motion for New Trial Filed: 3/24/2023

Sincerely,

“/s/” Danielle Roberts
Criminal Post Trial Deputy

CC: Kim Ogg

District Attorney
Appellate Division
Harris County, Texas

ARLENE WEBB & TRISH MATTHEWS (VIA E-MAIL)

This is your notice to inform any and all substitute
reporters in this cause.

3/24/2023 4:1 5 PM

Marilyn Burgess - District Clerk Harris County

Envelope No 74006424

By: S Santacruz

Filed: 3/24/2023 4 15 PM

CAUSE NO CAUSE NO:1235418

CONVICTION: First Degree Felony - SENTENCE –
February 23, 2023 Aggravated Sexual Assault of a
Child less than 14 years of age

IN THE 230TH DISTRICT COURT
HARRIS COUNTY, TEXAS

STATE OF TEXAS

v.

CAYETANO, MIGUEL ADAN

Cause No. 1235418

NOTICE OF APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant, CAYETANO, MIGUEL ADAN, in the above-styled and number cause and gives NOTICE OF APPEAL of his Conviction from February 23, 2023 pursuant to Texas Criminal Procedure Rule 44.02. The defendant was detained in Harris County Jail, but is in the process of being located to a TDC facility that has not been determined as of this writing. Therefore, the undersigned attorney will be signing on his behalf.

App.105a

/s/ John J. Tripodi

The Tripodi Law Firm, P.C.

John J. Tripodi, Esq.

State Bar No. 24111347

Address: 440 Louisiana Street

Suite #900

Houston, Texas 77002

Tel: (713) 474-7702

Fax: (281) 516-5529

Email:

John@Tripodilawfirm.com

/s/ John J. Tripodi

Defendant

March 24, 2023

CAUSE NO CAUSE NO:123541801010

IN THE 230TH DISTRICT COURT
COUNTY CRIMINAL COURT AT LAW NO. 230TH
HARRIS COUNTY, TEXAS

STATE OF TEXAS

v.

CAYETANO, MIGUEL ADAN, Defendant.

Cause No. 123541801010

**TRIAL COURT'S CERTIFICATION
OF DEFENDANT'S RIGHT OF APPEAL***

I, judge of the trial court, certify this criminal case:

☒ is not a plea-bargain case, and the defendant
has the right of appeal.

/s/ Chris Morton

*“A defendant in a criminal case has the right of *appeal* under these rules. The *trial* court shall enter a certification of the defendant’s right to appeal in every case in which it enters a judgment of guilt or other appealable order. In a plea bargain case-that is, a case in which a defendant’s plea was guilty or *nolo contendere* and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant-a defendant may appeal only: (A) those matters that were raised by a written motion filed and ruled on before trial, or (B) after getting the trial court’s permission to appeal.” TEXAS RULES OF APPELLATE PROCEDURE 25.2(a)(2).

Judge

Date Signed: 6/14/2023

I have received a copy of this certification. I have also been informed of my rights concerning any appeal of this criminal case, including any right to file a *pro se* petition for discretionary review pursuant to Rule 68 of the Texas Rules of Appellate Procedure. I have been admonished that my attorney must mail a copy of the court of appeals's judgment and opinion to my last known address and that I have only 30 days in which to file a *pro se* petition for discretionary review in the court of appeals. TEX. R. App. P. 68.2 I acknowledge that, if I wish to appeal this case and if I am entitled to do so, it is my duty to inform my appellate attorney, by written communication, of any change in the address at which I am currently living or any change in my current prison unit. I understand that, because of appellate deadlines, if I fail to timely inform my appellate attorney of any change in my address, I may lose the opportunity to file a *pro se* petition for discretionary review.

Defendant's' Signature Waived

Defendant CAYETANO, MIGUEL ADAN

Mailing Address: 7500 PINEMONT DR 1009

Telephone number: 0000000000

Fax number (if any): N/A

/s/ John J. Tripodi

Defendant Counsel Tripodi, John Joseph

State Bar of Texas ID number: 24111347

Mailing Address: 440 LOUSIANA ST, SUITE #900,
HOUSTON, TX 77002

Telephone number: (713) 474-7702

Fax number (if any): (281) 516-5529

APPEAL CARD

COURT: 230th

CASE NUMBER: 123541801010

THE STATE OF TEXAS

vs.

CAYETANO, MIGUEL ADAN

DATE NOTICE OF APPEAL: 06/14/2023

JUDGE PRESIDING: CHRIS MORTON

COURT REPORTER: ARLENE WEBB

COURT REPORTER: TRISH MATTHEWS

COURT REPORTER:

ATTORNEY ON TRIAL: RALPH R. MARTINEZ

ATTORNEY ON APPEAL: TRIPODI, JOHN
JOSEPH

☒ HIRED

OFFENSE: AGG SEX ASSLT CHILD-UNDER 14

JURY TRIAL: ☒ YES

PUNISHMENT ASSESSED: 60 YEARS TDCJ

COMPANION CASES (IF KNOWN): N/A

AMOUNT OF APPEAL BOND: \$0000

APPELLANT CONFINED: ☒ YES

DATE SUBMITTED TO MASTER CLERK


App.109a

BIN: 06/14/2023

DEPUTY CLERK: A LEE

DATE SUBMITTED TO APPEAL SECTION:
06/14/2023

DEPUTY CLERK: CLERK_NAME

 rec'd & sent -
6-20-23

**EXHIBITS TO CAYETANO MOTION AND
AMENDED MOTION FOR A NEW TRIAL,
FILED IN THE 230TH DISTRICT COURT,
HARRIS COUNTY, TEXAS**

**EXHIBIT E (TO MOTION)
NOTARIZED STATEMENT OF
MARCIELA MEZA FLORES,
TRANSLATION AND IMAGE
(MARCH 17, 2023)**

Public Notary Number 3
Lawyer Sergio Padilla Macedo
Amealco de Bonfil Queretaro
Record number 583, Five hundred eighty-three
Volume 12 Twelve

In Amealco de Bonfil, State of Queretaro on this 17th day of March 2023, before licensed lawyer Sergio Padilla Macedo, Notary holder of the Public Notary Number Three of this notarial demarcation appears Mrs. MARICELA MEZA FLORES. In order to establish in this instrument various manifestations. In the first term receipt of appearance the following:

DECLARES UNDER LAW

The underly notary, I state under the terms of article thirty-four, of the law of notarial state in force. I informed the person of the penalty provided in article 284, of the code in force in the state, applicable to those who conduct themselves falsely in statements before a notary. So being duly warned. Formally declares to say the truth in the following statements.

Continued, Maricela manifest that it's her desire to provide her statement in the present document which expressly recognizes that since the year 2005, she maintains a relationship of free union with Mr. Fernando Atanasio Santiago. In the year 2005 they met in the city of Houston TX, United States of America, place where they lived for a while and since they met they have lived together. They established themselves in Houston and confided in that city as a couple, currently both (Maricela and Fernando) living together but not married legally. They lived as a couple and now have two daughters of names Y.A. and I.A.M., recognizing that they lived together but not married. Maricela testifies that on April 5th, 2009 she, Mr. Fernando Atanasio Santiago and their young daughter travelled from Houston Texas, United States of America to Mexico. They arrived in Mexico on April 7 2009 to the community of La Pini, Amealco Queretaro, where they lived until August 2013. After this date they changed their address to the #42 Fresno Street, Nuevo Amanecer, Amealco Queretaro. She states this is the truth about their civil state and their return from the mentioned city. Her statement was taken under the oath of law for legal purposes Under Jurisdiction of Law.

The present person identifies as Maricela Meza Flores, Mexican, not Married but living together with Mr. Fernando Atanasio Santiago. She is from San Pedro Tenango, Amealco Queretaro, a neighbor of this city with address the #42 Fresno Street, Nuevo Amanecer. She was born December 22, 1982. Housewife with id #MEFM821223MQTZL, voter id 0011136737284.

I, the notary, certify that I know Maricela because she identifies with mentioned identifications and she has provided a copy of ID's to accompanied with this document. I consider her with legal capacity to make contracts and obligate herself to such. No objection to what I noted, since she presented legal documents that have seen. I certify that Maricela Meza Flores signed before me. I certify with my notary (lawyer) signature, the seal of authorization.

Additional Notes:

Definitive Authorization in Amealco. Municipality of Amealco de Bonfil State of Queretaro on this 17th day of March 2023. On this day I certify this document.

I certify this is the first testimony that is done for the solicitant Mrs. Maricela Meza Flores in Amealco, Municipality of Amealco de Bonfil State of Queretaro on this 17th day of March 2023. There is page Appropriately sealed, counted, initialed, in terms of law. I certify, As the main notary of this Public Notary Number 3.

I certify,
The Main Notary of Public
Notary Number Three
Lawyer, Sergio Padilla Macedo

NOTARÍA PÚBLICA NÚMERO TRES

PLAZA DE LA CONSTITUCION No. 18 INT. B
TEL. 448 27 8 02 70 AMEALCO, QRO.

Lic. Sergio Padilla Macedo
NOTARIO TITULAR

TESTIMONIO

DE LA ESCRITURA PÚBLICA EN LA QUE SE HACE CONSTAR LA
COMPARECENCIA DE LA SEÑORA:

MÁRICELA MEZA FLORES

583, QUINIENTOS OCHENTA Y TRES

ESCRITURA No.

12, DOCE

TOMO No.

17, DIECISIETE DE MARZO DE 2023, DOS MIL VEINTITRÉS.

AMEALCO, QRO., A

Notaría Pública Número 3

Lic. Sergio Padilla Macedo
Amealco de Bonfil, Qro.



----- ESCRITURA NÚMERO 583, QUINIENTOS OCHENTA Y TRES. -----

----- TOMO 12, DOCE. -----

En Amealco, Municipio de Amealco de Bonfil, Estado de Querétaro a los 17, diecisiete días del mes de marzo de 2023, dos mil veintitres, ante mi Licenciado **SERGIO PADILLA MACEDO**, Notario Titular de la Notaría Pública Número Tres de esta Demarcación notarial **COMPARECE** la señora **MARICELA MEZA FLORES**, a fin de dejar asentado en este instrumento diversas manifestaciones, por lo que en primer término recibo de la compareciente la siguiente:

----- PROTESTA DE LEY. -----

El suscrito Notario hago constar, que en los términos del artículo 34, treinta y cuatro de la Ley del Notariado del Estado en vigor, hice saber a la compareciente de las penas previstas por el artículo 284, doscientos ochenta y cuatro del Código Penal vigente en el Estado, aplicables a quienes se conducen con falsedad en declaraciones ante Notario, por lo que quedando debidamente apercibida de ello, protesta formalmente conducirse con verdad en las declaraciones que emita en el presente instrumento.

A continuación la compareciente manifiesta que es su deseo dejar asentado a través del presente instrumento, que reconoce expresamente que desde el año 2005, dos mil cinco, mantiene una relación de CONCUBINATO con el señor **FERNANDO ATANASIO SANTIAGO**, año en el que se conocieron en la ciudad de Houston, Texas, Estado Unidos de América, lugar en donde vivieron por un periodo, pues desde entonces hacen vida en común, habiendo establecido su domicilio en donde ambos cohabitaron en dicha ciudad y haciendo vida de pareja, agregando que actualmente ambos comparecientes se encuentran libres de matrimonio que a día de hoy han procreado dos hijas de nombres [REDACTED]

[REDACTED] reconociendo que en efecto tienen vida en común en la figura de concubinato, así mismo manifiesta la compareciente que el día cinco de abril de 2009, dos mil nueve tanto ella como el señor **FERNANDO ATANASIO SANTIAGO** y su menor hija [REDACTED] viajaron desde la ciudad de Houston Texas, Estados Unidos de América, hacia este país México, llegando el día 7, siete de abril de 2009, dos mil nueve a la comunidad de San Pío, Amealco, Querétaro, en donde vivieron hasta el mes de agosto de 2013, dos mil trece, posterior a esa fecha cambiaron su domicilio a la calle Fresno número 42, cuarenta y dos, colonia Nuevo Amanecer, Amealco, Querétaro, siendo su deseo dejar constancia fehaciente de la presente situación en relación a su estado civil y a su regreso de la ciudad mencionada, mediante la declaración que en este acto realiza ante la fe del suscrito, para los efectos legales a que haya lugar.

----- GENERALES: -----

Por sus generales la compareciente manifestó llamarse:-----

MARICELA MEZA FLORES, ser mexicana, libre de matrimonio pero viviendo en



35

concubinato con el señor FERNANDO ATANASIO SANTIAGO, originaria de San Pedro Tenango, Amealco, Querétaro y vecina de esta ciudad, con domicilio en calle Fresno número 42, cuarenta y dos, colonia Nuevo Amanecer, nació el veintitrés de diciembre de 1982, mil novecientos ochenta y dos, dedicada al hogar, con clave única de población MEFM821223MQTZLR04, identificándose con credencial de elector con folio número 0011136737284.

YO EL NOTARIO CERTIFICO:- Conocer a la compareciente, puesto que la identifica con el documento descrito del que agrego copia al expediente de este instrumento, que la considero con capacidad legal para contratar y obligarse por lo que nada me consta ni aparenta lo contrario, que tuve a la vista el documento que se menciona, que le leí el presente instrumento, que le expliqué su contenido y fue legal, que me manifestó su conformidad, lo ratifica y firma para constancia.- DOY FE.

MARICELA MEZA FLORES.- Rúbrica.- Ante mí.- Do y fe.- Firma del Notario.- Sello de Autorizar del Notario.

NOTAS COMPLEMENTARIAS.

AUTORIZACIÓN DEFINITIVA.- En Amealco, Municipio de Amealco de Bonfil, Estado de Querétaro, a 17, diecisiete días del mes de marzo de 2023, dos mil veintitrés.- En esta fecha autorizo definitivamente el presente instrumento por no requerir de ulterior trámite.- DOY FE.

ES PRIMER TESTIMONIO, QUE SE EXPIDE PARA LA SOLICITANTE, SEÑORA MARICELA MEZA FLORES, EN AMEALCO, MUNICIPIO DE AMEALCO DE BONFIL, ESTADO DE QUERÉTARO, A LOS 17, DIECISIETE DÍAS DEL MES DE MARZO DE 2023, DOS MIL VEINTITRÉS. - VA EN UNA HOJA DEBIDAMENTE SELLADA, COTEJADA Y RUBRICADA EN LOS TÉRMINOS DE LEY.- DOY FE.

EL NOTARIO TITULAR DE LA NOTARÍA PÚBLICA

NÚMERO TRES

LIC. SERGIO PADILLA MACEDO

-PAM5670810UC6-

Certification of Translator

I, Jose L. Sanchez, hereby certify that I am fluent and competent in both English and Spanish, and I have truly, completely, and accurately translated the attached document as provided to me, from Spanish into English to the best of my knowledge, ability and belief.

/s/ Jose L. Sanchez

Translator

440 Louisiana Street, Suite #900

Houston, Texas 77002

(713) 236-7700

Date: March 18, 2023

**Engineer Ignacio Layola Vera, Constitutional
Governor of the State of Queretaro**

By the exercise of power conferred on the Governor of the Judicial Power of articles 57 fraction 14 of the Political Constitution of the Free and Sovereign State of Queretaro of Arteaga and 1, 3, 11, 18 and 36 of the Law of the notary for the State of Queretaro, I have appointed Lawyer

Sergio Padilla Macedo
Registered Notary

To public notary number one of the notarial demarcation of Amealco, in virtue that he has met the requirements the law demands and having passed the exam that took place on May 2nd of the year 2002.

Given at Palacio de la Corregidora, headquarters of the Executive Power of Queretaro, on the 27th day of May 2002.

United by Queretaro

Engineer Ignacio Layola Vera
Constitutional Governor of the State

Lawyer Bernardo Garcia Camino
Secretary of Government



**Ing. Ignacio Loyola Vera, Gobernador Constitucional
del Estado de Querétaro**



SECRETARÍA DE GOBIERNO

Sergio Padilla Macedo
a quien se expide el nombramiento

en ejercicio de las facultades que confieren al Titular del Poder Ejecutivo los artículos 57 fracción XIV de la Constitución Política del Estado Libre y Soberano de Querétaro Artanga y 1, 3, 11, 18 y 36 de la Ley del Notariado para el Estado de Querétaro, he tenido a bien nombrar al Licenciado

SERGIO PADILLA MACEDO
NOTARIO ADSCRITO

de la Notaría Pública número Uno de la Demarcación Notarial de Amélico, en virtud de que cumple los requisitos que la propia Ley exige y con el examen efectuado el día 2 dos de mayo de 2002 dos mil dos, mismo que fue aprobado.

Dado en el Palacio de la Corregidora, sede del Poder Ejecutivo del Estado de Querétaro, a los veintisiete días del mes de mayo de dos mil dos.

"Firmado por Querétaro"

Ing. Ignacio Loyola Vera
Gobernador Constitucional del Estado

Lic. Bernardo García Camino
Secretaría de Gobierno

Certification of Translator

I, Jose L. Sanchez, hereby certify that I am fluent and competent in both English and Spanish, and I have truly, completely, and accurately translated the attached document as provided to me, from Spanish into English to the best of my knowledge, ability and belief.

/s/ Jose L. Sanchez

Translator

440 Louisiana Street, Suite #900

Houston, Texas 77002

(713) 236-7700

Date: March 18, 2023

**EXHIBIT F (TO MOTION)
PROOF OF CONTINUOUS RESIDENCE IN
THE MEXICAN STATE OF QUERETARO,
TRANSLATION AND IMAGE
(MARCH 18, 2023)**

San Ildefonso Tultepec, Amealco de Bonfil, Queretaro,
March 18, 2023

Subject: Proof of residence

To Whom it may concern

The undersigned, Jorge Lopez Valdez, Subdelegate of
La Pini, Amealco de Bonfil, Queretaro.

He Records (Notes)

That Mrs. Maricela Meza Flores and Mr. Fernando Atanasio Santiago were residing in the community of La Pini, Amealco de Bonfil, Queretaro from April 9, 2009 until August 2013. I confirm his residence and I confirm he stayed in his country of origin during previously stated date.

Without further also at the moment, written in the community of La Pini, Amealco de Bonfil, Queretaro, on this third day of March 18, 2023.

Attentively

/s/ C. Jorge Lopez Valdez
Subdelegate

App.121a

San Ildefonso Tultepec, Amealco de Bonfil, Qro. a 3 de marzo de 2023.

ASUNTO: CONSTANCIA DE RESIDENCIA

A QUIEN CORRESPONDA

El que suscribe, **Jorge López Valdez**, subdelegado de La Pini, Amealco de Bonfil, Querétaro.

HACE CONSTAR

Que la señora **Maricela Meza Flores** y el señor **Fernando Atanasio Santiago** estuvieron radicando en la comunidad de La Pini, Amealco de Bonfil, Querétaro. **El día 9 de abril de 2009 hasta agosto de 2013**, confirmando su residencia y haciendo constar su estancia en su país de origen durante las fechas señaladas.

Sin más por el momento se extiende la presente en la comunidad de La Pini, Amealco de Bonfil, Qro., a los 3 días del mes de marzo del año 2023.

ATENTAMENTE



AMEALCO DE BONFIL
JURADO EMANCIPACIÓN 1820-1821
JORGE LÓPEZ VALDEZ
SUBDELEGADO AUXILIAR
LA PINI

C. JORGE LÓPEZ VALDEZ
SUBDELEGADO

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Certification of Translator

I, Jose L. Sanchez, hereby certify that I am fluent and competent in both English and Spanish, and I have truly, completely, and accurately translated the attached document as provided to me, from Spanish into English to the best of my knowledge, ability and belief.

/s/ Jose L. Sanchez

Translator

440 Louisiana Street, Suite #900

Houston, Texas 77002

(713) 236-7700

Date: March 18, 2023

**EXHIBIT G (TO MOTION)
NOTARIZED TESTIMONY
OF WITNESSES TESTIFYING AS TO
DEFENDANT'S RESIDENCY IN MEXICO ,
TRANSLATION AND IMAGE
(MARCH 17, 2023))**

Public Notary Number 3
Lawyer Sergio Padilla Macedo
Amealco de Bonfil Queretaro
Record number 584, five hundred eighty-four
Volume 12 Twelve

In Amealco de Bonfil, State of Queretaro on this 17th day of March 2023, before licensed lawyer Sergio Padilla Macedo, Notary holder of the Public Notary Number Three of this notarial demarcation appears: Mrs. MARICELA MEZA FLORES, JESUS PEREZ RETANA, BALBINA RETANA RUIZ y MARIA GUADALUPE SANTIAGO SANCHEZ for whom I do the following:

DECLARES UNDER LAW

As the notary, I certify that under terms of article 34 of the law of the State of Queretaro. I let the aforementioned witness of the penal code 284 in the State, applicable to those who provide false testimony before the notary, for which they have been made aware of. They declare under law that their testimony is the truth to be recorded in this document.

Under article 8 and 9 of the Federal law of Personal Data in possession of the witnesses, with respect to their identification documents that will be provided with this document and in the appropriate

file. They authorized that they can be brought before the law, the same is true for those who have a personal interest to those legitimate. For all legal purposes. Upon continuation Mrs. Jesus Perez Retana, Balbina Retana Ruiz y Maria Guadalupe Santiago Sanchez that she and Mr. Fernando Atanasio Santiago lived together but are not married (free union) since 2005, since they met in Houston Texas, United States of America. They will also testify the date when they traveled from Houston Texas to this country (Mexico).

Next, I make the first witness to come forth declares under law that his name is Jesus Perez Retana, is Mexican, single, from La Pini, Amealco Queretaro. Address #20 Pinitos Street. He was born July 16, 1983. Laborer identifies with voter card 0022059908812. Answer to the first question that he knows Mrs. Maricela Meza Flores since the year 2009, they were neighbors for a while.

The second question, the witness knows and certifies that Mrs. Maricela Meza Flores maintains a free union relationship with Mr. Fernando Atanasio Santiago. He knows that they met in Houston Texas, United States of America in the year 2005. He also knows that to the present date, they have procreated two daughters of names Y.A. and I.A.M.

The first child was born in Houston, Texas.

Third question the witness knows that in April 5 2009, Mr. Fernando Atanasio y Mrs. Maricela Meza Flores along with their daughter Y.A. traveled from Houston, Texas, United States of America to this country, Mexico.

Fourth questions, the witness knows and certifies that Mr. Fernando Atanasio Santiago y Mrs. Maricela

Meza Flores along with their young daughter Y.A. arrived from, United States of America to Mexico on April 7th 2009. They lived in La Pini, Amealco, Queretaro until August 2013. They later moved to live in the neighborhood Nuevo Amanecer, Amealco, Queretaro.

Answer to fifth questions, the reason for his statement is that he lived as a neighbor to Fernando Atanasio Santiago and Mrs. Maricela Meza Flores.

Next, I make the second witness come forth and declare under law. She states her name as Balbina Retana Ruiz, Mexican, Married, neighbor, from La Pini, Amealco, Queretaro, known address. She was born March 31st 1945, house wife, identifies with voter card #0022050411205. To the first question, she answered that she knows Mrs. Maricela Meza Flores since approximately 13 years. They were neighbors. To the second questions she answers that Mrs. Maricela Meza Flores was living for a while in the city of Houston, TX, United States of America, place where she met Fernando Atanasio Santiago with who she has a free union relationship. To the third questions, she knows that Mrs. Maricela Meza Flores has procreated two daughters of names Y.A. and I.A.M. with Mr. Fernando Atanasio Santiago. The witness knows that on April 5 2009, they traveled. Mr. Fernando Atanasio Saniago and Mrs. Maricela Meza Flores and their young child Y.A. to this country. They arrived on the April 7 2009 to La Pini, Amealco Queretaro, placed where they lived for a while. To the fourth question: Her reason to testify is in her testimony.

Next, I make the third witness come forth and declare under law.

She states that her name is Maria Guadalupe Santiago Sanchez, Mexican, from Tlalnepantla de Baz, Estate of Mexico and neighbor of La Pini, Amealco Queretaro. Address #56 Calle del Rio, she was born November 13, 1985. Housewife, identifies with voter card #0022066588620. To the first question, she answered that she has known Mrs. Maricela Meza Flores for about 25 years. She is part of her family and Maricela and Mrs. Maria Guadalupe were neighbors. To the second question she knows that Mrs. Maricela Meza Flores maintains a free union relationship with Fernando Atanasio Santiago. She met Fernando in Houston Texas, United States of America in the year 2005. Third question, she knows that Mrs. Maricela Meza Flores has procreated two daughters of names Y.A. and I.A.M. with Mr. Fernando Atanasio Santiago.

To the fourth questions, she says that in April of 2009 they traveled. Fernando Atanasio Santiago and Mrs. Maricela Meza Flores, Y.A. to this country. arriving on April 7 2009 to La Pini, Amealco Queretaro. They established their address at this location until the month of August 2013 and afterwards they moved to #42 Calle Fresno, Colonia Nuevo Amanecer, Amealco Queretaro. To the fifth question, the reason of her testimony is because she has known Maricela for 25 years. She is a family member and neighbor until August 2013.

With the previous act, I conclude Questioning.

DECLARES UNDER LAW

The witness stated her name as Maricela Meza Flores, Mexican living in free union with Mr. Fernando Atanasio Santiago. She is from San Pedro Tenango, Amealco, Queretaro and neighbor of this city. Address #42 Colonia Nuevo Amanecer. She was born December 23rd 1982. Housewife, with ID# MEFM821223MQ TZLR04. Identifies with voter card #0011136737284. I, the notary, certify, to know the witnesses since they have identified themselves with the documents attached. I consider them with legal capacity to make a contract and obligate themselves to such. I have no reason to doubt of their legal capacity. I have read them, these statements and explained the contents legal contingency. They agreed and signed it as their statement. I certify that this document was signed, initialed, before me by Maricela Meza Flores, was signed, initialed, by Jesus Perez Retana, was signed, initialed, by Balbina Retana Ruiz, was signed, initialed, by Maria Guadalupe Santiago Sanchez. I sign, initial with the Notary Stamp, signature.

Complimentary Notes:

Definitive Authorization in Amealco. Municipality of Amealco de Bonfil State of Queretaro on this 17th day of March 2023. On this day I authorize definitively the present document, subsequent. I certify with the Notary with the Notarie's signature, seal of Notary Authorization. This is the first testimony that is done for the solicitant, Mrs. Maricela Meza Flores. This document is appropriately signed, initialed and sealed under the terms of law of Amealco, Amealco de Bonfil, State of Queretaro, on this 17th day of March 2023.

App.128a

I certify,
The Main Notary of Public
Notary Number Three
Lawyer, Sergio Padilla Macedo

Certification of Translator

I, Cassandra Dominguez, hereby certify that I am fluent and competent in both English and Spanish, and I have truly, completely, and accurately translated the attached document as provided to me, from Spanish into English to the best of my knowledge, ability and belief.

/s/ Cassandra Dominguez
Translator
440 Louisiana Street, Suite #900
Houston, Texas 77002
(713) 236-7700

Date: 3-22-2023

Amealco, Queretaro on this 21 day of month of March

To whom it may concern:

Hereby the assigned lawyer Sergio Padilla Macedo, at this moment the appointed (registered) notary to Notary number 1 and the main notary of Public Notary 3 of the notarial demarcation of Amealco Queretaro. By means of the present document to inform you that under Mexican legislation a public notary is a private individual who is entrusted with the function of authenticating and witnessing formal proceedings.

By virtue of the aforementioned, the notarial seal which, bears the national symbol shows the power the State confers on its notaries.

Notaries in Mexico issue public documents of the same legal value as those issued by government bodies.

The appointment of a notary is for life and it's necessary for the professional to have at least five years of experience and previously have passed aptitude and knowledge exams.

By virtue of the aforementioned is that the undersigned has issued the public records that prove that under oath he is obligated to say the truth.

For information about Mexican legislation you can click on the following link:

For present pending legal effects

<http://legislaturaqueretaro.gob.mx/app/uploads/2016/01/LEYO88.pdf>

Amealco Querétaro a los 21 días del mes de marzo de 2023

A QUIEN CORRESPONDA:

Por medio del la presente el suscrito Licenciado **SERGIO PADILLA MACEDO**, en su momento Notario adscrito a la notaría pública número 1, uno, actualmente notario titular de la Notaría pública número 3, tres de la demarcación notarial de Amealco, Qro, por medio de la presente me permito hacer del conocimiento que en la legislación mexicana el notario publico es un particular al que se le encomienda una función del Estado consistente en autenticar y dar fe de los actos que ante dicha persona se formaliza.

En virtud de lo anterior, el uso del sello notarial, mismo que presenta el escudo nacional mexicano hace constar el ejercicio de las facultades que el Estado le otorga al notario.

Los notarios en México emiten documentos públicos del mismo valor jurídico que los que emiten los órganos gubernamentales.

El nombramiento del notario es vitalicio y necesariamente debe de recaer en un profesional del derecho con por lo menos 5 cinco años de experiencia y previa aprobación de exámenes de conocimiento y aptitudes.

En virtud de dicho nombramiento es que el suscrito he emitido las constancias relativas a las comparecencias realizadas por el publico en general en las que, bajo protesta de decir verdad (juramento de verdad) narran los comparecientes lo que saben y les conta.

Para conocimiento de la legislación mexicana se puede contar en la siguiente liga:

Se extiende la presente para los efectos legales condicentes
<http://legislaturaqueretaro.gob.mx/app/uploads/2016/01/LEY088.pdf>

ATENTAMENTE

SERGIO PADILLA MACEDO
Notario Titular De La Notaría Pública Número 3



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Notaria Pública Número 3

Lic. Sergio Padilla Macedo
Amealco de Bonfil, Qro.



ESCRITURA NÚMERO 584, QUINIENTOS OCHENTA Y CUATRO

TOMO 12, DOCE

En Amealco, Municipio de Amealco de Bonfil, Estado de Querétaro a los 17, diecisiete días del mes de marzo de 2023, dos mil veintitrés, ante mi Licenciado **SERGIO PADILLA MACEDO**, Notario Titular de la Notaría Pública Número Tres de esta Demarcación notarial **COMPARECE, C O M P A R E C E N**: Los señores **MARICELA MEZA FLORES, JESÚS PÉREZ RETANA, BALBINA RETANA RUIZ y MA. GUADALUPE SANTIAGO SÁNCHEZ**, a quienes hago la siguiente:

PROTESTA DE LEY

El suscrito Notario hago constar, que en los términos del artículo 34, treinta y cuatro de la Ley del Notariado del Estado, en vigor, hice saber a los comparecientes de las penas previstas por el artículo 284, doscientos ochenta y cuatro del Código Penal vigente en el Estado, aplicables a quienes se condicen con falsedad en declaraciones ante Notario, por lo que quedando debidamente apercibidos de ello, se restan formalmente conductas con verdad en las declaraciones que emitan en el presente instrumento.

En términos de lo dispuesto por los artículos 8 octo y 9 nuevo de la Ley Federal de Protección de Datos Personales en posesión de los particulares, respecto a sus datos personales que constan en este instrumento y en el expediente respectivo, autorizan que los mismos puedan ser proporcionados a las autoridades competentes, al igual que a las personas que tengan interés legítimo en los mismos, para todos los efectos legales a que haya lugar.

A continuación los señores **JESÚS PÉREZ RETANA, BALBINA RETANA RUIZ y MA. GUADALUPE SANTIAGO SÁNCHEZ**, se retiran momentáneamente de esta Audiencia y acto seguido la señora **MARICELA MEZA FLORES** manifiesta que el motivo de su comparecencia es con la finalidad de recibir testimonio de los señores **JESÚS PÉREZ RETANA, BALBINA RETANA RUIZ y MA. GUADALUPE SANTIAGO SÁNCHEZ** para acreditar que mantiene una relación de concubinato con el señor **FERNANDO ATANASIO SANTIAGO** desde el año 2005, dos mil cinco, en razón de que se conocieron en ciudad de Houston Texas, Estados Unidos de América, así mismo acreditar que en que viajaron de dicha ciudad a este país.

Acto seguido hago pasar al primero de los testigos propuestos quien por sus generales manifestó llamarse **JESÚS PÉREZ RETANA**, ser mexicano, cédula originario y vecino de La Pini, Amealco, Querétaro, con domicilio en calle Los Pinitos número 20, código postal 76160 el 16, dieciséis de julio de 1963, mil novecientos ochenta y tres, obrero, identificándose con credencial de elector 0022059908812 y en relación a la primera pregunta contesta que sí conoce a la señora **MARICELA MEZA FLORES**, desde el año 2009, dos mil nueve, en razón de haber sido vecinos por un tiempo. - A LA SEGUNDA- Que sabe y le consta que la señora **MARICELA MEZA FLORES** mantiene una relación de concubinato con el señor **FERNANDO ATANASIO SANTIAGO**, sabe igualmente que ellos se conocieron en la ciudad de Houston Texas, Estados Unidos de América, en el año 2005, dos mil cinco, igualmente sabe que a la fecha han procreado dos hijos de nombres

[REDACTED] que incluso la primera de ellas nació en dicha ciudad.- A LA

TERCERA- Que sabe que el día 5, cinco de abril de 2009, dos mil nueve tanto el señor **FERNANDO**

ATANASIO SANTIAGO como la señora **MARICELA MEZA FLORES** y su menor hija [REDACTED]

viajaron de la ciudad de Houston Texas, Estados Unidos de América, hacia este país México.- A LA

CUARTA- que sabe y le consta que los señores **FERNANDO, MARICELA** y su menor hija **YEIMI**

ATANASIO cuando llegaron de Estados Unidos de América, esto el día 7, siete de abril de 2009, dos mil nueve, se mudaron en La Pini, Amealco, Querétaro, hasta el mes de agosto de 2013, dos mil trece,

posteriormente se mudaron a vivir a la colonia Nuevo Amanecer, Amealco, Querétaro.- A LA QUINTA- Que

la razón de su dicho lo es porque como ya mencionó fue vecino de los señores **FERNANDO ATANASIO**

SANTIAGO y **MARICELA MEZA FLORES** por un tiempo.

Acto seguido hago pasar a la segunda de los testigos propuestos, quien por sus generales manifestó

llamarse **BALBINA RETANA RUIZ**, ser mexicana, casada, originaria y vecina de La Pini, Amealco,

Querétaro, con domicilio conocido, nació el 31, treinta y uno de marzo de 1945, mil novecientos cuarenta y

cinco, dedicada al hogar, identificándose con credencial de elector con folio número 0022050411205.- A LA

PRIMERA PREGUNTA contestó que sí conoce a la señora **MARICELA MEZA FLORES**, hace

aproximadamente trece años por ser vecinas.- A LA SEGUNDA- Que sabe que la señora **MARICELA**

MEZA FLORES estuvo viviendo por un tiempo en la ciudad de Houston Texas, Estados Unidos de América,

lugar en donde conoció al señor **FERNANDO ATANASIO SANTIAGO**, con quien actualmente mantiene

una relación de concubinato.- A LA TERCERA- Que la testigo sabe que la señora **MARICELA MEZA**

FLORES ha procreado dos hijas de nombres [REDACTED] con el señor

FERNANDO ATANASIO SANTIAGO, sabiendo la testigo que el día 5, cinco abril del año 2009, dos mil

nueve, viajaron tanto el señor **FERNANDO ATANASIO SANTIAGO**, la señora **MARICELA MEZA FLORES**



y su menor hija [REDACTED] a este país, llegando el día 7, siete de abril del año 2009, dos mil nueve a La Pini, Amealco, Querétaro, lugar donde establecieron su domicilio por un tiempo. A LA CUARTA.- Que la razón de su dicho está implícita en su declaración.- Acto seguido hago pasar a la tercera de los testigos propuestos, quien por sus generales manifestó llamarse MA. GUADALUPE SANTIAGO SÁNCHEZ, mexicana, casada, originaria de Tlalnepantla de Baz, Estado de México y vecina de La Pini, Amealco, Querétaro, con domicilio en calle del Río número 56, cincuenta y seis, nació el 13, trece de noviembre de 1985, mil novecientos ochenta y cinco, dedicada al hogar, identificándose con credencial de elector con folio número 0022086586620.- A LA PRIMERA PREGUNTA contestó que sí conoce a la señora MARICELA MEZA FLORES, desde hace como veinticinco años pues es parte de su familia además de haber sido vecinas.- A LA SEGUNDA.- Que sabe que la señora MARICELA MEZA FLORES actualmente mantiene una relación de concubinato con el señor FERNANDO ATANASIO SANTIAGO, al que conoció en la ciudad Houston Texas, Estados Unidos de América en el año de 2005, dos mil cinco. A LA TERCERA.- Que la testigo sabe que la señora MARICELA MEZA FLORES ha procreado, con los de nombres [REDACTED] con el señor FERNANDO ATANASIO SANTIAGO.- A LA CUARTA.- Manifiesta la testigo que en abril del año 2009, dos mil nueve, viajaron con el señor FERNANDO ATANASIO SANTIAGO, la señora MARICELA MEZA FLORES y su menor hija [REDACTED] este país, llegando el día 7, siete de abril de 2009, dos mil nueve a La Pini, Amealco, Querétaro, lugar donde establecieron su domicilio hasta el mes de agosto de 2013, dos mil trece, posterior a esto se mudaron a la calle Fresno número 42, cuarenta y dos, colonia Nuevo Amanecer, Amealco, Querétaro. A LA QUINTA.- Que la razón de su dicho lo es porque como ya menciono con respecto a la solicitante desde hace veinticinco años, por ser familiares además de ser vecinas hasta el mes de agosto de 2013, dos mil trece. Con lo anterior se da por terminado el presente acto.

GENERALES

Por sus generales lo compareciente manifestó llamarse MARICELA MEZA FLORES ser mexicana, libre de matrimonio pero viviendo en concubinato con el señor FERNANDO ATANASIO SANTIAGO, originaria de San Pedro Tenango, Amealco, Querétaro, vecina de esta ciudad, con domicilio en calle Fresno número 42, cuarenta y dos, colonia Nuevo Amanecer, nació el 23, veintitrés de diciembre de 1982, mil novecientos ochenta y dos, dedicada al hogar, con una única de población MEFM821223MQTZLR04, identificándose con credencial de elector con folio número 0011136737284.

YO EL NOTARIO CERTIFICO.- Que a los comparecientes puesto que se identificaron con los documentos descritos de los que hago copia al apéndice, que los considero con capacidad legal para contratar y obligarse pues nada me consta ni aparenta lo contrario, que les lei el presente instrumento, que les explique su contenido y fuerza legal, que me manifestaron su conformidad, lo ratifican y firman para constancia.- DOY FE.

MARICELA MEZA FLORES.- Rúbrica.- JESÚS PÉREZ RETANA.- Rúbrica.- BALBINA RETANA RUIZ.- Rúbrica.- MA. GUADALUPE SANTIAGO SÁNCHEZ.- Rúbrica.- ANTE MI.- Firma del Notario.- Sello de autorizar del [REDACTED]

NOTAS COMPLEMENTARIAS.

AUTORIZACIÓN DEFINITIVA.- EN Amealco, Municipio de Amealco de Bonfil, Estado de Querétaro a los 17, diecisiete días del mes de marzo del 2023, dos mil veintitrés.- En esta fecha autorizo definitivamente el presente instrumento por no requerir ulterior trámite.- Do y fe.- firma del Notario.- Sello de autorizar del [REDACTED]

PRIMER TESTIMONIO QUE SE EXPIDE PARA LA SOLICITANTE, SEÑORA MARICELA MEZA FLORES.- VA EN UNA HOJA DEBIDAMENTE SELLADA, COTEJADA Y RUBRICADA EN LOS TÉRMINOS DE LEY.- EN AMEALCO, MUNICIPIO DE AMEALCO DE BONFIL, ESTADO DE QUERÉTARO A LOS 17, DIECISIETE DÍAS DEL MES DE MARZO DE 2023, DOS MIL VEINTITRÉS.- DOY FE.

EL NOTARIO TITULAR DE LA NOTARÍA PÚBLICA
NUMERO TRECE

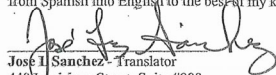
LIC. SERGIO PAULLA MACEDO
-PAMS670810UC6-

SPM/sgz*

54

Certification of Translator

I, **Jose L. Sanchez**, hereby certify that I am fluent and competent in both English and Spanish, and I have truly, completely, and accurately translated the attached document as provided to me, from Spanish into English to the best of my knowledge, ability and belief.



Jose L. Sanchez - Translator
440 Louisiana Street, Suite #900
Houston, Texas 77002
(713) 236-7700

_____ March 18, 2023
Date

Unofficial Copy Office of Marilyn Burgess District Clerk

54B

Certification of Translator

I, Jose L. Sanchez, hereby certify that I am fluent and competent in both English and Spanish, and I have truly, completely, and accurately translated the attached document as provided to me, from Spanish into English to the best of my knowledge, ability and belief.

/s/ Jose L. Sanchez

Translator

440 Louisiana Street, Suite #900

Houston, Texas 77002

(713) 236-7700

Date: March 18, 2023

**EXHIBIT H (TO MOTION)
PROOF OF PURCHASE ON APRIL 15, 2009
OF AGRICULTURAL SHELLER ,
TRANSLATION AND IMAGE**

AGROALTENA

Amealco de Bonfil, Queretaro on March 7, 2023

TO WHOM IT MAY CONCERN:

I hereby certify that our client FERNANDO ATANASIO SANTIAGO from the community of La Pini, Municipality of Amealco de Bonfil in the state of Queretaro, purchased a Triunfo brand sheller with a 1hp electric motor, on April 15, 2009, being me the seller at the time and thus being a witness of its acquisition.

Carefully

Samuel Zepeda Gonzalez

Certification of Translator

I, Jose L. Sanchez, hereby certify that I am fluent and competent in both English and Spanish, and I have truly, completely, and accurately translated the attached document as provided to me, from Spanish into English to the best of my knowledge, ability and belief.

/s/ Jose L. Sanchez

Translator

440 Louisiana Street, Suite #900

Houston, Texas 77002

(713) 236-7700

Date: March 18, 2023



Amealco de Bonfil, Querétaro a 7 de marzo del 2023

A QUIEN CORRESPONDA:

Por Medio de la Presente hago constar que nuestro cliente **FERNANDO ATANASIO SANTIAGO** de la comunidad de La Pini municipio de Amealco de Bonfil del estado de Querétaro, adquirió una desgranadora marca Triunfo con motor eléctrico de 1hp, el día 15 de abril del 2009, siendo yo el vendedor en su momento y siendo el encargado de la venta y entrega de este mismo; siendo así testigo de la adquisición de la misma.

ATENTAMENTE

SAMUEL ZEPEDA GONZALEZ

INTERCULTURAL INSTITUTE NONHO, A.C.
INSTITUTIONAL CODE:22MSU00671
STUDY PLAN CODE: LU54100

San Ildefonso Tultepec, Amealco de Bonfil, Queretaro,
March 3, 2023

Subject: Employment Record

TO WHOM IT MAY CONCERN:

Hereby in this document I confirm that Mr. Fernando Atanasio Santiago was collaborating as supervisor of the Vegetable Production area in our institution during the period of April 14th to August 28th of 2009.

During his employment, he performed more than satisfactorily in his corresponding activities, complying with the schedule and the established operating rules, performing all the assigned functions, showing interest for the student community, being a responsible, honest and very committed to his work.

This is issued for purposes that take place in the locality of San Ildefonso Tultepec, Amealco de Bonfil, Queretaro on the 3rd day of the month of March 2023.

Attentively

Mario Bladimir Monroy Gomez
Director



INSTITUTO INTERCULTURAL NÕNHO, A.C.

CLAVE DE LA INSTITUCIÓN: 22MSU0067/
CLAVE DEL PLAN DE ESTUDIOS: LUS4100

San Ildefonso Tultepec Amealco de Bonfil, Qro. a 3 de marzo de 2023.

ASUNTO: CONSTANCIA LABORAL

A QUIEN CORRESPONDA

PRESENTE

Por este medio hago constar que el C. Fernando Atanasto Santiago estuvo colaborando como encargado del área de Producción de Hortalizas en nuestra institución durante el periodo del día 14 de abril al 28 de agosto de 2009.

Durante su estancia se desempeño de forma más que satisfactoria en sus actividades correspondientes, cumpliendo con su horario de trabajo y las reglas de operación establecidas, realizando todas las funciones asignadas, mostrando interés por la comunidad estudiantil, siendo una persona responsable, honesta y muy comprometido con el trabajo.

Se extiende la presente para los fines que haya lugar en la localidad de San Ildefonso Tultepec, Amealco de Bonfil, Querétaro a los 3 días del mes de marzo de 2023.

ATENTAMENTE


MARIO BLADIMIR MONROY GÓMEZ
DIRECTOR



INSTITUTO
INTERCULTURAL
NÕNHO

50574C

Certification of Translator

I, Jose L. Sanchez, hereby certify that I am fluent and competent in both English and Spanish, and I have truly, completely, and accurately translated the attached document as provided to me, from Spanish into English to the best of my knowledge, ability and belief.

/s/ Jose L. Sanchez

Translator

440 Louisiana Street, Suite #900

Houston, Texas 77002

(713) 236-7700

Date: March 21st, 2023

**EXHIBIT K (TO MOTION FOR NEW TRIAL)
2017 IRS TAX RETURN**

Form 1040 Department of the Treasury – Internal
Revenue Service U.S. Individual Income tax Return
(99)

OMB No. 1545-0074

IRS Use Only-Do not write or staple in the space

For the year Jan, 1-Dec, 31, 2017, or other tax year
beginning _____, 2017, ending _____,
20____

Your first name and Initial

FERNANDO

Last Name

ATANASIO SANTIAGO

Your social security number

. . .

**Home address (number and street), if you have
a P.O. box, see instructions.**

7500 PINEMONT DR

Apt. no

1009

**City, town, or post office, state, and ZIP code. If
you have a foreign address, also complete spaces
below (see instructions).**

Houston TX 77040

Filing Status

1. ☒ Single

[. . .]

Exemptions

- 6a ☒ Yourself. If someone can claim you as a dependent, do not check box 6a

Boxes checked on 6a and 6b 1

[. . .]

Income Attach Form(s) W 2 here. Also attached Forms W-2G and 1099-R If tax was withheld.

12. Business income or (loss). Attach Schedule C or C-EZ – 1,000

22. Combine the amounts In the far right column for lines 7 through 21, This is your total Income – 1,000

[. . .]

Adjusted Gross Income

27. Deductible part of self-employment tax, Attach Schedule SE – 71

[. . .]

36. Add lines 23 through 35 – 71

37. Subtract line 36 from line 22. This is your adjusted gross Income – 929

Tax and Credits

38. Amount from line 37 (adjusted gross Income) – 929

Standard Deduction for –

- People who check any box on line 39a or 39b or who can be claimed as a dependent, see instruction
- All others:

Single or Married filling separately, \$6,350
Married filling jointly or Qualifying widow(er)
\$12,700.

Head of Household \$9,350

40. Itemized deductions (from Schedule A) or your standard deduction (see left margin) – 6,350

41. Subtract line 40 from line 38 – (5,421)

42. Exemptions. If line 38 is \$156,900 or less, multiply \$4,050 by the number on line 6d. Otherwise, see Instructions – 4,050

43. Taxable income. Subtract line 42 from line 41. If line 42 is more than line 41, enter -0 – 0

44. Tax (see instructions). Check if any from: – 0

[. . .]

47. Add lines 44, 45, and 46 – 0

[. . .]

55. Add lines 48 through 54. These are your total credits – 0

56. Subtract line 55 from line 47. If line 55 is more than line 47, enter -0- – 0

Other Taxes

57. Self-employment tax. Attach Schedule SE –
141

[. . .]

63. Add lines 56 through 62. This is your total tax – 141

Payments

66a. Earned Income Credit (EIC) – NO

[. . .]

74. Add lines 64, 65, 66a, and 67 through 73. These are your total payments – 0

Amount You Owe

78. Amount you owe. Subtract line 74 from line 63. For details on how to pay, see instructions – 141

Third Party Designee

Do you want to allow another person to discuss this return with the IRS (see instructions)? ☒ No

Sign Here

Under penalties of Perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and accurately list all amounts and sources of income I received during the tax year. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

Joint return? See Instructions. Keep a copy for your records. ►

45123 {signature not legible}

Spouse's signature. If a Joint return, both must sign

Date: 12-14-2018

Your Occupation: Labor

Daytime phone number: 832-777-8496

[. . .]

SCHEDULE C-EZ (Form 1040)

**Department of Treasury Internal Revenue
Service (99)**

**Net Profit From Business (Sole
Proprietorship)**

- ▶ Partnerships, Joint ventures, etc., generally must file Form 1065 or 1065-B.
- ▶ Attach to Form 1040, 1040NR, or 1041.
- ▶ See Instructions.

OMB No. 1545-0074

2017 Attachment Sequence No. 09A

Name of proprietor

Fernando Atanasio Santiago

Social security number ((SSN)

. . .

Part I General Information

[. . .]

B. Enter business code (see page 2)

E. Business address (Including suite or room no.). Address not required If same as on page 1 of your tax return.

7500 PINEMONT DR APT 1009

City, town or post office, state, and ZIP code

Houston, TX 77040

Part II Figure Your Net Profit

1. Gross receipts. Caution: If this Income was reported to you on Form W-2 and the “Statutory employee” box on that form was checked, see Statutory employees in the instructions for Schedule C, line 1, and check here..... ► 1 – 1,000

...

3. Net profit. Subtract line 2 from line 1. If less than zero, you must use Schedule C. Enter on both Form 1040, line 12, and Schedule SE, line 2, or on Form 1040NR, line 13, and Schedule SE, line 2 (see instructions). (Statutory employees do not report this amount on Schedule SE, line 2.) Estates and trusts, enter on Form 1041, line 3 ► 3 – 1,000

[...]

SCHEDULE C-EZ (Form 1040)

**Department of Treasury Internal Revenue
Service (99)**

Self-Employment Tax

- ▶ Go to www.Irs.gov/ScheduleSE for instructions and the latest Information.
- ▶ Attach to Form 1040 or Form 1040NR

OMB No. 1545-0074

2017 Attachment Sequence No. 17

**Name of person with self-employment Income (as
shown on Form 1040 or Form 1040NR)**

Fernando Atanasio Santiago

Social security number (SSN)

...

Before you begin: To determine if you must file Schedule SE, see the Instructions.

[...]

Section A - Short Schedule SE. Caution: Read above to see If you can use Short Schedule SE.

[...]

2. Net profit or (loss) from Schedule C, line 31; Schedule C-EZ, line 3; Schedule K-1 (Form 1065), box 14, code A (other than farming); and Schedule K-1 (Form 1065-B), box 9, code J1. Ministers and members of religious orders, see Instructions for types of income to report on this line. See Instructions for other Income to report – 1, 000

3. Combine lines 1a, 1b, and 2 – 1, 000

4. Multiply line 3 by 92.35% (0.9235). If less than \$400, you don't owe self-employment tax; don't file this schedule unless you have an amount on line 1b – 924

5. Self-employment tax. If the amount on line 4 is:

- . \$127,200 or less, multiply line 4 by 15.3% (0.153). Enter the result here and on Form 1040, line 57, or Form 1040NR, line 55
- More than \$127,200, Multiply line 4 by 2.9% (0.029). Then, add \$15,772.80 to the result.

Enter the total here and on Form 1040, line 57, or Form 1040NR, line 55 – 141

6. Deduction for one-half of self-employment tax.

Multiply line 5 by 50% (0.50), Enter the result here and on Form 1040, line 27, or Form 1040NR, line 27 – 71

[. . .]

Form 8965

**Department of Treasury Internal Revenue
Service**

Health Coverage Exemptions

- ▶ Attach to Form 1040, Form 1040A, or Form 1040EZ.
- ▶ Go to www.Irs.gov/Form8965 for Instructions and the latest Information.

OMB No. 1545-0074

2017 Attachment Sequence No. 75

Name as shown on return

Fernando Atanasio Santiago

Social security number ((SSN)

. . .

Complete this form if you have a Marketplace-granted coverage exemption or you are claiming a coverage exemption on your return.

[. . .]

**Part II Coverage Exemptions Claimed on Your
Return for Your Household**

7. If you are claiming a coverage exemption because your household Income or gross income Is below the filing threshold, check here – ☒

[. . .]

Form W-7
(Rev. September 2016)
Department of the Treasury
Internal Revenue Service

**Application for IRS Individual Taxpayer
Identification Number**

- ▶ For use by individuals who are not U.S. citizens or permanent residents.
- ▶ See separate instructions.

OMB No. 1545-0074

An IRS individual taxpayer identification number (ITIN) is for federal tax purposes only.

Before you begin:

- Don't submit this form if you have, or are eligible to get, a U.S. social security number (SSN).
- Getting an ITIN doesn't change your immigration status or your right to work in the United States and doesn't make you eligible for the earned income credit.

Application Type (Check one box):

☒ Apply for a New ITIN

Reason you're submitting Form W-7. Read the instructions for the box you check. Caution: If you check box b, c, d, e, f, or g, you must file a U.S. federal tax return with Form W-7 unless you meet one of the exceptions (see instructions).

- c ☒ U.S. resident alien (based on days present in the United States) filing a U.S. federal tax return

Name (see instruction)

1a First Name: Fernando

Last Name: Atanasio Santiago

Applicant's mailing address

2 Street address, apartment number, or rural route number. If you have a P.O. box, see separate instructions.

7500 PINEMONT DR – APT 1009

City or town, state or province, and country. Include ZIP code or postal code where appropriate

HOUSTON TX 77040

Foreign (non U.S.) address (if different from above) (see instruction)

3 Street address, apartment number, or rural route number. If you have a P.O. box

CL NUEVO AMANECER CL FRESNO CS
No 42

City or town, state or province, and country. Include ZIP code or postal code where appropriate

AMEALCO DE BONFIL QUERETARO GT

Birth information

4 Date of birth (month/ day/ year)

01-09-1984

Country of birth

MEXICO

City and state or province (optional)

AMEALCO, QRO

5 ☒ Male

Other information

6a Country(ies) of citizenship

MEXICANA

6d Identification document(s) submitted (see Instructions)

☒ Passport

Issued by: MEXICO

No.: G23373206

Exp. date: 01 - 05 - 2027

Date of entry into the United States
(MM/DD/YYYY): 01-03-2017

6e Have you previously received an ITIN or an Internal Revenue Service Number (IRSN)?

☒ No/Don't know. Skip line 8f.

Sign Here

[. . .]

Date (month/day/year) 12-14-2018

Phone number 832-777-8496

Acceptance Agent's Use ONLY

Name of Company . . .

[. . .]

**EXHIBIT L (TO AMENDED MOTION)
EMERGENCY REQUEST EMAIL FROM
JOHN J. TRIPODI TO THE
DETENTION LEGAL ACCESS TEAM
(APRIL 3, 2023)**

From: john@tripodilawfirm.com
To: "john"
Subject: EMERGENCY REQUEST_ for an A
NUMBER_ and ICE RECORDS
Date: Thursday, April 20, 2023 5:31:48 PM

From: john@tripodilawfirm.com
<john@tripodilawfirm.com>
Sent: Monday, April 3, 2023 12:30 PM
To: Detention.LegalAccess
<Detention.LegalAccess@ice.dhs.gov>
Subject: EMERGENCY REQUEST_ for an A
NUMBER_ and ICE RECORDS

<p>CAUTION: This email originated from outside of DHS. DO NOT click links or open attachments unless you recognize and/or trust the sender. Please use the Cofense Report Phishing button to report. If the button is not present, click here and follow instructions.</p>
--

April 3, 2022

Dear Legal Access Team (LAT):

I am an attorney based in Houston, Texas, but
cover Immigration Matters on a National level.

Since I have been licensed by the States of Texas,
Florida, Ohio and Pennsylvania, there are a variety of
legal matters that are researched depending on the
subject matter.

Please find attached a MOTION FOR NEW TRIAL for a defendant (Foreign National from Mexico) convicted of a sexual assault involving a minor in Harris County, Texas.

I am currently the APPELLATE attorney (NOT the Trial Attorney).

The Jury sentenced the Defendant to (60) sixty years in prison.

After interviewing several different family members, I concluded that the Defendant was INNOCENT.

The defendants INNOCENCE is readily apparent because the alleged sexual assault was between April 15, 2009, to April 27, 2009.

In addition, on May 20, 2009, the mother of the victim reported to a hospital in Houston, Texas stating the last attempt of a sexual assault was May 19, 2009.

In the MOTION FOR NEW TRIAL, I have provided the Court with written documentation from witnesses in Mexico stating his wife, 3-year-old child and him, began living in in the country of Mexico on April 7, 2009.

One of the persons testifying to this fact was a (Public Official), Notary and Attorney with the responsibility of keeping records for RESIDENCY. The public official/ attorney stated that his records indicated the defendant was in his hometown from April 9, 2009, to August 2013.

All of this information should be sufficient for a NEW TRIAL but there is no guarantee.

When I interviewed the defendant in JAIL, he explained to me that it was difficult to find work in

April 2009 and therefore he attempted to cross the border (FROM) MEXICO (INTO) the United States during May 2009.

However, the defendant was apprehended by Immigration and Customs Enforcement (ICE) in May 2009 and instructed he was subject to a (5) five-year BAR from entering the United States.

Unfortunately, after interviewing multiple family members, they are all UNAWARE of the Defendant's A NUMBER.

I need to obtain the defendant's A NUMBER (and) ICE's documentation regarding the Mexican Border crossing from May 2009.

I recognize that the *Normal Process* is a FOIA with an A number.

However, I am subject to TEXAS (STATE Law) and have less than (2) two weeks to provide the Court New information regarding the INNOCENCE of the defendant.

Sentencing the defendant to (60) sixty years to a Texas STATE PRISON for a crime he did not commit would be a grave injustice.

The defendant has an undocumented brother and sister living in Houston, Texas and are willing to SIGN any documentation allowing for the release of the defendants A NUMBER and border history from May 2009.

I can also have documentation sent to the DEFENDANT in PRISON and he can SIGN any documentation requested by your office.

As his attorney of record for his MOTION for NEW TRIAL, I am authorized by Texas (STATE law), to sign any documentation on my Client/Defendant's behalf.

Since I have been practicing law for (36) thirty-six years, I know that it is (*NOT commonplace*) to Release a Detainee/Respondent's A NUMBER or a person's ICE history.

However, I am subject to TEXAS (STATE) LAW.

I am *reaching out* because there is no other alternative to avoid this person serving a 60-year prison term with no opportunity for *Parole*.

If your office has any *suggestions or questions*, please call or email me at (713) 474-7702 and John@Tripodilawfirm.com, respectively.

Thank you.

Sincerely,

John J. Tripodi

John J. Tripodi, Esq.

The Tripodi Law Firm, P.C.

440 Louisiana Street, Suite #900

Houston, TX 77002

(713) 300-5159 Land Line

(713) 474-7702 Cell Phone

(281) 516-5529 Fax

Licensed in Texas, Florida, Ohio and Pennsylvania

**EXHIBIT M (TO AMENDED MOTION –
ICE RESPONSE EMAIL
(APRIL 18, 2023)**

From: john@tripodilawfirm.com
To: "john"
Subject: EMERGENCY REQUEST_ for an A
NUMBER_and ICE RECORDS
Date: Thursday, April 20, 2023 5:31:48 PM

From: Detention.LegalAccess
<Detention.LegalAccess@ice.dhs.gov>
Sent: Tuesday, April 18, 2023 1:46 PM
To: john@tripodilawfirm.com
Subject: RE: EMERGENCY REQUEST_ for an A
NUMBER_and ICE RECORDS

For that DOB and name, the A# is 087622624. He does have a pending ICE detainer.

Encounters by DHS are as follows (however subject may have entered/exited without inspection or encounter with official).

- He was encountered 1/2002, not sure Whether he took voluntary return or not.
- In 1/2002 and took VR.
- 9/2009 and was encountered and processed for Expedited Removal

For official records you will still need to go through the FOIA Office.

Jessica F. Jones
Senior Policy Advisor and ERO Parental
Interests Coordinator
Custody Programs/Special Populations and
Programs Unit
Enforcement and Removal Operations
U.S. Immigration and Customs Enforcement
Parental.Interest@ice.dhs.gov
– Parental interests Inquiries
Detention.LegalAccess@ice.dhs.gov
– Legal Access General Inquiries
LEXISNEXIS mailbox@ice.dhs.gov
– Electronic Law Library.

Check out ICE.gov far Attorney Information and Resources and the updated Parental Interests webpages.

**SEXUAL ASSAULT EXAMINATION
REPORT (REDACTED, RECORDERS RECORD)
RELEVANT EXCERPTS
(MAY 20, 2009)**

**STEP 1 REQUEST FOR MEDICAL FORNESC
EXAMINATION, TREATMENT,
COLLECTION OF EVIDENCE,
AND RELEASE OF MEDICAL RECORDS**

I hereby authorize Ashley Huynh RN, (Name of Examiner) a representative of Memorial Hermann Katy (Name of Hospital) to perform a medical forensic examination, treatment and the collection of evidence. I further permit the photographic documentation and release of copies of the complete report to the law enforcement agency.

I release Memorial Hermann and its representatives from legal responsibility or liability for the release of this information.

Signature of Mother

/s/ Ashley Huynh RN

Signature of Witness

Note: If the parent or guardian is not available for signature, child may be examined for sexual abuse under Texas Family Code.

STEP 2
SEXUAL ASSAULT EXAMINATION
FORENSIC REPORT FORM

Please print legibly. To be filled out with medical information gathered from the parent. Please inform the patient that, should the case go to court, it may be necessary to gather additional evidence at a later time. Please fill all spaces with information or N/A.

Name: *****

DOB: 04/***_

Sex: F

Race: Hispanic

Address: 2800 Katy Hockley Katy, TX 77493

Phone: 713.483.0168

Patient Brought in by: *****

Agency or Relationship of Escort: Mother

Hospital Number: 45087047

Law Enforcement Case Number: HC090072676

Exam Date: 5/20/09

Beginning Time of Exam: 1915

VITAL SIGNS:

Time 1416

Temp 98.7

Pulse 84

Resp 16

B/P 126/69

Current Medications: None

HISTORY OF ASSAULT: (Patient's description of pertinent details of the assault—if known by patient, such as: orifice penetrated, digital penetration or use of foreign object, oral contact by assailant, oral contact by patient)

Patient stated "My uncle, Fernando, told my brother and sister to go out the room and locked the door. I was trying to go out, but he didn't let me. He took my clothes off. He put his front part in my front part (points to female genital). I told him no. After, I yelled but nobody heard. Then I pushed him and he left. It happened several time since the last days of April, yesterday he wanted to do that but somebody knocked on the door, he only hugged me."

Date of Assault: 5/15/09

Time of Assault: 1700

Number of Assailants: 1

Prior to evidence collection, patient has:

Paper work only

At time of assault, was:

Contraceptive foam or spermicide present? ☒ No

Lubricant used by assailant? ☒ No

Condom used by assailant? ☒ No

Tampon present during assault? ☒ No

Patient menstruating? ☒ No

Assailant injured during assault? ☒ Yes

If known, where "I pushed him and kicked him on stomach."

Was there penetration? ☒ Female Sexual Organ

Did ejaculation occur? ☒ No

At time of exam, was tampon present? ☒ No

Menstruation at time of exam? ☒ No

When was the patient's most recent sexual contact with a male up to 1 week prior to the assault?

None

Race of that Individual N/A

If the response is less than 48 hours, inform the patient of the possibility that blood and fluid samples may be requested from that individual at a later time.

/s/ Ashley Huynh RN

Signature of Examiner

45087047-7500 ADM: 05/20/09

Xxxxxxxxxxxxx

DOB: 04/***_-- F - 12 years

SER: EMR



STEP 2
SEXUAL ASSAULT FORENSIC EXAMINATION

Page 2

Significant Past Medical History:

Last normal menstrual period: 5/5/09

Vaginal tampons used in past? None

Contraceptives used: None

Genital surgical procedures: None

General Appearance: (behavior, affect)

Calm, cooperative, age-appropriate, tearful during history, Attempted foley technique during genital exam, patient crying and in pain so I stop immediately.

Body Surface Injuries: (Include all details of trauma: i.e. abrasions bitemarks)

☒ No body surface injuries noted.

Body Surface Diagrams: Document injuries and observations on the attached body diagrams.

Genital Examination:

Tanner Stage ☒ 4

Labia Majora No trauma

Labia Majora No trauma

Hymen No trauma

Vagina Not Visualized

Cervix Not Visualized

Perineum No trauma

Anus No trauma, + good sphincter tone.

Penis N/A

Scrotum N/A

Check for Sperm ☒ Not Done

Genital Diagrams: Document injuries and observations on the attached genital diagrams.

Document all diagnostic tests and treatment on medical record.

Ending Time of Exam: 1955

Impressions From Exam:

1. Sexual assault per patient history.
2. No physical trauma on exam.
3. No genital trauma on exam.
4. Paperwork only, no evidence collected.

/s/ Ashley Huynh RN

Signature of Examiner

EVIDENCE ITEMS INCLUDED IN KIT

None Marked

EVIDENCE ITEMS NOT INCLUDED IN KIT

0 # of paper bags

0 # Photographs

0 # X-Rays

☒ # Other CD/PO images (Specify)

Patient Follow-Up Care/Legal Checklist:

GYN/Medical/STD follow-up appointment ☒ Yes

Sexual assault counseling referral given

☒ Yes

Written and verbal information given to patient

☒ Yes

Medical facility received permission to contact patient

☒ by telephone

☒ by mail

Authorization for Release of Evidence to Law Enforcement Agency completed

☒ Yes

Law enforcement/Children's Protective Services notified if suspect child abuse

☒ Yes

/s/ Ashley Huynh RN

Signature of Examiner

/s/ Ashley Huynh RN

Printed Name of Examiner

STEP 15 RECEIPT OF INFORMATION

I have received the following items (check those which apply):

1. One Sealed Envelope, paperwork only

0 # of sealed clothing bag(s)

0 # X-Rays or copies of X-Rays

0 # Photographs

0 # Other _____

Name of person releasing articles:

/s/ Sanda Martin

Signature

Sanda Martin

Printed Name

5/22/09

Date

1032

Time

Received by:

/s/ Gary Elofson

Signature

Gary Elofson

Printed Name

5/22/09

Date

1032

Time

2161

ID Badge#

HCSO

Agency

**STEP 16 AUTHORIZATION FOR EXAMINATION
AND PAYMENT**

I hereby authorize Memorial Hermann (Name of Hospital) to perform a sexual assault examination and request payment for this forensic evidence examination from the law enforcement jurisdiction to which the crime was reported.

5/20/09

Date of Examination

45087047-7500 ADM: 05/20/09

XXXXXXXXXXXX

DOB: 04/***- F – 12 years

SER: EMR

|||||

Case #: HC090072676

5/20/09

Date of Examination

Note: Once form is signed, it should be sent to the law enforcement jurisdiction of authorization of payment.

Harris County Sheriff

Law Enforcement Agency

/s/ Gary Elofson

Authorized Signature of Law Enforcement
Official

Gary Elofson

Printed Name of Law Enforcement Official

5/22/09

Date

1032

Time

Note: Please return this form to the hospital within 10 days. Texas Civil Statute Article 44471 requires that law enforcement agencies pay for evidence collection examinations in the case of reported sexual assault.

[. . .]



1400 Highway 71
International Falls, MN 56649
218.283.4481
218.283.2281 [Fax]

PATIENT LABEL

Name: *****

Dob: 04/***_

Printed Name: *****

Phone: *****

SEXUAL ASSAULT EXAM REPORT

Date of Incident: 5/19/09

Time of Incident: 4:00 PM

Date of Exam: 5/20/09

Time of Exam: 13:20

FORENSIC SPECIMANS

Clothing Obtained as Evidence: No

No Other Categories Marked as Collected

[...]

MEDICAL HISTORY/ALLERGIES:

Chronic Illnesses: None

Current Medications: None

ALLERGIES: UNKA

FEMALE GYN HISTORY:

Date of first day of your last period: 3/5/09

Menses usually lasts (# of days): 7 days

Usual # of days between periods: 28 ☒ regular

Last tampon use (date): N/A

Contraceptives used: ☒ No

Hysterectomy: ☒ No

Time since your last sexual encounter prior to exam:
last days of April

- A. Body orifices Involved in assault ☒ Vaginal
- B. Did assailant use a condom? ☒ No
- C. Did penetration take place? ☒ Yes
- D. Did ejaculation occur: ☒ Unsure
- E. Did assailant's mouth have contact with any part of your body? ☒ No
- F. Did your mouth have contact with the assailant's body? ☒ No
- G. Did the assailant sexually assault you in any other way? ☒ Unsure
- H. Since assault, pt. states that she has ☒ Bathed
- I. Did assailant keep anything that belongs to you? (i.e. clothing, jewelry, purse, underwear, etc.) ☒ No
- J. Did you scratch the assailant during the assault ☒ No

K. Did you Injure the assailant in any other way?

☒ Yes describe: pushed him

L. Describe any sexual dysfunction reported (i.e. premature ejaculation, difficulty achieving an erection, etc.): unknown

Patient's Account of Incident:

Since April, Pt's uncle had sexually assaulted her 4 times with penetration. Assaults occurred during day time after school since pt's mother had to work from 2:00 p.m. to 11:00 p.m. xxxxx assault pt refused to take her clothes on occasion on 5/19/09. Pt was afraid to let her Mother know about the indecent since her uncle told her not to tell anybody. Pt's mother confronted the uncle and she told her that he was in love with the pt.

DIAGRAMS:

Indicate size, color and nature of abnormalities and shade in tender area.

[full body diagrams indicates no markings]

[Vaginal diagram is marked "perforations"]

[Penile diagram indicates no markings]

[Oral diagram indicates no markings]

PRESENT PHYSICAL FINDINGS:

(Describe, Document Injury location, nature, size, Color, Pain and drainage if present)

There is no physical injury.

Vagina not checked

ASSESSMENT:

Pt will be referred to ER for further test

45087047-7500 ADM: 05/20/09

XXXXXXXXXXXX

DOB: 04/***- ** - F - 12 years

SER: EMR

|||||

**CPS RECORDS
(REDACTED, EXHIBIT C TO MOTION FOR
NEW TRIAL), RELEVANT EXCERPTS**

CPS FILE REQUEST FORM

Date of Request: January 6, 2010

Court/Div: CACD

CPS Cause ID Number:

Cause #: 1235418

Mother's Name: xxxxxxxxxxxx

DOB: 2-23-74

Victim's Name: xxxxxxxxxxxx

DOB: 04/***_

[. . .]

Defendant's Name: Miguel Cayetano

DOB: 6-10-86

[. . .]

ADA Name: Tiffany Dupree

Date Needed: 1-13-09 (See Note 2 below)

**TEXAS DEPARTMENT OF
FAMILY AND PROTECTIVE SERVICES**

Commissioner
Anne Heiligenstein

ADA: Tiffany Dupree

County: HARRIS

DEFENDANT: Miguel Cayetano

VICTIM: xxxxxxxxxxxxxxxxxxxxxx

Case # & Name 31556089 - xxxxxxxxxxxxx

**CONFIDENTIAL ! CONFIDENTIAL !
CONFIDENTIAL !**

**RELEASE TO PROSECUTOR OR LAW
ENFORCEMENT OFFICIAL**

CONFIDENTIAL DOCUMENT

**THIS DOCUMENT CONTAINS INFORMATION
MADE CONFIDENTIAL BY LAW.**

**THE NAME OF THE COMPLAINANT/REPORTER
HAS NOT BEEN DE-IDENTIFIED!**

**UNDER THE INFORMANT'S PRIVILEGE THE
COMPLAINANT'S IDENTITY SHOULD NOT BE
REVEALED TO OUTSIDE PARTIES, INCLUDING
THE ALLEGED PERPETRATOR, WITHOUT A
COURT ORDER.**

**CONFIDENTIAL ! CONFIDENTIAL !
CONFIDENTIAL !**

**Office of General Counsel 5425 Polk St., Houston,
Texas 77023 (713) 767-2650 Fax (713) 767-2763**

INVESTIGATION REPORT

Case Name: xxxxxxxxxxxxx

Case #: xxxxxxxxxxxxx

Intake Received:	5/20/2009
Investigation Initiated:	5/21/2009
Investigation Completed:	7/14/2009
Investigation Approved:	7/15/2009
Overall Disposition:	Reason to Believe
Risk Finding:	Factors Controlled
Recommended Action:	Close
Safety Decision:	SNS
Safety Plan Completed:	YES
Sensitive Case:	No
Priority:	1
Multiple Referral:	
Caseworker:	xxxxxxxxxxxxxx
Supervisor:	xxxxxxxxxxxxxx
County:	Harris
Office:	2500 BOLSOVER, HOUSTON, TX 77005-2590

Intake Narrative

Intake Received:	5/20/2009
Stage ID:	43915043
Stage Type:	SXAB1
Reporter Name:	xxxxxxxxxxxxxx
Rel/Int:	Law Enforcement
Person ID:	28701617
Person Notes:	Reporter is responding deputy

GENERAL INFORMATION/DESCRIPTION:

Harris County SO report #HC099072676

OV (12yo f) lives with SB (10yo m) B (5yo f), MO and AU/AP (m). MO speaks little or no English. OV speaks English.

OV made the outcry yesterday (5/19/09) that AU had sexually assaulted her in later April (exact date unknown). OV and 5yo SB were in the room when AU came in and asked 5yo SB to leave. AU then locked himself in the room with OV, took off her clothes and then penetrated her vagina with his penis.

AU had told OV not to say anything. Yesterday AU again tried to take off OV's clothes. OV got away this time and later told her mother. These are the only known instance where AU attempted to sexually assault OV. There are no known instance of AU sexually assaulting SBs.

MO and the children moved in with AU while his wife (MO's sister) and their 3yo were still in the home. MO's sister and the 3yo cousin moved to Mexico in mid-April. AU and his wife would watch OV and SBs after school while MO worked. AU was home alone with the children after school at the time of the initial assault.

MO and the children are from El Paso. MO and the children have no where else to stay. Shelters have been recommended to MO. But at this time it is unknown where MO will go. MO took OV to Memorial Hermann Katy today and were still there when last seen.

It cannot be confirmed that the family will not go back to AU's home. AU plans to reunite with his family in Mexico in two years.

CONCLUSIONS:

CPS SXAB P1

12yo was raped by her uncle who lives in the home. It cannot be confirmed that AU's access to 12yo will be cut off. If access is not cut off, 10yo and 5yo siblings would also be at risk.

No match found.

LOCATING INFORMATION:

Directions. When the family is home. Where the victim can be seen

Allegation Detail

Victim:	Complainant
Allegation:	Sexual Abuse
Alleged Perpetrator:	Atanacio, Fernando
Disposition:	RTP
Severity:	Moderate

xxxxxxx disclosed sexual abuse. This worker was not able to interview Fernando Atanacio as this worker attempted home visits and phone contact but was not successful.

xxxxxxxxxxx Sexual Abuse Atanacio, Fernando R/O

This child did not disclose sexual abuse.

xxxxxxxxxxx Sexual Abuse Atanacio, Fernando R/O

This child did not disclose sexual abuse.

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Address:

2800 KATY HOCKLEY CUT OFF RD
KATY, TX 77493-1587

Characteristics: No Characteristics Applicable

Name: xxxxxxxxxxxxxx Person ID: 54426042 SSN: *****
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Rel/Int: Sibling

DOB: *****

Age: 10

Gender: Male

Race: White

Address:

2800 KATY HOCKLEY CUT OFF RD
KATY, TX 77493-1587

Role: No Role

Ethnicity: Hispanic

Characteristics: No Characteristics Applicable

Name: xxxxxxxxxxxxxx Person ID: 54426039 SSN: *****
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Rel/Int: Oldest Victim

DOB: *****

Age: 12

Gender: Female

Race: White

Address:

2800 KATY HOCKLEY CUT OFF RD
KATY, TX 77493-1587

Role: Designated Victim

Ethnicity: Hispanic

Characteristics: No Characteristics Applicable

Name: Atanacio, Fernando Person ID: 54426057
SSN: *****

Rel/Int: Aunt/Uncle
DOB: 6/10/1986
Age: 23
Gender: Male
Race: White
Address: 2800 KATY HOCKLEY CUT OFF RD
KATY, TX 77493-1587
Role: Designated Perpetrator
Ethnicity: Hispanic
Characteristics: No Characteristics Applicable

Name: xxxxxxxxxxxxxx Person ID: 54426002 SSN:

Rel/Int: Parent
DOB: *****
Age: 36
Gender: Female
Race: White
Address: 2800 KATY HOCKLEY CUT OFF RD
KATY, TX 77493-1587
Role: No Role
Ethnicity: Hispanic
Characteristics: No Characteristics Applicable

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Person(s) Contacted: xxxxxxxxxxxxxxxx

Purpose: Gather/Obtain Info

Narrative:

5/21/09 FTF with xxxxxxxxxxxxx Assistant Principal
at King Elementary 281-237-6850

This worker spoke with xxxxxxxxxxxxx stated she

has never had an problems with the family nor has the child missed any days of school xxxxxxxx stated she would place monitors within the school and contact CPS with any concerns. XXXXXXXXXXXX stated the school would provide transportation from the shelter to the schools so the children can continue the school year.

Date of Contact: 5/21/2009
Person(s) Contacted: FPS Staff
Date Entered: 5/21/2009
Purpose: Staffed Case

Narrative:

5/21/09 at approx. 1:30 p.m. Initial Contact with
XXXXXXXXXXXXXXXX

This worker spoke with XXXXXXXXXXXXXXXX at King Elementary. XXXXXXXXXXXXXXXX stated he was born XXXXXXXXXXXXXXXX and he is 10 years old. XXXXXXXXXXXXXXXX stated he is in the 4th grade. XXXXXXXXXXXXXXXX stated he lives with his mother XXXXXXXXXXXXXXXX and two sisters XXXXXXXXXXXXXXXX, XXXXXXXXXXXXXXXX state last night his family and him slept in a hotel because they were having problems with their uncle Fernando Atanacio. XXXXXXXXXXXXXXXX stated he does not know what kind of problems but stated he did not know what happened. XXXXXXXXXXXXXXXX stated two days ago his sister XXXXXXXXXXXXXXXX told his mother something at 5 or 6 p.m. and then later that night they went to the park. XXXXXXXXXXXXXXXX stated yesterday his mother took XXXXXXXXXXXXXXXX to the hospital while he was at school. XXXXXXXXXXXXXXXX stated at 8:00p.m. his mother came to get him from the trailer and went to spend the night tonight. XXXXXXXXXXXXXXXX stated

they have been living with his uncle Fernando since the beginning of the school year. XXXXXXXXXXXX stated when he lived with his uncle they lived with Gondido Atanacio, Renaldo Atanacio and Lucera Atanacio. XXXXXXXXXXXX stated Renaldo and Lucera are married but have no children. XXXXXXXXXXXX stated they lived in a 3 bedroom trailer. XXXXXXXXXXXX stated Renaldo and Lucera have one room, Gondido and a friend had the other room, while XXXXXXXXXXXX and his mother were in the other room. XXXXXXXXXXXX stated Fernando sleeps in the living room XXXXXXXXXXXX stated he used to live in El Paso but they moved to Houston in August because his mother was having problems with their father. XXXXXXXXXXXX stated his father's name is XXXXXXXXXXXX. XXXXXXXXXXXX stated there was no domestic violence in the home. XXXXXXXXXXXX stated police did come to the family home when he was living with his father but not at their uncles home. XXXXXXXXXXXX stated his father would get mad when his mother wanted to go somewhere. XXXXXXXXXXXX stated he does not have any family here in Houston as they are in El Paso and Mexico. XXXXXXXXXXXX stated there are no drugs or alcohol in the home but stated his father and Uncle will drink beers. XXXXXXXXXXXX stated on Fridays, however, would his uncle drink a beer. XXXXXXXXXXXX stated when he gets in trouble his mother will take away the Playstation 2 but never do they whoop him. XXXXXXXXXXXX his private area was his middle part, and his butt but denied anyone has ever touched his private area and stated no one has ever forced him to touch their private area. XXXXXXXXXXXX denied anyone put their mouth on his private area and

stated no one had forced him to put his mouth on their private area. XXXXXXXXXXXXX denied ever being shown pictures or videos of naked people.

Date of Contact: 5/21/2009

Person(s) Contacted: XXXXXXXXXXXXX

Date Entered: 5/22/2009

Purpose: Assessment

Narrative:

5/21/09 at approx. 2:30 p.m. FTF with XXXXXXXXX

This worker spoke with Ms. TT****z at King Elementary. Ms. XXXXXXXXXXXXX stated she took her daughter to the hospital yesterday for a SAM exam. XXXXXXXXXXXXX stated when she was at work at Jack in the Box two days ago her son Christian contacted her and said XXXXXXXXXXXXX was in the bedroom with Fernando. XXXXXXXXXXXXX stated she immediately left work and confronted the uncle. XXXXXXXXXXXXX stated the uncle told her that he does not love his wife, XXXXXXXXXXXXX (M'sM***'s sister) but loved XXXXXXXXXXXXX as she is there holding his hand. XXXXXXXXXXXXX stated Fernando would not admit nor deny that he did anything to XXXXXXXXXXXXX. XXXXXXXXXXXXX stated she asked XXXXXXXXXXXXX what happened and stated the uncle would hug and kiss her but the uncle told her not to tell her mother. XXXXXXXXXXXXX stated she has never seen anything wrong in the home. XXXXXXXXXXXXX stated her daughter told her Fernando tried to put his middle part inside of her but XXXXXXXXXXXXX pushed him off of her because it hurt. XXXXXXXXXXXXX stated the SANE did not have the results immediately so they are waiting for that. XXXXXXXXXXXXX stated Fernando had one

child, XXXXXXXXXXXXXXXX (3) is in Mexico. XXXXXXXXXXXXXXXX stated XXXXXXXXXXXXXXXX is not coming back from Mexico and stated Fernando is supposed to go to Mexico in one year. Ms. T***** stated she is getting assistance through Katy Christian Ministries (KCM) at 281-391-5262 as they put her in a hotel room the night before. XXXXXXXXXXXXXXXX stated she does not know where she is sleeping tonight but is supposed to call KCM. XXXXXXXXXXXXXXXX stated she was a victim to domestic violence in 2003 as her ex-husband, XXXXXXXXXXXXXXXX went to jail for this. XXXXXXXXXXXXXXXX stated she was living in El Paso in a different home but was having problems with the father and that is why she moved here. XXXXXXXXXXXXXXXX stated she is not going to go to Fernando's home as she is going to protect her child. XXXXXXXXXXXXXXXX stated there is no drugs or alcohol in the home. XXXXXXXXXXXXXXXX denied anyone in the home had mental or physical health problem. XXXXXXXXXXXXXXXX stated she was never sexually abused as a child. XXXXXXXXXXXXXXXX agreed to meet this worker on Tuesday, May 26, 2009 at 10:00 a.m. for a forensic.

XXXXXXXXXXXXX stated she knows the uncle as Fernando Atanacio but when she took his identification he is listed as Adan Cayetano-Miguel DOB 6/10/86 and his social security is 677-09-3229. XXXXXXXXXXXXXXXX had already filed an police report for the sexual assault of a child with Harris County HC090072676.

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Date of Contact: 5/25/2009

Person(s) Contacted: XXXXXXXXXXXXXXXX FPS Staff

Date Entered: 7/14/2009

Purpose: Assessment

Narrative:

5/25/09 CPS history check on XXXXXXXXXXXXXXX

A CPS history check was completed on the family. At the time of the check, the family had no previous CPS history.

Date of Contact: 5/26/2009

Person(s) Contacted: XXXXXXXXXXXXXXX

Date Entered: 5/27/2009

Purpose: Assessment

Narrative:

5/26/09 at approx. 10:a.m. Attempted Forensic Interview with XXXXXXXXXXXXXXX

This worker scheduled an interview with the XXXXXXX family but the family did not show. This worker attempted contact with XXXXXXX telephone but XXXXXXX did not pick up. This worker contacted HAWK women's shelter and left a message for Ms. T***** to contact this worker.

Date of Contact: 5/26/2009

Person(s) Contacted: FPS Staff

Date Entered: 5/26/2009

Purpose: Staffed Case

Narrative:

Family no showed to office. Worker will contact school and see if children have been attending school. If so worker will go to the school and pickup children and bring them in since mother has not followed through.

Worker will complete tasks by 5/28/09.

Date of Contact: 6/21/2009
Person(s) Contacted: Complainant
Date Entered: 6/24/2009
Purpose: Forensic Assmt/Other

Narrative:

June 22, 2009 at approx. 4:15 p.m. Forensic Interview with XXXXXXXXXXXXXXXX.

This worker sat in on a forensic interview between XXXXXXXXXXXXXXXX and Claudie. XXXXXXXXXXXXXXXX translated this interview. She is going to summer school because she didn't pass her math and reading. She plays with her siblings at home. Truth and Lie were established using examples. She promised to only say the truth and stated that no one told her what to say. She said that she is here because her uncle came into the room at her uncle and aunts house after putting her brothers outside to play and would lock the door and do things he shouldn't be doing. He would sometimes take my clothes off and I didn't want to. He tried to put his thin inside me one time. I Scream and don't know if anyone heard me. I was scared that something could happen and that is why I didn't tell my mom. He tried to put his thing in her private part. Last time was at the end of April around the 20th something. He did it like 4 or 5 times when he came home from work like around 4 pm during the week. He would lie to her siblings by telling them that their friend was waiting for them outside to play. He would come in the room, lock the door, he would take off his clothes and then takes hers off too. I would say no but he wouldn't listen. He would be standing and I would be standing too. He would try to put his part inside of mine. She felt bad because

he should not be doing that. He tried the first time but he didn't put it inside but he did 4 other times. His hands would be hugging her as she kept moving back because she didn't want to. She doesn't know why he stopped doing it or the time span. Doesn't remember the second time but he took off his and her clothes, threw her on the bed and put his part in part. It felt bad, ugly. He laid on top of her. I pushed him and kicked his on the stomach because she didn't want to. One time he told me not to tell anything to my mom. Nothing ever came out of his part. He didn't touch her anywhere else, he would only hug her. He put his part inside of her like 4 or 5 parts. It would happen like around 4 or 5 in the afternoon. She was afraid to tell but she finally told mom and the next day they took her to the hospital where a police officer questioned her and many people talked to her about what had happened. This happened in May and currently is now in a shelter. XXXXXXXXXXXXX denied anyone has put their mouth on her nor has anyone forced on others, no pictures of naked people, no one else have seen her without clothes, no one else has touched her or tried to touch her. NO just get after her when they misbehave. MO and FA would argue but not hit each other. No drugs or alcohol in the home.

[...]

**AMERICAN BAR ASSOCIATION
RULE 8.4: MISCONDUCT**

Maintaining The Integrity Of The Profession

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) *engage in conduct involving dishonesty, fraud, deceit or misrepresentation;*
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a

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lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.