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7
8 IN THE SUPERIOR COURT
9 OF THE STATE OF CALIFORNIA
10 YOLO COUNTY

11 IN RE AJAY KUMAR DEV,)

12)
13 Petitioner,)

14 On Habeas Corpus.)
15 _____)

No.:

Court of Appeal Case No.
C062694

Superior Court (Yolo)
No. 062444

16
17
18 PETITION FOR WRIT OF HABEAS CORPUS AND MEMORANDUM OF POINTS
19 AND AUTHORITIES IN SUPPORT THEREOF
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1 IN THE SUPERIOR COURT
2 OF THE STATE OF CALIFORNIA
3 YOLO COUNTY
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5 IN RE AJAY KUMAR DEV,) No. :
6 Petitioner,) Court of Appeal Case No.
7) C062694
8 On Habeas Corpus.) Superior Court (Yolo County)
9) No. 062444
10) PETITION FOR WRIT OF
HABEAS CORPUS

11
12
13 INTRODUCTION: A SINGLE QUESTION
14

15 “[M]istakes in the criminal justice system are sometimes made.” (*In re Sanders*
16 (1999) 21 Cal.4th 697, 703.) And when they are, habeas corpus is available to correct
17 them. (*Ibid.*)
18

19 Here, petitioner Ajay Dev and his wife Peggy adopted a daughter, Sapna Deo,
20 from Nepal in 1999. Sapna was a teenager at the time. In 2004, Sapna went to police
21 alleging that Ajay had sexually assaulted her several times a week from her adoption in
22 1999 to late 2003. Months later she withdrew the charges, and then months after that she
23 renewed them. In 2008 petitioner was formally charged with 85 counts of improper
24 sexual conduct with Sapna, two counts of showing her pornography and five related
25 counts involving threats or false imprisonment. From day one, petitioner has maintained
26 his innocence as to every charge.
27

28 In light of the nature of the charges, it was not surprising that the state’s main

1 witness was Sapna herself. She testified for six days and alleged a series of improper
2 sexual contacts by petitioner including lewd acts, rape and sexual penetration. She also
3 testified that petitioner showed her pornography on a home computer. The defense theory
4 was that Sapna had made up the charges. As the prosecutor forthrightly recognized in his
5 closing argument, however, for jurors to accept this defense they would have to find a
6 reason why Sapna “would . . . be making this all up” and what her “motive [was] to still
7 be doing this.”

8
9 The defense offered the jury a motive, introducing evidence that because of
10 escalating tensions with Ajay and Peggy over whether Sapna should observe Nepali
11 customs in America, Sapna was concerned that they might void the 1999 adoption and
12 force her to move back to Nepal. She made up the charges against Ajay to stay on the
13 path to United States citizenship, and stuck to the story because she did not want to
14 jeopardize her chance at becoming an American. As the defense explained to the jury, the
15 only question for the jury was whether Sapna was telling the truth, or was she lying so she
16 could become a citizen:

17
18 There’s one issue in this case. Has the prosecutor proven beyond a
19 reasonable doubt that Sapna Dev has told us the truth? And that is the only
20 issue with regard to every single count.

21 * * *

22 Her goal in life is to become a United States citizen. . . . So the Violence
23 Against Women Act is her refuge. If Ajay Dev can be convicted based on
24 her false testimony, she’s home free. She gets a free ride. She gets her
25 citizenship.

26 * * *

27 As to all the elements of all the crimes, they all turn on one issue. Has [the
28 prosecutor] proven beyond a reasonable doubt that Sapna is telling the
truth?

For his part, the prosecutor agreed that Sapna’s credibility was key to the defense.

1 In the prosecutor's own words, "No Sapna, no case." The prosecutor candidly recognized
2 that jurors would have to find Sapna was lying in order to find Ajay not guilty. But
3 according to the prosecutor Sapna had no motive to lie and obtaining citizenship had
4 nothing at all to do with the allegations:
5

6 [F]or the defendant to be innocent . . . Sapna would have to be making all
7 this up, and she'd have to have some motive to still be doing this. And it is
8 not the Violence Against Women Act because she already had her LPR. If
9 she wanted to stay a citizen, she didn't have to say anything at all, no, she
10 was already on track to being a citizen. She didn't have to say anything
11 about this.

12 In short, jurors had a single question to resolve in deciding if Ajay was guilty:
13 should they believe Sapna? In large part jurors agreed with the prosecutor and
14 determined that Sapna *was* credible, convicting on 76 of the 92 counts.

15 As discussed in much greater detail below, however, post-conviction investigation
16 has shown that in determining whether Sapna should be believed, the jury did not have
17 the full story, or anything even close. It turns out that prior to trial, Sapna admitted to at
18 least six different people that the sexual allegations were not true. As defense counsel
19 had surmised, Sapna was angry with Ajay about wanting her to obey Nepali customs and
20 afraid her adoption would be voided and she would lose her shot at becoming an
21 American citizen.

22 Sangita Dev is Sapna's first cousin -- they have known each other their entire lives
23 and they are very close. When Sapna visited Nepal in 2004, she told Sangita that she
24 made up the allegations because she was upset about how strict petitioner was, she was
25 afraid of having the adoption reversed and she wanted to return to the United States.
26

27 Sangita does not stand alone. Sapna told her friend Dinesh Deo that she renewed
28

1 the criminal charges against Ajay because she was angry with him, believing he had
2 gotten her arrested in Nepal for passport fraud in 2004, and she needed to make the
3 criminal charges so she could return to the United States. She told Dinesh she would “put
4 Ajay in jail like he had put her in jail.”
5

6 Sangita and Dinesh do not stand alone. Bhabendra Yadav was the headmaster of
7 the high school in the small town where Sapna is from in Nepal, was close friends with
8 Sapna’s grandmother and knows Sapna well. While Bhabendra was visiting with Sapna’s
9 grandmother in 2004, Sapna stopped by. They discussed the allegations against Ajay.
10 Sapna admitted the allegations were not true and that she was angry because Ajay was
11 such a strict parent, insisting she follow Nepali customs. Sapna later said she reopened
12 the case against Ajay because she believed he and his family were behind the passport
13 fraud case in Nepal.
14

15 Sangita, Dinesh and Bhabendra do not stand alone. Ranjana Deo is a teacher in
16 Nepal, is a distant relative of Sapna and has known her since she was born. During a visit
17 to Nepal, Sapna told Ranjana that Ajay was a strict parent who wanted her to live by
18 Nepali customs and threatened to send her back to Nepal if she did not. During a later
19 visit, Sapna was very angry with Ajay, believing he was behind her passport fraud
20 charges in Nepal. She told Ranjana that she (Sapna) could return to America if she
21 testified against Ajay in exchange, and that “if she did not testify there would be no way
22 for her to return to the United States.”
23

24 Sangita, Dinesh, Bhabendra and Ranjana do not stand alone. Shweta Deo is also a
25 teacher in Nepal, and has known Sapna since they were children. In a trip to Nepal,
26 Sapna explained that Ajay was a strict parent who talked about sending her back to Nepal
27 when she refused to observe traditional Nepali customs. Sapna told Shweta that she was
28 “furious” with Ajay when he spoke with her boyfriend who then broke up with her, and

1 made up the allegations in order to find a way to stay in the United States. Because she
2 felt bad about the false allegations, she withdrew them, but she later pursued them again
3 because she believed Ajay was involved with her Nepali passport fraud case and she
4 wanted to return to the United States.

5
6 But Sangita, Dinesh, Bhabendra, Ranjana and Shweta do not stand alone. Madhuri
7 Deo is Sapna's own sister. She is Facebook friends with Sanjay Dev, Ajay's brother. In
8 a January 2018 Facebook message Madhuri sent to Sanjay, she conceded that Sapna lied
9 in order to "get to Amrika" and then stuck with the lie in order to avoid being deported:

10
11 [Sapna] want to take revenge and get to Amrika [sic]. . . . The only way to
12 come to Amrika [sic] was to come testify against Ajay uncle. We did not
13 know that he will be put in jail long time. Now Sapna say that if she helps
14 she will go to jail and get deported. . . . Sapna has lied many times in the
15 past. She had no choice. Police say to her they will help if Sapna testify for
16 rape. . . . We know that she was not raped. . . . We also tell Sapna to tell the
17 truth that this never happen but she scared now.

18 But Sangita, Dinesh, Bhabendra, Ranjana, Shweta and Madhuri do not stand alone.
19 In addition to evidence from several corroborating Nepali witnesses (also discussed
20 below), post-conviction investigation has revealed forensic and documentary evidence
21 which directly undercuts Sapna's credibility and confirms both the motive Sapna had for
22 making up the allegations and the defense theory presented at trial. For example, in
23 response to the state's introduction of pornographic videos found in the home -- and its
24 claim that petitioner showed them to Sapna -- the defense contended in no uncertain terms
25 that it "didn't happen" and that Sapna looked at the pornography herself. In equally
26 uncertain terms -- and under oath -- Sapna told jurors "there was no way that [she] wanted
27 to watch" the pornographic videos herself and -- when specifically asked if she watched
28 these videos alone, she swore she never did. Newly authenticated forensic e-mail
evidence from computer expert Michael Mullen -- which the defense offered at trial but
which the trial court excluded -- now shows that Sapna was lying to the jury. In fact,

1 Sapna accessed the pornography at home when Ajay and Peggy were both at work. And
2 newly authenticated documentary evidence which was also offered at trial -- but which
3 was also excluded for lack of foundation -- establishes the good cause Sapna had for
4 being concerned about her adoption being unraveled: she was convicted in Nepal for
5 lying about her birth date in order to obtain a passport and facilitate an improper adoption.

6
7 In short, the new evidence presented and discussed in the Petition for Writ of
8 Habeas Corpus shows that prior to trial, Sapna repeatedly admitted to family and friends
9 that she lied about the allegations. Jurors deciding if Sapna lied never heard this
10 evidence, or any of the other new evidence establishing that Sapna was simply not
11 credible. Moreover defense counsel has candidly conceded that he did not make a tactical
12 decision not to present any of this evidence. Thus, as the Supreme Court envisioned in
13 *Sanders*, petitioner is employing the Great Writ to correct a “mistake[] . . . in the criminal
14 justice system.” (*In re Sanders, supra*, 21 Cal.4th at p. 703.)

15
16 In pursuing this course Mr. Dev recognizes habeas courts may properly harbor
17 skepticism when faced with a claim that a mistake has been made. From an institutional
18 perspective, that skepticism may well be necessary. After all, not only were substantial
19 resources expended in providing petitioner a jury trial but the jury concluded he was
20 guilty on 76 counts. Such verdicts should not lightly be set aside. Of course, as the
21 Supreme Court has itself noted, it is in precisely this situation -- that is, where a jury has
22 unanimously found a defendant guilty beyond a reasonable doubt -- that “mistakes . . . are
23 sometimes made.”

24
25 At the end of the day, petitioner’s claims will require the Court to determine
26 whether this is one such case and whether relief is required. It is worth noting that -- to
27 paraphrase the prosecutor -- for Sapna to be believed now, witnesses Sangita, Dinesh,
28 Bhabendra, Ranjana, Shweta and Madhuri would have “to be making all this up,” Mr.

1 Mullen would have to be wrong and the Nepali court documents would have to be
2 ignored.

3
4 Fortunately, however, it is not yet the end of the day. The ultimate question of
5 whether relief is required is not before the Court at this early stage of the habeas corpus
6 proceedings. Instead, under established California case law, this Court has the
7 considerably simpler task of “assum[ing] the petitioner’s factual allegations are true” and
8 assessing whether petitioner has established a prima facie case for relief on any of his
9 claims. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) If so, an Order to Show Cause
10 should issue which simply requires the state to formally admit or deny the factual
11 allegations of the petition. (*Ibid.*) Credibility assessments are not made at this early,
12 prima-facie-case stage of the proceedings, but instead are made later -- if necessary --
13 with the benefit of an evidentiary hearing. (*See People v. Bacigalupo* (2012) 55 Cal.4th
14 312, 333.)

15
16 As discussed more fully below, assuming petitioner’s factual allegations are true,
17 he has indeed established a prima facie case. An Order to Show Cause should issue.

18 19 **JURISDICTIONAL ALLEGATIONS**

20
21 Petitioner Ajay Dev, through counsel, files this Petition for Writ of Habeas
22 Corpus. By this verified petition petitioner alleges as follows:

23 24 I.

25 Petitioner is unlawfully confined by the California Department of Corrections
26 pursuant to a judgment of the Superior Court for Yolo County in *People v. Dev*, No.
27 062444.

1 II.

2 Petitioner pled not guilty. He was tried by jury.

3
4 III.

5 Petitioner was charged with 85 counts of improper sexual conduct, two counts of
6 showing pornography to a minor and five related counts involving threats or false
7 imprisonment. A jury unanimously acquitted petitioner of 13 counts and one
8 enhancement. The jury hung on another 3 counts and one enhancement. The jury
9 convicted on the remaining 76 counts. The trial court sentenced petitioner to state prison
10 for 378 years and 4 months.

11
12 IV.

13 Petitioner appealed his conviction to the Third District Court of Appeal. On
14 January 12, 2017, the appellate court affirmed his conviction and sentence. (*People v.*
15 *Dev* (2017) 2017 Cal. App. Unpub. LEXIS 220.) Petitioner filed a timely Petition for
16 Rehearing in the appellate court, which was denied, and a timely Petition for Review in
17 the California Supreme Court. On April 19, 2017, the Supreme Court denied review.
18 The case was final on appeal 90 days later, on July 18, 2017, when the 90 day time period
19 for seeking certiorari from the United States Supreme Court expired. (*In re Pedro T.*
20 (1994) 8 Cal.4th 1041, 1046.)

21
22 V.

23 As to the matters raised in paragraph VI-VIII of this petition, no other petitions for
24 writ of habeas corpus have been filed. Petitioner has no adequate remedy at law.

1 **CLAIMS FOR RELIEF**

2
3 **VI.**

4 Petitioner’s judgment of conviction has been unlawfully and unconstitutionally
5 imposed in violation of his constitutional rights as guaranteed by the state constitution as
6 well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States
7 Constitution. Trial counsel rendered ineffective assistance of counsel in failing to present
8 readily available testimony to support the defense he himself elected to present and
9 undercut the state’s case. The following facts now known to petitioner support this claim:
10

- 11 a. The state charged petitioner with 92 criminal counts involving Sapna
12 Dev. These included 85 charges of improper sexual contact, and
13 seven additional charges including making threats, dissuading a
14 witness, false imprisonment, possession and exhibition of
15 pornography, and assault. (4 CT 858-898.)
16
- 17 b. Ajay and Peggy Dev adopted Sapna from Nepal in 1999. (15 RT
18 4174.) At the time Sapna was a teenager. In February of 2004 --
19 when Sapna was 20 years old -- she went to police alleging that Ajay
20 Dev had raped her two to three times a week from 1999 until
21 December of 2003. (8 RT 1969, 1976, 1981-1982, 1996, 2065-2069,
22 2082.)
23
- 24 c. In May 2004 Sapna wrote a letter to the District Attorney requesting
25 that police “withdraw the case against Ajay K. Dev.” (9 CT 2501.)
26
- 27 d. Later in 2004 Sapna visited Nepal for her sister’s wedding. While in
28 Nepal Sapna was charged and convicted of passport fraud. (5 RT

1 977-980.) Sometime thereafter Sapna contacted authorities in Yolo
2 county who assisted her return to the United States. (9 RT 2140-
3 2144, 2157.)

4
5 e. The prosecutor brought charges based on these allegations and called
6 Sapna to testify in support of the charges. (4 RT 699-898; 5 RT 903-
7 1011.)

8
9 f. Defense counsel’s theory of the case was that Sapna was lying and
10 jurors should not believe her.

11
12 g. Defense counsel told jurors “[t]his woman cannot tell the truth.” (18
13 RT 5061.) According to defense counsel, the only question for
14 jurors was whether “Sapna is telling the truth.” (18 RT 5066.) The
15 verdict would depend on whether “Sapna Dev has told us the truth.”
16 (18 RT 5020.)

17
18 h. Defense counsel’s theory was that Sapna was lying. According to
19 counsel, Sapna feared Ajay and Peggy would void her adoption
20 because she (Sapna) had lied about her age and was too old to be
21 adopted legally. If this happened, Sapna’s testimony against Ajay
22 would nevertheless help her obtain American citizenship. (18 RT
23 5117.)

24
25 i. Defense counsel sought to prove his motive theory, introducing
26 evidence that because of the passport fraud conviction in Nepal,
27 Sapna was aware her adoption could be voided. He offered into
28 evidence official Nepali court documents proving the Nepali

1 conviction. The trial court excluded the documents saying that
2 defense counsel failed to properly authenticate them. (2 RT
3 11201223, 137; 6 RT 1364-1367.) The appellate court upheld this
4 ruling on appeal. (*People v. Dev* (2017) 2017 Cal. App. Unpub.
5 LEXIS 220 at *38-46.) Defense counsel also sought to prove Sapna
6 was lying by cross-examining her on inconsistencies in her
7 testimony. This included the inconsistency between her initial
8 testimony during cross-examination at the preliminary hearing that
9 no rapes ever occurred anywhere but California and her later
10 admission during that same cross-examination that Ajay had also
11 raped her in Bangkok, Thailand. (2 CT 547, 556; 3 RT 557; 7 RT
12 1501-1512, 1699-1702.) In his rebuttal closing argument, the
13 prosecutor told jurors that the reason defense counsel pursued this
14 area of cross-examination at the preliminary hearing was because
15 petitioner had confessed to his lawyer that he raped Sapna in
16 Bangkok. (19 RT 5124-5125.)

17
18 j. In connection with the pornography charges, forensic evidence
19 showed pornography was accessed on the Dev's home computer on
20 September 26, 2003 between 8:36 and 8:56 in the morning. (10 CT
21 2866.) Under oath Sapna told jurors that it was petitioner who
22 downloaded and accessed the pornography found on the home
23 computer and she never accessed it by herself. (4 RT 792-803; 6 RT
24 1288-1289.)

25
26 k. Defense counsel sought to prove Sapna had in fact lied to jurors
27 under oath. He offered into evidence an email Ajay Dev sent to
28 Peggy Dev from his work computer at 8:48 on the morning of

1 September 26 -- exactly when the pornography was being watched at
2 home. The trial court excluded this alibi evidence and the appellate
3 court upheld the ruling saying the counsel had failed to establish a
4 proper foundation for the evidence. (18 RT 4878-4881; *People v.*
5 *Dev* (2017) 2017 Cal. App. Unpub. LEXIS 220 at * 67-73.)
6

7 l. The prosecutor also recognized that Sapna's credibility was key,
8 telling jurors "No Sapna, no case." (18 RT 5015.) The prosecutor
9 later told jurors that in order to accept the defense theory, "Sapna
10 would have to be making all this up, and she'd have to have some
11 motive to still be doing this." (18 RT 5142.)
12

13 m. To provide corroboration for Sapna's allegations, the state
14 introduced a pretext call Sapna made to Ajay which was recorded.
15 (9 RT 2103-2104.) Some of the pretext call was in Nepali. (9 RT
16 2106.) In that call, Ajay denies any improper conduct on 22
17 occasions. (9 CT 2459, 2460, 2461, 2462, 2467, 2469, 2470, 2476,
18 2480, 2483, 2486, 2487, 2497.)
19

20 n. The state elected not to provide a certified translator of the Nepali
21 portions of the call. (9 RT 2106.) Instead, the state elected to have
22 Sapna translate those portions for the jury. (9 RT 2106.) Sapna
23 translated one exchange and told jurors that in it Ajay said "But you
24 had sex with me when you were 18." (15 CT 4176.) Defense
25 counsel offered his own expert who said this portion of the tape was
26 "inaudible," but that he could decisively rule out Sapna's translation
27 because he could unmistakably hear the first syllable of the word in
28 dispute which was incompatible with any Nepali word connoting

1 “sex.” (14 RT 3866-3867.) In closing argument the prosecutor
2 argued the defense expert was not to be trusted because “if [he]
3 find[s] something that’s good for the defense, [he] bring[s] it out. If
4 [he] find[s] something incriminating, [he doesn’t] bring that out.”
5 (18 RT 4986-4987.)
6

7 o. Jurors never heard testimony from Sapna’s first cousin, Sangita Dev,
8 that in 2004 Sapna admitted making up the allegations because she
9 was upset about how strict petitioner was as a parent, she was afraid
10 of having the adoption reversed and she wanted to return to the
11 United States. (Exhibit C.)
12

13 p. Jurors did not hear testimony from Sapna’s friend Dinesh Deo that
14 Sapna admitted renewing the charges against petitioner because she
15 was angry with him and she needed to make the criminal charges so
16 she could return to the United States. (Exhibit G.)
17

18 q. Jurors did not hear testimony from headmaster Bhabendra Yadav
19 that Sapna admitted the allegations against petitioner were not true;
20 she made them out of anger over how strict a parent petitioner was
21 and she renewed the charges because she believed petitioner was
22 behind the passport fraud case in Nepal. (Exhibit H.)
23

24 r. Jurors did not hear testimony from Sapna’s friend Ranjana Deo that
25 Sapna was angry at petitioner because she thought he was behind the
26 passport fraud case which had been brought against her and that “if
27 she did not testify [against petitioner] there would be no way for her
28 to return to the United States.” (Exhibit I.)

1 s. Jurors did not hear from Sapna’s friend Shweta Deo that Sapna said
2 she was “furious” with Ajay when he spoke with her boyfriend who
3 then broke up with her, she made up the allegations in order to find a
4 way to stay in the United States, she felt bad about the false
5 allegations and so withdrew them but she later pursued them again
6 because she believed Ajay was involved with her Nepali passport
7 fraud case and she wanted to return to the United States. (Exhibit J.)
8

9 t. Jurors did not know that in a facebook message, Sapna’s own sister
10 Madhuri admitted that her family had all told “Sapna to tell the truth
11 that this never happen but she scared now,” that Sapna wanted “to
12 take revenge and get to Amrika,” “the only way to come to Amrika
13 was to come testify against Ajay” and “[n]ow Sapna says that if she
14 helps she will go to jail and get deported.” (Exhibit K, Attachment
15 2.)
16

17 u. Jurors did not hear from a forensic expert that at 8:48 on the morning
18 of September 26, 2003 -- the precise time someone was accessing
19 pornography at the petitioner’s home -- petitioner was at work
20 sending an email to Peggy who was at her work. (Exhibit M.) In
21 other words, Sapna had lied to the jury about accessing the
22 pornography.
23

24 v. Jurors did not have information about Sapna’s Nepali convictions,
25 showing that she had been found to have lied about her birth date,
26 and that her real birth date was April 28, 1983. (Exhibit U, V.)
27

28 w. Jurors did not know that (1) the pretext call could be enhanced to

1 hear inaudible portions, (2) a certified translator could now hear the
2 portion of the call which Sapna translated as “But you had sex with
3 me when you were 18” and (3) in fact, Sapna translation was
4 incorrect and the actual translation was “If that [is] so why did you
5 come with me since 18 years.” (Exhibit O.)
6

7 x. Jurors did not know that the prosecutor’s argument that Ajay had
8 confessed rape to his own lawyer was entirely false. (Exhibit P.)
9

10 y. The jury (1) deliberated more than 30 hours over the course of 6
11 days, (2) asked several questions, (3) requested the transcript of the
12 pretext call, (4) asked to see the video of Sapna’s police interview
13 with detective Hermann, (5) acquitted petitioner of 13 counts and
14 one enhancement, and (6) hung on another 3 counts and one
15 enhancement. (12 CT 3238, 3258, 3259, 3261, 3264, 3266, 3269,
16 3270, 3272, 3273-3275.)
17

18 z. Trial counsel had no tactical reason for failing to investigate,
19 discover and/or present (1) testimony from witnesses to whom Sapna
20 confessed that she was lying and had made up the allegations, (2)
21 offer the Nepali court documents but do so with an inadequate
22 foundation, (3) offer the September 26 email but do so with an
23 inadequate foundation, (4) obtain an expert for the pretext call but
24 fail to enhance the most critical portion of the call once his own
25 expert reported that it was inaudible or (5) move to reopen the case
26 after the prosecutor presented demonstrably false argument in the
27 rebuttal portion of his closing argument. Taken either singly or
28 together these failures undermine confidence in the outcome of the

1 trial.

2
3 VII.

4 Petitioner's judgment of conviction has been unlawfully and unconstitutionally
5 imposed in violation of his constitutional rights as guaranteed by the state constitution, his
6 state statutory rights pursuant to Penal Code section 1473, as well as the Fifth, Sixth,
7 Eighth and Fourteenth Amendments to the United States Constitution. Petitioner hereby
8 reincorporates each of the facts set forth above. Regardless of whether trial counsel's
9 failure to investigate, discover and present the new evidence described above constituted
10 ineffective assistance of counsel, presentation of this new evidence would more likely
11 than not have changed the outcome at trial and as such requires that relief be granted. In
12 addition to the facts/new evidence set forth above, incorporated herein by reference, the
13 following additional facts now known to petitioner support this claim:

- 14
15 a. In a January 2018 Facebook message to Ajay's brother Sanjay Dev,
16 Sapna's sister Madhuri admitted that:

17
18 [Sapna] want to take revenge and get to Amrika [sic]. . . . The only
19 way to come to Amrika [sic] was to come testify against Ajay uncle.
20 We did not know that he will be put in jail long time. Now Sapna say
21 that if she helps she will go to jail and get deported. . . . Sapna has
22 lied many times in the past. She had no choice. Police say to her
23 they will help if Sapna testify for rape. . . . We know that she was not
24 raped. . . . We also tell Sapna to tell the truth that this never happen
25 but she scared now. (Exhibit K, attachment 2.)

26
27 VIII.

28 Petitioner's judgment of conviction has been unlawfully and unconstitutionally
imposed in violation of his constitutional rights as guaranteed by the state constitution as
well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States
Constitution. Even if none of the errors specified above alone require a new trial, the

1 combination of those errors with one another and/or the combination of those errors with
2 the errors identified by petitioner on his direct appeal, require relief. Petitioner hereby
3 reincorporates the facts and claims in all prior paragraphs. In addition, to those claims,
4 and for purposes of a cumulative error argument, petitioner re-alleges the following
5 claims raised on direct appeal:

6
7 a. The trial court's exclusion of translated Nepali Court records
8 certified by the Nepali foreign ministry which impeached Sapna's
9 testimony violated state law as well as Mr. Dev's rights to a fair trial
10 and to present a defense.

11
12 b. The trial court's exclusion of e-mail evidence which showed Sapna
13 lied at trial violated state law as well as Mr. Dev's rights to a fair
14 trial and present a defense.

15
16 **TIMELINESS ALLEGATIONS**

17
18 **XI.**

19 Generally, courts will not address the merits of habeas petitions filed with
20 substantial unexplained delay. The following factual allegations show this petition is
21 properly before the Court:

22
23 a. Petitioner was convicted in June 2009. He appealed his conviction
24 and the Third District Court of Appeal upheld the conviction on
25 January 12, 2017.

1 b. Mr. Dev petitioned for review in the California Supreme Court, but
2 the Court denied the petition on April 19, 2017. Mr. Dev’s
3 conviction became final on July 18, 2017 after the 90 days in which
4 to seek certiorari expired. (*People v. Smith, supra*, 234 Cal.App.4th
5 at p. 1465 [case is final on appeal after state supreme court denies
6 review and time for seeking certiorari expires]; United States
7 Supreme Court Rules, rule 13-1.)
8

9
10 c. Mr. Dev has no formal education or training in the law. In
11 particular, Mr. Dev has no training in appellate procedure or habeas
12 corpus procedure. (Declaration of Ajay Dev (“Dev Declaration”) at
13 para. 2, attached as Exhibit Q.)
14

15 d. After Mr. Dev’s appeal was final, his family retained undersigned
16 counsel to review the case a potential habeas petition on April 7,
17 2017. (Declaration of Cliff Gardner (“Gardner Declaration”) at para.
18 5, attached as Exhibit R.) Counsel was tasked with reviewing Mr.
19 Dev’s trial record to determine if there were any additional issues to
20 pursue in state habeas corpus proceedings. (*Id.* at para. 5.)
21

22
23 e. The Reporter’s Transcript of Mr. Dev’s trial contains 19 volumes
24 totaling 5,275 pages. (*Id.* at para. 6.) The Clerk’s Transcript
25 contains 15 volumes totaling 4400 pages. (*Ibid.*) The record also
26 includes augmented records. (*Ibid.*)
27
28

1 f. Habeas counsel completed review of the entire record in late August
2 or early September 2017. (*Id.* at para. 7.) In September 2017
3 counsel wrote to Mr. Dev and advised him of the potential areas of
4 investigation for a Petition for Writ of Habeas Corpus. (*Id.* at para.
5 8.) Counsel and petitioner met in prison in October of 2017 to
6 discuss the investigation. (*Ibid.*) The investigation began the next
7 month. (*Ibid.*) Because the investigation required contacting
8 witnesses in the United States, Nepal and Australia, it took seven
9 months to complete. (*Ibid.*)

10
11 g. The claims in this Petition are being raised within weeks after
12 counsel learned the factual and legal basis for the claims and
13 informed Mr. Dev of these findings. (*Ibid.*; Dev Declaration at para.
14 2.)
15

16 WHEREFORE, petitioner prays that this Court:
17

18 1. Take judicial notice of the transcripts and court records in *People v.*
19 *Dev*, No. 062444, *People v. Dev*, C062694 and *People v. Dev*, S240129;
20

21 2. Order respondent to file and serve a certified copy of the record on
22 appeal, and file an Answer to the Petition which (a) specifically admits or denies each of
23 the factual allegations of the Petition so this Court can determine if there are any material
24 facts in dispute and (b) shows cause why petitioner is not entitled to the relief sought;
25

26 3. After full consideration of the issues raised in the Petition, including
27 the factual allegations of both the Petition as well as the supporting memorandum filed
28

1 concurrently with that petition (hereby incorporated by reference), vacate the judgment
2 and sentence imposed upon petitioner or, in the alternative,


3
4 4. Depending on whether the state disputes any material facts in its
5 Answer, permit discovery and an evidentiary hearing at which petitioner may offer proof
6 concerning the allegations in this petition; and

7
8 5. Grant such other and further relief as may be appropriate.

9
10 DATED: 7/12/18

Respectfully submitted,

11
12 CLIFF GARDNER
LAZULI WHITT

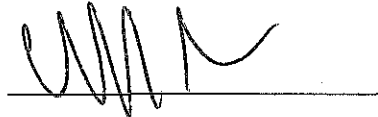
13
14 
15 By Cliff Gardner
Attorney for Petitioner

1 VERIFICATION

2
3 I, Cliff Gardner, declare that I am an attorney for petitioner Ajay Dev. I make this
4 verification for petitioner because of his absence from the county where I have my office.
5 I have read the attached petition and believe the matters stated therein to be true. On that
6 basis, I allege they are true.

7
8 I declare under penalty of perjury that the foregoing is true and correct.

9
10 Executed this 13th day of July, 2018, at Berkeley, California.

11 

12
13 Cliff Gardner

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7 IN THE SUPERIOR COURT
8 OF THE STATE OF CALIFORNIA
9 YOLO COUNTY

10 AJAY KUMAR DEV,
11
12 Petitioner,
13
14 On Habeas Corpus.

) No.:
)
) Court of Appeal Case No.
) C062694
)
) Superior Court (Yolo)
) No. 062444
)

15
16
17 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
18 PETITION FOR WRIT OF HABEAS CORPUS
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1 INTRODUCTION

2
3 Petitioner Ajay Dev and his wife Peggy adopted Sapna Deo from Nepal in 1999.
4 Five years later Sapna went to police claiming that Ajay had raped her several times a
5 week from the 1999 adoption through December 2003. She withdrew the allegations a
6 few months later. Then, after visiting Nepal in 2004 -- and being charged and convicted
7 of falsifying her date of birth -- she renewed her allegations. In 2008 the state acted on
8 these allegations, charging petitioner with 85 counts of improper sexual conduct with
9 Sapna, two counts of showing her pornography and five related counts involving threats
10 or false imprisonment. Sapna returned to America to testify.

11
12 At trial, the parties both agreed that Sapna’s credibility was key to the case. For
13 his part, the prosecutor explicitly recognized how important Sapna was to the case, telling
14 jurors “No Sapna, no case.” The prosecutor’s theory was that Sapna was telling the truth;
15 he told jurors there was no reason Sapna “would . . . be making this all up” and she had
16 no motive to “still be doing this.”

17
18 The defense also recognized Sapna’s credibility was key. Defense counsel told
19 jurors that the verdicts would “turn on one issue. Has [the prosecutor] proven beyond a
20 reasonable doubt that Sapna is telling the truth?” Under the defense theory Sapna was
21 lying -- she made up the allegations because she was concerned the Devs could void her
22 adoption (based on the false date of birth) and jeopardize her path to becoming an
23 American citizen.

24
25 Jurors listened to Sapna’s testimony. Jurors found Sapna credible, convicting Mr.
26 Dev on 76 counts. The court sentenced Mr. Dev to 378 years in state prison.

1 As discussed more fully below, because of a breakdown in the adversarial system,
2 the jurors deciding whether to believe Sapna did not hear a wealth of readily available
3 evidence directly supporting defense counsel’s theory that she was lying. This evidence
4 includes numerous witnesses to whom Sapna candidly admitted -- well before trial -- that
5 she made up the sexual assault allegations. It includes numerous witnesses to whom
6 Sapna explained the precise reasons she had made up the allegations -- she was angry at
7 petitioner and fearful her adoption could be voided and she wanted to ensure she stayed
8 on the path to becoming an American citizen. It includes messages from Sapna’s own
9 sister that her family had all told “Sapna to tell the truth that this never happen but she
10 scared now,” that Sapna wanted “to take revenge and get to Amrika,” “the only way to
11 come to Amrika was to come testify against Ajay” and “[n]ow Sapna says that if she
12 helps she will go to jail and get deported.” It includes forensic and documentary evidence
13 showing that Sapna lied while testifying. It includes documentary evidence from the
14 Nepali judicial system establishing the precise motive defense counsel unsuccessfully
15 sought to rely on at trial. And defense counsel has conceded that he had no tactical
16 reason for failing to present any of this evidence.

17
18 This Memorandum of Points and Authorities will discuss this (and other) new
19 evidence all directly undercutting Sapna’s credibility and the state’s case. At this point in
20 the proceedings, however, it is important to keep in mind that -- as discussed in the
21 Introduction to the Petition for Writ of Habeas Corpus -- this Court is *not* charged with
22 determining if relief is proper. Instead, the Court’s role is to “assume the petitioner’s
23 factual allegations are true” and decide whether petitioner has established a *prima facie*
24 case for relief on any of his claims. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) If
25 so, the Court must issue an Order to Show Cause, requiring the state to formally admit or
26 deny the factual allegations of the petition. (*Ibid.*)

1 As discussed below, assuming the truth of petitioner’s factual allegations here, he
2 has certainly established a prima facie case for relief. The Court should issue an Order to
3 Show Cause.

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STATEMENT OF THE CASE

On August 14, 2008, the Yolo County District Attorney’s Office filed a 92-count information against appellant Ajay Kumar Dev. The information charged as follows:

- 1) Counts 1, 4, 6, 9, 11, 14, 16, 19, 21, 24, 26, 29, 31, 34, and 36 each charged Mr. Dev with lewd or lascivious acts upon a 14 or 15-year-old child in violation of Penal Code § 288, subd. (c)(1). (4 CT 858, 860-867, 869, 871-874.)
- 2) Counts 2, 7, 12, 17, 22, 27, 32, 37, 40, 43, 46, 49, 52, 55, 58, 61, 66, 68, 70, 72, 74, 76, 78, 80, 82, and 84 each charged forcible sexual penetration in violation of § 289, subd. (a)(1). (4 CT 859, 861, 863, 865m 868m 870, 872, 874-875, 877-879, 881-883.)
- 3) Counts 3, 8, 13, 18, 23, 28, and 33 each charged forcible sexual penetration in violation of § 289, subdivision (I). (4 CT 859, 862-863, 866, 868, 870, 873.)
- 4) Counts 5, 10, 15, 20, 25, 30, 35, 39, 42, 45, 48, 51, 54, 57, 60, 63, 67, 69, 71, 73, 75, 77, 79, 81, 83, 85, and 86 each charged rape in violation of § 261, subd. (a)(2). (4 CT 860, 862-863, 866, 868, 870, 873, 875-876, 878-883.) Counts 75 and 79 added allegations that the crimes were committed with the intent to inflict great bodily injury upon the victim within the meaning of § 12022.8. (4 CT 891, 893.)
- 5) Counts 38, 41, 44, 47, 50, 53, 56, 59, and 62, felonies each charged forcible sexual penetration in violation of § 289, subd. (h). (4 CT 875-877, 879-882, 884-885.)
- 6) Count 64 charged distribution or exhibition of lewd material to a minor, in violation of § 288.2, subd. (a). (4 CT 886.)
- 7) Count 65 charged possession or distribution of matter depicting a minor engaged in sexual conduct, in violation of § 311.2, subd. (d). (4 CT 886.)
- 8) Count 87 charged criminal threats in violation of § 422. (1 CT 29.)
- 9) Count 88 charged assault with intent to commit mayhem, rape, sodomy, or oral copulation in violation of § 220. (4 CT 897.)
- 10) Count 89 charged false imprisonment in violation of §§ 236/237, subd. (a). (4 CT 897.)

1 11) Counts 90 and 91 each charged dissuading a witness in violation of §
2 136.1, subd. (b)(2), felonies. (4 CT 897.)

3 12) Count 92 charged dissuading a witness in violation of § 136.1, subd.
4 (a)(1). (4 CT 898.)

5 Mr. Dev pled not guilty. On June 25, 2009, the jury unanimously acquitted Mr.
6 Dev of the count 6 lewd and lascivious charge, the sexual penetration charges in counts 2,
7 3, 7, 8, 12 and 13, the rape charges in counts 5, 10, and 15, the charges of exhibiting
8 improper materials in counts 64 and 65, the false imprisonment charge in count 89 and
9 the enhancement allegation in count 75. (12 CT 3273.) The jury was unable to reach a
10 verdict on counts 86, 87, and 88, or the count 79 enhancement allegation. (12 CT 3275.)
11 The jury convicted on the remaining charges. (12 CT 3274-3366; 14 CT 3836-3842.) In
12 all the jury acquitted of 13 charges and one enhancement, it hung on three counts and one
13 enhancement and it convicted on 76 counts.

14
15
16 On August 7, 2009, the trial court sentenced Mr. Dev to state prison for 378 years
17 and 4 months. (14 CT 3836-3842.) Mr. Dev filed a Notice of Appeal. (14 CT 3829.)
18 On January 12, 2017 the appellate court affirmed the conviction. (*See People v. Dev*,
19 C062694, Opinion of Court of Appeal, attached as Exhibit A.) Mr. Dev's Petition for
20 Review to the state supreme court was denied on April 19, 2017. (*See People v. Dev*,
21 S240129, Order of April 19, 2017, attached as Exhibit B.)
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1 STATEMENT OF FACTS

2
3 The state charged Ajay Dev with improper sexual conduct towards his adopted
4 daughter Sapna Dev. Given the absence of any confirming eyewitness testimony -- and as
5 is typical in cases involving these kinds of allegations -- Sapna would be the state's main
6 witness and the state's case would depend on Sapna's credibility. Although the jury
7 ultimately believed Sapna, it was not without reservation; the jury acquitted on 13 counts
8 and one enhancement, hung on three counts and another enhancement and convicted on
9 the remaining 76 counts. Section A of this Statement of Facts will discuss evidence and
10 argument the jury heard. Section B will discuss new evidence that the jury never heard.
11

12 A. Evidence And Argument The Jury Heard.

13
14 **1. Family background, the adoption and the path to citizenship.**
15

16
17 Based entirely on Sapna's allegations, the state's theory was that Sapna was
18 sexually assaulted numerous times a week for five years -- from 1999 to 2004. (18 RT
19 5015.)¹ The defense theory on the other hand was that Ajay had never inappropriately
20 touched Sapna and instead Sapna was lying; the criminal allegations Sapna brought
21 would enable her to stay in America even though she had come to America under false
22 pretenses, having lied in her adoption paperwork. (18 RT 5061, 5117.)
23

24 Ajay was born in Nepal. (14 RT 3893-3894; 13 RT 3796.) His parents, along
25 with Ajay and his older brother Sanjay, immigrated to the United States in 1980 for his
26

27 ¹ Because numerous witnesses share the same common Nepali last names of
28 Dev and Deo, petitioner will occasionally used first names to avoid confusion. No
disrespect to any party or witness is intended.

1 father to pursue a Ph.D. at the University of California, Davis. (14 RT 3894; 14 CT 3920,
2 3924.) Ajay was 13 years old and Sanjay was 16 years old. (14 RT 3893-3894.) Ajay
3 enjoyed a typical American childhood and after high school joined his brother at Chico
4 State University. (14 CT 3924.) There, Ajay earned Bachelor's and Master's degrees in
5 Engineering. (13 CT 3797.)

6
7 In 1997, Ajay married an American woman named Peggy. (15 RT 4074.) Ajay
8 and Peggy lived in Davis, California. (15 RT 4108.) Ajay worked as a civil engineer for
9 the State of California's Department of Water Resources. (4 RT 760; 15 RT 4108.) At
10 the time of Sapna's allegations, Ajay had no prior criminal history. (13 CT 3797.) He
11 had never been charged with a felony or misdemeanor, and had never even been arrested.
12 (13 CT 3797.)

13
14 In October 1998, Ajay, Peggy, and Ajay's parents traveled to Nepal to spend time
15 with family. (15 RT 4162; 16 RT 4399.) There Ajay and Peggy spent time with three of
16 his distant nieces, one of whom was Sapna Deo. (15 RT 4163.) Sapna's father, Birendra
17 Deo, had five daughters. (9 CT 2608.) He worked in a cigarette factory and it was hard
18 to make ends meet. (9 CT 2608-2609.) This was particularly so because of the dowry
19 system in Nepal. (9 CT 2608.) Under this system, the bride's father is required to pay a
20 substantial sum of money or give land to the groom's father. (9 CT 2608.) With five
21 daughters, the dowries for marriage were a heavy burden for Birendra.

22
23 Ajay and Peggy decided to adopt an older child from Nepal from a poor family.
24 (15 RT 4169.) They could provide the child with an education in the United States as
25 well as citizenship. (14 RT 4027-4030.) That child could then help their family in Nepal.
26 (15 RT 4166.) Ajay and Peggy decided they would speak with Sapna's parents about
27

1 adopting Sapna. (15 RT 4168-4169.) Peggy felt a connection with Sapna and thought
2 that she would be a positive addition to their family. (15 RT 4172.)

3
4 Sapna's parents approved; Ajay and Peggy would act as her guardians in the
5 United States but Sapna would maintain her relationship with her family in Nepal. (4 RT
6 715.) Ajay and Peggy promised they would pay for Sapna's education in the United
7 States and maintain her Nepali cultural values as well. (15 RT 4113.) The adoption
8 would allow Sapna a green card and to eventually obtain United State's citizenship. (4
9 RT 715-716; 7 RT 1650; 15 RT 4010, 4124, 4166; 17 RT 4517.)

10
11 In January 1999, Sapna came to the United States to live with Ajay and Peggy. (4
12 RT 720.) Sapna enrolled at Holmes Junior High School as a ninth grader. (14 CT 3939.)
13 Sapna took to American life easily, enjoying high school and her new friendships. (14 RT
14 3735-3738, 3744; 15 RT 4190; 16 RT 4225, 4226-4227.) Friends and relatives described
15 Sapna as happy and openly affectionate towards both Ajay and Peggy. (7 RT 1788-1789;
16 14 RT 3602, 3673, 3777; 15 RT 3915, 4058-4059.)

17
18 Sapna's adoption became final on December 6, 1999. (15 RT 4174.) Under
19 United States law, Sapna had to be under 16 years old in order to be adopted. (11 RT
20 2722; 13 RT 3456; 15 RT 4168.) This was not a problem; according to Sapna's 1998
21 Nepali passport, on December 6, 1999, Sapna was still one-month shy of her sixteenth
22 birthday. (5 RT 979-980; 9 CT 2502.)

23
24
25 In December 2001, Ajay and Peggy filed an application with the Immigration and
26 Naturalization Service (INS) to adjust Sapna's citizenship status. (16 RT 441.) Sapna
27 was now on a path to American citizenship.

1 As INS agent Luz Dunn explained at trial, as their legally adopted daughter, in a
2 few years Sapna would automatically qualify for United States citizenship through the
3 INS's derivative citizenship program. (11 RT 2713, 2722-2724; 13 RT 3456-3457.)
4 Absent her adoptive status, however, Ms. Dunn testified that Sapna would have no
5 guarantee of obtaining United States citizenship. (11 RT 2784-2785; 13 RT 3430, 3456-
6 3457, 3460-3461.) Similarly, if Sapna was over 16 at the time of her adoption, she would
7 not qualify for automatic derivative citizenship and could only gain citizenship through
8 the rigorous and uncertain path of naturalization. (11 RT 2784-2785; 13 RT 3430.) In
9 April 2002, INS issued Sapna a permanent resident card or green card. (11 RT 2740; 16
10 RT 4411; 9 CT 2450.)

11
12 **2. Sapna ignores Nepali cultural norms as she grows into a**
13 **teenager and attends college.**

14
15 As noted above, Ajay and Peggy promised Sapna's parents they would maintain
16 Nepali cultural values. (15 RT 4113.) This became increasingly difficult as Sapna
17 became an older teenager, and resulted in a great deal of friction in the home.

18
19 Sapna graduated from high school in June 2002 and started Sacramento City
20 College that fall. (4 RT 813, 822.) She continued living at home but she now had a cell
21 phone and use of the family car. (4 RT 822; 5 RT 1194-1195; 6 RT 1239; 15 RT 4115,
22 4200; 16 RT 4201.) Peggy testified that Sapna started to skip her college classes, text
23 various boys and stay out past her curfew without calling. (15 RT 4115, 4118-4122; 16
24 RT 4208-4209, 4234-4237.)

25
26 After a series of disagreements about Sapna's whereabouts and her curfew, Ajay
27 and Peggy became increasingly concerned they could not fulfill their promise to Sapna's
28

1 Nepali parents that she would abide by Nepali cultural standards, not American ones.
2 Shyamli Sah -- a Nepali family friend living in the United States -- testified that
3 promiscuity is not tolerated in Nepali culture. (15 RT 4061.) Sanjay Dev confirmed that
4 in Nepali culture premarital sex was forbidden for women. (14 RT 3875; 15 RT 4061.)
5 Unsure of how to handle the situation, on October 1, 2002, Peggy emailed Sapna's Nepali
6 father Birendra:

7
8 Ajay and I expect Sapna to follow our rule of not dating or having sex
9 before marriage as I know this will bring shame on her, us and your family
10 as well. I don't have confidence in her to live by these requests at this time.
11 I pray that you may give her and me guidance as how to deal with this
12 situation before it becomes too late.

13 (15 CT 4336.)

14
15 Sapna's behavior continued. In November 2002, Ajay and Peggy suspected that
16 Sapna was dating Siddhartha ("Sidd") Jain who was five years older than Sapna. (15 RT
17 4199-4200; 16 RT 4201; 14 CT 3907, 3911.) Ajay and Peggy forbade her from
18 communicating with Sidd. (14 CT 3911.) At trial Sapna denied dating Sidd or having
19 sex with him. (7 RT 1676-1679.)

20
21 But Sapna's good friend Sneh Dahal told a very different story, testifying that
22 Sapna dated Sidd for several months, regularly referred to him as her boyfriend and
23 would go to his apartment two to three times a week. (14 RT 3755-3758.) Ms. Dahal
24 saw Sidd's black Mercedes parked in front of the Dev home on at least one occasion.
25 (*Ibid.*) Jamie Erin Murray-Clark -- a neighbor of the Devs -- confirmed this; she saw a
26 black Mercedes parked outside the Dev home on several occasions. (13 RT 3552.) Ms.
27 Murray-Clark and her husband James also saw Sapna close the living room curtains when
28 "an Indian or Iranian man" entered the Dev home and then re-open the curtains once the

1 man left. (13 RT 3552-3553.) In fact, they saw Sapna bring other young men to the
2 house when Ajay and Peggy were not home. (13 RT 3552.)

3
4 Sapna testified that on January 2, 2003, she told Ajay she thought she was
5 pregnant. (4 RT 825.) Ajay took Sapna to the Pregnancy Consultation Center. (4 RT
6 827; 16 RT 4380.) Britta Guerrero from the Pregnancy Consultation Center testified that
7 the laboratory tests showed Sapna had been pregnant for about five weeks -- since
8 November 2002. (10 RT 2621, 2623.) According to Sapna's friend Sneh Dahal, this is
9 precisely when Sapna was dating Sidd. (14 RT 3757.)

10
11 Despite Sapna's claim that Ajay was raping her several times each and every week
12 during this period -- and had gotten her pregnant -- just one month later, in February
13 2003, Sapna gave Ajay a birthday card:

14
15 I love you daddy. You are a very special part of me. Without you I would
16 not be able to express my emotions and I would not be able to be myself.
17 With all my heart & love[,] you[r] daughter Sapna.

18
19 (14 RT 4197; 9 CT 2531-2532.)

20
21 When Sapna's behavior continued, Ajay suggested that Sapna should spend the
22 summer in Nepal with her family to re-immense her into Nepali culture. (16 RT 4212; 15
23 CT 4312.) Ajay and Peggy then arranged with Sapna's Nepali father for her to spend the
24 summer at home in Nepal. (15 CT 4312.)

25
26 Before leaving for Nepal, Sapna got pregnant again. (5 RT 1138.) Under oath,
27 Sapna told jurors that the pregnancy was a result of Ajay's sexual assault and that Ajay
28 again took her to the Pregnancy Consultation Center. (5 RT 1145.) Sure enough, the

1 clinic paperwork seemed to confirm Sapna's testimony that Ajay was there again. (5 RT
2 1141.) The paperwork shows that on May 8, 2003, she returned to the clinic and
3 terminated the pregnancy by taking an abortion pill. (5 RT 1138; 10 RT 2621-2623; 9 CT
4 2350, 2362.)

5
6 But it turned out that Sapna had lied again, forging Ajay's signature. Handwriting
7 expert James Blanco testified that after comparing the signature to both Ajay's
8 handwriting as well as Sapna's handwriting it was his expert opinion that it was "highly
9 probable" that Sapna forged Ajay's signature. (12 RT 3144.) At the preliminary hearing,
10 however, Sapna was sure that Ajay signed the paperwork and denied having written it
11 herself. (5 RT 1141.) But at trial when confronted by defense counsel's questioning that
12 the signature looked like her handwriting, and that defense counsel had consulted with a
13 handwriting expert, Sapna admitted that it was not Ajay's signature and she *had* forged it:

14
15 Q: [by defense counsel): You recognized the handwriting for the
16 signature Ajay K. Dev, as in fact being your handwriting, Right?

17 A: (By Sapna): Yes.

18 Q: Because you in truth and in fact signed his name?

19 A: Yes.
20

21 (5 RT 1139.) She then claimed did not know whether or not she did. (5 RT 1139-1140.)
22

23
24 On May 30, 2003 -- pursuant to the plan to re-immers Sapna in Nepali culture --
25 Ajay and Sapna flew to Nepal where they parted ways; Ajay visiting relatives in both
26 Nepal and India and Sapna spending the majority of her time with her family and friends
27 in Boria and Janakpur, Nepal. (4 RT 855-856; 15 RT 4114, 4123- 4124.) Of course,
28 Sapna was now free to disclose any abuse to her family and friends.

1 She did no such thing. Instead, less than a month into her stay, Sapna called Peggy
2 and told her she wanted to come home. (15 RT 4128.) According to Peggy, Sapna
3 begged Ajay and Peggy to allow her to return from Nepal a month early. (5 RT 4128-
4 4129.) This would require her to travel back to the United States alone with Ajay -- the
5 man who she would later claim had been raping her continuously two to three times a
6 week for years. (4 RT 853, 856-857; 15 RT 4128-4130.)

7
8 That fall, Sapna returned to Sacramento City College. (14 CT 3944.) Araz
9 Taifehesmatian recalled meeting Sapna in physics class. (9 RT 2212.) Araz testified that
10 at some point during the semester, they started dating. (9 RT 2220.) Ajay and Peggy
11 suspected Sapna might be having sex with Araz, but Sapna vehemently denied it and
12 accused them of being too controlling and overly suspicious. (4 RT 870; 7 RT 1737; 9
13 RT 2290; 16 RT 4232-4233, 4445; 9 CT 2551; 10 CT 2725.)

14
15 Once again, however, Sapna's own friends established she was lying. At trial,
16 Araz testified that during the semester he and Sapna had sex at his mother's house once a
17 week. (9 RT 2324.) Sneh Dahal corroborated his testimony and verified that, during this
18 time period, Sapna referred to Araz as her boyfriend. (14 RT 3767, 3772.) For her part,
19 Sapna denied that she was dating Araz. (4 RT 870.)²

20
21
22
23
24 ² On November 4 and November 5 -- about the time Sapna started sleeping
25 with Araz -- she went to Planned Parenthood. (9 RT 3309-3310.) She said nothing about
26 being sexually assaulted multiple times a week as she would later claim. Instead, she told
27 the intake nurse that she had a "new partner" and had sexual intercourse "a couple of
28 weeks ago," but that the condom may have broken. (9 CT 2393; 13 RT 3319-3320.) At
trial, Sapna admitted she went to Planned Parenthood on these dates to be tested for
Sexually Transmitted Diseases because she was anticipating having sex with either Will
(a new boyfriend) or Sidd. (4 RT 849.)

1 Sapna's home life with Peggy and Ajay became increasingly strained. Sapna
2 continued to go out without permission and would refuse to tell Peggy and Ajay who she
3 was with. (16 RT 4242-4245.) On December 1, 2003, Ajay and Peggy gave Sapna an
4 ultimatum; she must abide by their rules or move out. (7 RT 1625-1626.) To Ajay and
5 Peggy's surprise Sapna decided to move out. (16 RT 4247-4248.) Sapna left this note:

6
7 Hi, mom and dad! Thanks for everything that you have give [sic]
8 me, love, food, and house. I will keep in touch. don't worry! I love
9 you very much. Alejandra came to pick me up! I might come back to
pick up my bike later tonight. ♥ Sapna.

10
11 (6 RT 1480-1481; 9 CT 2518.)
12

13 Ajay and Peggy were shocked when Sapna left. (16 RT 4247-4248.) Ajay
14 mailed Sapna's father Birendra and told him Sapna moved out "to do things we don't
15 approve of," explained that he and Peggy hoped Sapna would move back into their home,
16 finish her education and pursue a career and asked Birendra to convince Sapna to return
17 to Nepal again – this time for an entire semester. (10 CT 2726.) For her part, Peggy e-
18 mailed Birendra and asked him to encourage Sapna to come home and straighten out,
19 adding that the adoption may have been a mistake. (16 RT 4275-4280; 10 CT 2728-
20 2729.) She conveyed Ajay's heartbreak over the situation along with Ajay's anxiety over
21 facing the Nepali community in light of Sapna's conduct. (16 CT 4345.) Peggy copied
22
23
24
25
26
27
28

1 Sapna on the email. (16 RT 4275-4280; 10 CT 2728-2729.)³

2
3 On December 24, 2003, Ajay and Peggy took a cruise to the Caribbean. (16 RT
4 4287; 10 CT 2721.) While on their trip, Ajay sent an e-mail to Birendra, with a copy to
5 Sapna, cutting off all financial assistance to Sapna and her family in Nepal. (16 RT 4287-
6 4289; 10 CT 2721-2723.) Ajay explained that Sapna moved out because she wanted
7 unlimited freedom to be with boys and socialize. (10 CT 2721-2723.) Although Ajay
8 had promised to provide her with an education and thus a means to provide financial
9 support to her family in Nepal, Sapna was not responsible enough to follow through. (10
10 CT 2721-2723.)

11
12 Sapna responded, emailing Birendra and saying she moved out because Ajay and
13 Peggy were “abusive,” they slapped her and she was afraid of them. (9 CT 2550; *see also*
14 4 RT 861-862; 15 RT 4114, 4118-4122; 9 CT 2549-2550.) Sapna then lied to her father,
15 insisting that the Devs’ suspicions about her romantic relationships with boys were not
16 true. (9 CT 2550-2551.)

17
18 Peggy and Ajay returned from their Caribbean trip on January 5, 2004. (10 RT
19 2541.) When they arrived home, Ajay and Peggy greeted Sapna curtly and demanded that
20 she return her cell phone to them before she left. (13 RT 3587-3590; 16 RT 4299-4300.)
21

22
23 ³ Peggy explained why Ajay was so devastated. Ajay’s parents had not
24 approved of the adoption which created a rift in the family; Ajay’s parents and brother
25 Sanjay stopped speaking with Ajay and Peggy for about three years after the adoption. (4
26 RT 750-71; 14 RT 3878-79; 15 RT 4170-72, 4183-84.) As such, when Sapna began
27 dating and moved out, Ajay became depressed; he felt like a failure to Sapna, his parents,
28 her Nepali parents and the greater Nepali community. (16 RT 4552-4556.) On December
10, 2003, distraught and overwhelmed, Ajay went to a Motel 6 near his commuter bus
stop. (*Ibid.*) He had left a note for Peggy telling her that he just needed to get away for
the night -- Peggy found him there alone and brought him home. (16 RT 4552-4556.)

1 Three days later, Sapna e-mailed Ajay to tell him she missed him and Peggy “a lot” and
2 signed the e-mail “Miss you and love you. Your Daughter Sapna.” (16 RT 4300-4301;
3 15 CT 4347.) Later she sent another email trying to reconcile:

4
5 Personally, I really miss you guys more than anything right now and I really
6 want to talk especially after you came from your trip. I don't know if you
7 want to see me or not. I think and hope that you want to see me. I want to
8 come and visit but I don't know how comfortable you are to see me right
9 now. If you also want to see me please let me know through email....I love
10 you and miss you very much. Your Daughter - Sapna.

11
12 (15 CT 4349.)

13 Ajay responded, suggesting once again Sapna return to Nepal to regain
14 perspective. “The best thing for you today would have been to not go to school this
15 semester and go to Nepal for 5 months and come back to live with us after [your sister]
16 Maduri’s marriage and resume your school for Fall of 2004.” (14 RT 3910.) Of course,
17 in Nepal Sapna would again be free to disclose to her family and friends any abuse that
18 had occurred.

19
20 Sapna came over to Ajay and Peggy's house. (16 RT 4303-4305.) Peggy told
21 Sapna she was not welcome in their home until she apologized for making the false
22 accusations of physical abuse. (16 RT 4303-4305.)⁴

23
24 ⁴ Two days later Sapna testified that she and Ajay agreed to talk. (4 RT 881.)
25 Because Peggy had told Sapna she could not return to the Dev home, they met at the same
26 motel by Ajay’s commuter bus stop where he had gone in December. (16 RT 4252-4256,
27 4305-4307.) Peggy confirmed that later that same day Ajay told Peggy about the meeting
28 and asked for Peggy’s assistance in writing a contract he and Sapna had agreed upon to
reflect Sapna’s promise to achieve her college goals. (16 RT 4306-4308; 11 CT 3025-
3026.) In fact, Sapna signed a contract promising to pursue her college degree in
exchange for tuition assistance from Ajay and Peggy. (15 CT 4343-4344.)

1 In late January 2004 Ajay and Peggy found the email address of Sapna's new
2 boyfriend Will and sent him an email. (16 RT 4325-4331.) Ajay explained to Will that if
3 he was going to continue dating Sapna, he had to respect her heritage and abide by Nepali
4 cultural values. (16 RT 4327-4329; 10 CT 2799.) The next day -- February 1, 2004 --
5 Will broke up with Sapna and replied to Ajay in an e-mail: "Ajay Dev, I have done as you
6 wish, and broken all romantic relations with Sapna." (17 RT 4518-4519; 10 CT 2800.)
7

8 Sapna admitted that Will told her that he broke up with her because of Ajay's e-
9 mail. (5 RT 929; 7 RT 1712-1713.) She also admitted that she was outraged and blamed
10 Ajay for the break-up. (7 RT 1712.) Her friends Megan Ann Yarbrough and Sneh Dahl
11 confirmed that Sapna was furious with Ajay over her breakup with Will. (8 RT 1979; 14
12 RT 3773-3774.)
13

14 The very next day -- February 2, 2004 -- Sapna went to the police station and
15 accused Ajay of raping her two to three times a week for five years, from ages 15 through
16 20. (8 RT 1969, 1976, 1978, 1981-1982, 1996, 2065-2069, 2082.)
17

18 **3. Sapna alleges that Ajay raped her two to three times a week for**
19 **five years.**

20 On February 3, 2004, Detective Paul Hermann interviewed Sapna about her
21 allegations. (8 RT 2097- 2098.) Sapna reported that Ajay raped her approximately two to
22 three times a week starting two weeks after she came to the United States to live with the
23 Devs until she moved out of the house in December 2003. (5 RT 1135; 10 CT 2744-
24 2755.) At trial, Sapna's friend Sneh Dahal testified that after going to police Sapna called
25 numerous friends and told them Ajay had been having sex with her. (14 RT 3826, 3828-
26 3829.) Ms. Dahal said Sapna also told her not to speak to any investigators -- Sapna
27 wanted to sue Ajay. (14 RT 3833.)
28

1 SD: How are you telling the truth?

2 AD: You are lying. This is the worst possible accusation I could possibly
3 have.

4 (15 CT 4155-4156.) The conversation continued with Sapna trying to get Ajay to admit
5 that he had sex with her:
6

7 AD: Why are you telling me all this?

8 SD: I am just, I am just asking you, should I talk about this, or should I
9 not?

10 AD: This is the dumbest thing I ever heard. If you want to make me
11 wrong accusation and kill me, kill my life, try to do whatever you
12 want. I have my own voice to the police department.

13 (15 CT 4157.)
14

15 The conversation continued in this vain:
16

17 AD: I am not accusing you of anything, but you are accusing me.

18 SD: I am not accusing you.

19 AD: You have already accused me of abuses, now you are accusing me of
20 sexual abuse too.

21 SD: How am I abu [sic] how am I doing that daddy?

22 AD: You have already accused me of physical abuse, now you are [UI]

23 SD: Well, you have hurt me, haven't you? You have hit me, haven't
24 you?

24 AD: No, I have not. I have slapped you. I have not hurt you.

25 SD: You have hit me, you have.

26 AD: Sapna what do you want from me babu? What do you want from
27 me? Why are you [UI]

28

1 SD: I just want your honesty, ok. I don't want you to say anything that's
2 not true. You, you did have sex with me when I was 15, up until I
moved out.

3 AD: No, not true.

4 SD: It's not true?

5 AD: It's a big lie and you are trying to frame me, in the negative way

6

7 (15 CT 4158.) Ajay then tells Sapna that they should go to the police together:

8

9 SD: I guess I should just go to the police then daddy.

10 AD: Sapna.

11 SD: What?

12 AD: Why don't we both go to the police together.

13 SD: Both of us?

14 AD: Yes.

15

16 (15 CT 4159-4160.)

17

18 At one point, Sapna asks Ajay, "How is my life re . . . ruining daddy?" (15 CT
19 4174.) The next exchanges -- boldfaced here to indicate that they were actually spoken in
20 Nepali and had to be translated -- were important to both the prosecution and the defense.
21 According to Aryal Shakti, a certified Nepali translator working in the federal courts,
22 Ajay replied by saying "**Because you have fucked me after 18 years of your age.**" (15
23 CT 4174.) Sapna replied "Ok, so?" (15 CT 4174.) After a long pause in the
24 conversation, Ajay stated (again in Nepali but with the word "consent" in English) "**That**
25 **means you have given me consent.**" (15 CT 4174.)

26

27

28

1 The meaning of these two sentences were very much in dispute. The state spent
2 considerable time arguing that this reflected an admission of guilt on Mr. Dev's part. (18
3 RT 4982-4983.) The defense disagreed, arguing that translations are not exact and Mr.
4 Dev was saying that he has been "fucked" as in "she is framing him." (18 RT 5076-
5 5077.) What was clear however was that regardless of Sapna's subsequent translation for
6 the jury, at the time Sapna herself did *not* believe that the purpose of the pretext call had
7 been achieved, as the next exchange shows:

8
9 AD: **Talk softly, why are you talking so angrily?**

10 SD: Because I want you to talk to me. I want you to say it. (15 CT
11 4174.)

12
13 Later in the conversation, there was another exchange between Ajay and Sapna as
14 to which the parties disagreed on the translation. As noted above, the state relied on
15 Sapna to translate Ajay's statements spoken in Nepali. (5 RT 962; 9 CT 2480, 15 CT
16 4176.) According to Sapna, Ajay said, "**But you had sex with me when you were 18.**"
17 (15 CT 4176.) The defense expert who translated the pretext call testified that although
18 Ajay's statement was inaudible, he was able to decisively rule out Sapna's translation
19 because -- although mostly inaudible -- the expert could unmistakably hear the first
20 syllable of the word in dispute which was incompatible with any Nepali word connoting
21 "sex." (14 RT 3866-3867.)

22
23 As before, however, what followed this exchange was repeated frustration on
24 Sapna's part that Ajay would not admit the allegations. "**Why don't you admit?**" Sapna
25 demanded of Ajay. (15 CT 4180.) At the end of the call Sapna again said to Ajay, "I just
26 wanted to ask you about things, but you aren't. Definitely you are not telling me anything
27 about this. I am gonna go." (15 CT 4184.)
28

1 In an effort to convince Sapna that her false allegations would backfire on her,
2 Ajay suggested that her allegations would eventually be disproved by medical records
3 which would surely expose the real person who impregnated her. Ajay told Sapna “**You**
4 **had abortion when you were 18 years old and they have the record. When they have**
5 **the record, they will understand with which boy did you go with to give name.**” (15
6 CT 4180.) Sapna did not deny that she had been impregnated by a boyfriend and instead
7 simply stated “**the boy’s name is not there.**” (15 CT 4180.)

8
9 Rather than try and hide Sapna’s allegations, Ajay asked Sapna to tell, “mom what
10 you just told me.” (15 CT 4191.) When Peggy got on the phone, Sapna initially tried to
11 pretend that Peggy already knew about the accusations. (15 CT 4191.) When Peggy
12 asked what she was talking about, Sapna told Peggy that Ajay had been having sex with
13 her since she was fifteen up until she moved out. (15 CT 4191-4192.) Peggy handed the
14 phone back to Ajay and Ajay instructed Sapna to, “go to [the] police department, go to the
15 counselor and say exactly the same thing.” (16 RT 4485-4486; 15 CT 4192.)

16
17 **5. Sapna withdraws the allegations that Ajay had sexually**
18 **assaulted her for years, gets arrested and convicted in Nepal for**
19 **passport fraud, and renews the allegations.**

20 On May 5, 2004, with no formal charges pending against Ajay, Sapna wrote a
21 letter to the District Attorney requesting that police “withdraw the case against Ajay K.
22 Dev.” (9 CT 2501.) Although she denied having provided false information to the
23 police, she asked that all the charges be dropped. (5 RT 967-970; 9 RT 2140; 9 CT
24 2501.) Peggy testified that Sapna called her on Mother’s Day to let her know she had
25 called police to drop the charges against Ajay. (16 RT 4331.)

26
27 About a month after recanting her allegations, Sapna left for Nepal to celebrate her
28 sister’s wedding. (5 RT 964-965; 10 RT 2438, 2474.) During this visit, Murali Narayan

1 Deo filed a report with the Nepali government alleging that Sapna had lied about her date
2 of birth on her passport application. (5 RT 982-986, 1025; 10 RT 2572-2574; 9 CT 2502-
3 2504.) On her passport application -- as well as for purposes of her adoption -- Sapna had
4 stated that her date of birth was January 5, 1984. (5 RT 1025-1026; 10 RT 2496.) Murali
5 alleged that Sapna lied and that in fact her date of birth was April 28, 1983. (5 RT 1025-
6 1026.) As Sapna described at trial, on July 4, 2004, the Nepali government arrested her,
7 charged her with passport fraud, and confiscated her 1998 passport. (5 RT 977-980.)
8 Sapna was in jail for 20-21 days before she was finally released. (5 RT 978-979.)
9

10 It turns out that Sapna's date of birth was critical to the legality of her adoption in
11 America. As noted above, under United States law, Sapna had to be under 16 in order to
12 be adopted. (7 RT 1731; 10 RT 2536.) According to Sapna's 1998 Nepali passport
13 Sapna's date of birth was January 5, 1984, which made her one-month shy of her
14 sixteenth birthday on the date her adoption became final on December 6, 1999. (5 RT
15 979-980; 9 CT 2502; 14 CT 4074.) But if her date of birth was April 28, 1983 as charged
16 in the Nepali court proceedings, then Sapna was *over* 16 at the time of the adoption and
17 could *not* be legally adopted.
18

19 At trial, Sapna acknowledged that Murali may have filed the charges against her
20 because he may have held a grudge against Sapna because she had gone to live in
21 America but "[his] children could not go to America." (5 RT 1030.) Of course, without
22 her passport, Sapna had no way of re-entering the United States and, as a result, risked
23 losing her legal residency status and her path to American citizenship.
24

25 On June 26, 2005, Sapna was convicted of passport fraud in Nepal. (14 CT 4071-
26 4093.) After hearing testimony, the Nepal court determined that Sapna's accurate birth
27 date was April 28, 1983, not January 5, 1984. (5 RT 985-986; 14 CT 4071-4093.) Due to
28

1 her conviction, Sapna was not allowed to re-enter the United States without a “waiver of
2 police certificate.” (11 RT 2756; 13 RT 3437-3439, 3447-3448, 3450-3452.)⁵

3
4 At some point, Sapna contacted her old boyfriend Araz Taifehesmatian and told
5 him she was being held in Nepal against her will. (9 RT 2140-2142.) Sapna asked Araz
6 to call Detective Hermann to help facilitate her return to the United States. (9 RT 2141-
7 2144.) And he did just that.

8
9 **6. Sapna’s return to the United States to testify against Ajay.**

10
11 On October 3, 2005, at the behest of Detective Hermann, the United States
12 Embassy in Nepal issued the waiver of police certificate, allowing Sapna to re-enter the
13 country. (9 RT 2157; 11 RT 2759, 2769-2771; 13 RT 3437-3439, 3446-3447; 14 CT
14 4087.) Immigration specialist, Luz Dunn, testified that the embassy waived Sapna’s
15 police certificate because Sapna planned to testify in a criminal case. (11 RT 2759; 13
16 RT 3439.) Obviously Sapna was no longer withdrawing her allegations.

17
18 Detective Hermann advised Sapna that in seeking a new passport, she should use
19 the birth date of April 28, 1983, consistent with the Nepali court verdict. (5 RT 987-988,
20 1083-1084.) After obtaining a new passport, Sapna re-entered the United States on
21 November 16, 2005. (5 RT 1000; 9 RT 2153; 9 CT 2505.) Upon entry, I.C.E.
22 confiscated Sapna’s green card because the birth date conflicted with the birth date on her

23
24 ⁵ Immigration specialist Luz Dunn explained that a police certificate is a
25 document which shows whether or not a person has criminal record in their country of
26 origin. (13 RT 3437.) If a person has a criminal record, pursuant to United States
27 immigration law, they are not entitled to come into the United States. (13 RT 3437.) A
28 waiver of police certificate requires the United States to waive the requirement that the
country of origin provide the police certificate prior to entry into the United States. (13
RT 3438.)

1 new 2005 passport. (5 RT 1001-1002.) Detective Hermann testified that Sapna
2 immediately applied for citizenship, but was denied as were her numerous appeals. (9 RT
3 2183-2185.) In contrast, Sapna testified that immigration officials advised her that I.C.E.
4 would send her a new green card. (4 RT 897-898; 5 RT 1001-1002.) However, at the
5 time of trial, almost four years later, Sapna conceded that I.C.E. had still not sent her a
6 new green card. (4 RT 897-898; 5 RT 1001-1002.) Nevertheless, at trial, Sapna testified
7 that she was still in the process of becoming a United States citizen. (4 RT 897.)
8

9 Ms. Dunn further explained that the United States government was still
10 investigating Sapna's birth date and, given the date discrepancy, her adoption and
11 derivative immigration status could be revoked. (13 RT 3422, 3440-3441.) But Dunn
12 explained there was another path to citizenship for Sapna: a person illegally residing in
13 the United States could become an American citizen by proving she was a victim of
14 domestic violence. (13 RT 3433-3434, 3446-3447.)
15

16 On April 26, 2006, about five months after Sapna returned to the United States,
17 Ajay was arrested. (1 CT 1-3; 9 CT 2505.) On March 27, 2009, one month before
18 testifying against Ajay and three and a half years after re-entering the country, Sapna
19 submitted an application with the INS to have her confiscated green card replaced. (4 RT
20 894, 897-898; 5 RT 1086-1087; 9 CT 2451-2452.)
21

22 **7. Sapna's testimony at trial.**

23

24 At trial, Sapna testified in support of the allegations she had raised. (4 RT 754-6
25 RT 1777.) It is fair to say that some of this testimony showed remarkable evolution.
26

27 According to Sapna, the rapes initially occurred at home when Peggy was not
28 around. (4 RT 769.) They evolved -- according to Sapna, the rapes soon began to occur

1 when the family traveled to other people's homes as well. Thus, Sapna told jurors Ajay
2 raped her when they visited the home of Beverly Taylor, Peggy's mother. (4 RT 806,
3 808-813; 7 RT 1585-1595.) He raped her when they visited the home of Terry Easley,
4 Peggy's sister. (4 RT 806, 808; 7 RT 1513-1514.) He raped her when they visited the
5 home of Evonne O'Donnell, Peggy's best friend. (4 RT 808; 7 RT 1513, 1596-1599.)
6

7 But it was not just the location that evolved. As noted above, Sapna said that
8 initially Ajay only raped her at home when Peggy was not around. (4 RT 769, 775-776.)
9 According to Sapna, as Ajay apparently became bolder in his choice of locations, he also
10 became bolder in committing these forcible sex acts in the presence of numerous
11 witnesses. According to Sapna, when visiting Peggy's mother, Ajay raped her on the
12 floor of the bedroom while Peggy slept on the bed in the same room. (4 RT 809-811; 7
13 RT 1585-1593.) While visiting Peggy's sister Terry Easley, Ajay raped her on the floor
14 of Terry's living room while Terry's sons Benjamin and Nacho slept on the floor next to
15 them. (7 RT 1514, 1593, 1595.) And apparently becoming even bolder, on other
16 occasions Ajay raped her while Peggy slept in the very same bed. (7 RT 1521-1531,
17 1595-1598.)
18

19 In her testimony Sapna often admitted she could not recall details of the incidents.
20 (4 RT 776, 779; 7 RT 1592-1594.) Perhaps not surprisingly, when she did recall details,
21 there were a number of stark inconsistencies in the various versions Sapna gave.
22

23 By way of example only, at the preliminary hearing Sapna testified that *no* rapes
24 ever occurred when she was sleeping in the same bed as Peggy. (7 RT 1560-1562.) But
25 as noted above, at trial the story changed dramatically and she recalled that Ajay raped
26 her in the same bed as Peggy on several occasions. (7 RT 1521-1531, 1595-1598.)
27
28

1 Officer Briesnick was the first officer to interview Sapna after she made her
2 allegations on February 2, 2004. Sapna reported that her last sexual encounter with Ajay
3 was before she moved out of the Dev home in December 2003. (8 RT 2075, 2077-2078,
4 2080-2081.) The next day Sapna reiterated the same point to Detective Hermann,
5 explaining that the rapes stopped once she moved out:

6
7 Oh it lasted . . . until I moved out; probably just December, the month of
8 December. (10 CT 2745.)

9
10 But yet again, the story evolved. At trial, Sapna testified that weeks after she
11 moved out, Ajay raped her at Motel 6 where they met on January 12, 2004. (7 RT 1569-
12 1579.) Sapna told jurors that she voluntarily accompanied Ajay into the motel room --
13 despite having been raped over 500 times -- giving him “benefit of the doubt.” (7 RT
14 1552-1553, 1556.) Sapna told jurors that she had nightmares about this experience and it
15 was so traumatic it was something she “wouldn’t forget.” (7 RT 1548-1549.)

16
17 Curiously, however, Sapna did just that -- she forgot about it almost immediately.
18 Although Sapna spoke to officer Briesnick and Detective Hermann only weeks after the
19 January 12 incident that she “wouldn’t forget,” she forgot about it completely and told
20 both of them that the sexual assaults ended in December when she moved out. (8 RT
21 2077-2078, 2080-2081; 10 CT 2745.) She mentioned nothing about the experience she
22 “wouldn’t forget” to either officer. (7 RT 1549-1550, 1696-1697; 8 RT 2079; 9 RT 2107-
23 2108, 2205.) At trial she explained this by telling jurors she “couldn’t remember” the
24 incident that only moments earlier she had told jurors she “wouldn’t forget:”

25
26 Q: (by defense counsel) And then you [were] interviewed by the
 detective. Correct?

27 A: (By Sapna) Yes.

28 Q: And you didn’t tell him about Motel 6?

1 A: I couldn't remember at that time. (7 RT 1582-1583.)

2
3 But this was not the only incident Sapna had apparently forgotten to tell the
4 officers about. Although on February 2 and 3 she told Briesnick and Hermann the attacks
5 ended when she moved out in December, at trial she told jurors that only days before
6 speaking with them -- January 29 to be precise -- Ajay tried to rape her yet again. (6 RT
7 1420-1426; 9 CT 2818-2821.) She gave jurors a detailed rendition of this event, telling
8 them she was so terrified she immediately went to the police station with her friend
9 Megan, but -- remarkably enough -- the police station was closed so they went home. (5
10 RT 942-944; 6 RT 1382-1386, 1396-1397; 7 RT 1717.) Sapna recalled that they returned
11 the next night, January 30, to make a report. (5 RT 942-944.)

12
13 But yet again, Sapna's own friends contradicted Sapna's testimony. Megan told
14 jurors she and Sapna went to the police station (once), rang the "after hours bell" and
15 were let in. (8 RT 1996.) And Officer Briesnick confirmed that the department is always
16 accessible by the "after-hours" bell. (8 RT 2065-2067, 2082.) Briesnick, relying on the
17 police reports, testified that Sapna used the "after-hours bell" and made her initial police
18 report was *not* January 29 as Sapna had said -- after the attempted rape at the house -- but
19 February 2, 2004. (8 RT 2065-2067, 2082.)

20
21 As noted above, the February 2, 2004 report date is important. It is the day after
22 Ajay e-mailed Sapna's boyfriend Will and Will broke up with Sapna. (7 RT 1713; 8 RT

1 2065-2067; 10 CT 2800; 14 CT 3958.)⁶

2
3 **8. In closing argument, the prosecutor makes the extraordinary**
4 **allegation that petitioner admitted to his defense lawyer that he**
5 **raped Sapna.**

6 As noted above, the prosecutor recognized that Sapna’s credibility was key to the
7 state’s case. But the prosecutor’s closing argument took an unusual turn in at least one
8 respect.

9
10 At the preliminary hearing, defense counsel questioned Sapna about the details of
11 the rapes. During cross-examination, counsel asked Sapna whether she had been raped or

12 _____
13 ⁶ There were similar inconsistencies in connection with the oral copulation
14 charges. When Sapna spoke with Officer Briesnick on February 2, she did not report any
15 acts of oral copulation. (8 RT 2084.) The next day, during her videotaped interview with
16 Detective Hermann, she adamantly denied that Ajay ever forced her to perform oral sex
17 on him. She explained, “[b]ecause I just thought it was disgusting to do - put his thing in.
18 I never - I mean, it’s disgusting to put that thing in my mouth. . . . I wouldn’t do it.” (10
19 CT 2764-2765.) At trial, she switched gears entirely, telling jurors she was forced to
20 perform oral sex 30 to 50 times over the course of three years. (5 RT 1162-1163.)

21 Sapna testified that these repeated instances of oral sex were so traumatic
22 that it was “something that I will always remember that was done to me.” (5 RT 1160.)
23 Despite it being something she would “always remember,” Sapna could not remember if
24 Ajay ever ejaculated during oral sex. (5 RT 1162-1163.)

25 And there were similar inconsistencies in connection with the state’s
26 pornography charges. Sapna said that in 1999 -- when she was 15 years old -- Ajay made
27 her watch a pornographic video called “Eighteen and Confused” and forced her to orally
28 copulate him as depicted on the video. (5 RT 1159.) She recalled, and told jurors, that
Ajay showed her the movie on his laptop computer. (5 RT 1112, 1159.)

But the “18 and Confused” video did not exist in 1999. It was not even
produced until mid-January 2000. (12 RT 3032-3034; 10 CT 2810-2812.) And Peggy
Dev produced the receipt for the purchase of the laptop, showing that it was not even
purchased until November 2001. (15 RT 4109-4110, ACT (8/10/2010) 16.)

1 inappropriately touched outside of California. (2 CT 547.) Sapna ultimately agreed she
2 had never been touched improperly outside California. (2 CT 547.) Later, counsel asked
3 Sapna about the May 2003 trip she took to Nepal alone with Ajay during the same time
4 period when Sapna claimed petitioner was raping her two to three times a week. (2 CT
5 556.) Sapna verified that she had to share a hotel room with Ajay in Bangkok during a
6 layover in Thailand. (2 CT 556; 3 CT 557.) When defense counsel asked Sapna whether
7 there had been any inappropriate sexual contact while she was alone in the hotel room
8 with Ajay, she now changed her story and testified there had been inappropriate sexual
9 contact in Bangkok but that she had “forgotten.” (2 CT 556; 3 CT 557.)

10
11 At trial, defense counsel cross-examined Sapna about the inconsistencies in the
12 alleged Bangkok rape which he had elicited at the preliminary hearing. (7 RT 1501-
13 1512, 1699-1702.) During closing argument defense counsel urged jurors to consider
14 these inconsistencies (among others) as a reason not to believe Sapna’s testimony:

15
16 Where did it occur? Is the story consistent? At the preliminary hearing she
17 was asked, did he ever rape you outside the State of California? Answer,
18 no. Later, she changes her testimony. Well, it happened in Bangkok. (18
19 RT 5030.)

20 In his closing argument, the prosecutor skewered the defense, telling jurors that
21 defense counsel’s question itself proved petitioner guilty. The prosecutor told jurors that
22 the reason counsel asked Sapna about Bangkok was “[b]ecause Ajay told him . . . there
23 is only one other person on the planet who knows that they had sex in the motel room . . .
24 .” (19 RT 5124-5125.) Defense counsel’s immediately objection was overruled. (19 RT
25 5125.) Defense counsel made no motion to reopen the presentation of evidence to correct
26 the prosecutor’s argument. (*Ibid.*)

1 B. Evidence The Jury Never Heard.

2
3 **1. Introduction.**

4
5 As the discussion above shows, if jurors believed Sapna had made up the
6 allegations they would acquit. If jurors believed Sapna was telling the truth, they would
7 convict. In short, the only real question for the jury was whether Sapna was telling the
8 truth. As the prosecutor recognized, this case was about Sapna’s credibility: “No Sapna,
9 no case.” (18 RT 5015.) The prosecutor correctly told jurors that in order to acquit,
10 “Sapna would have to be making all this up, and she’d have to have some motive to still
11 be doing this.” (18 RT 5142.)

12
13 Even on the record presented, it is clear jurors had some concerns about Sapna’s
14 credibility. After all, jurors acquitted on 13 counts and one enhancement and hung on an
15 additional 3 counts and one enhancement. The remainder of this Statement of Facts will
16 detail the new evidence jurors did not have in deciding if Sapna should be believed as to
17 her remaining allegations. It not only includes evidence showing Sapna did indeed have a
18 motive to make up these allegations, but direct evidence that Sapna herself has admitted
19 to six witnesses that her allegations were false.

20
21 **2. Prior to trial, Sapna told numerous witnesses that her sexual
22 assault allegations against Ajay were false.**

23 **a. Sapna tells Sangita Dev that “nothing happened” and that
24 Ajay did not rape or touch her.**

25
26 Sangita Dev is Sapna’s first cousin, they grew up together in and near Boria,
27 Nepal. (Declaration of Sangita Dev (“Sangita Declaration”), attached as Exhibit C, at
28

1 para. 1.) Although Sangita was several years older than Sapna, they are very close.
2 (*Ibid.*)

3
4 Sangita recalled that Sapna returned from the United States to their village with
5 Ajay in 2003. (Sangita Declaration at para. 2.) Sapna appeared completely happy and
6 well adjusted. (*Ibid.*) Sangita saw Sapna again in 2004 when Sapna returned to Nepal
7 from the United States for the wedding of her sister Madhuri. (Sangita Declaration at
8 para. 3.) It was during this visit that Sapna was arrested for passport fraud. (*Ibid.*)

9
10 After Sapna was released, Sangita saw her outside her (Sapna's) home. (Sangita
11 Declaration at para. 4.) At that point the whole village was talking about Sapna's sexual
12 assault allegations against Ajay. (*Ibid.*) Sangita asked Sapna whether, as she had heard,
13 "Ajay is raping you?" (*Ibid.*) Sapna was clear: "nothing happened" -- Ajay did not rape
14 or touch her. (*Ibid.*) Instead, Sapna explained that she was upset and angry because Ajay
15 and Peggy were controlling and made her break up with her boyfriend. (*Ibid.*) She said
16 she was afraid they would reverse the adoption. (*Ibid.*) Sapna told Sangita that she had
17 dropped the case against Ajay. (*Ibid.*)

18
19 Sangita subsequently spoke with Sapna again, this time on the road to their village;
20 Sangita was riding a bike and Sapna was walking. (Sangita Declaration at para. 5.)
21 Sapna told Sangita that she had lost the passport fraud case, that she was scared and that
22 she blamed Ajay for the passport fraud charges against her. (*Ibid.*) Sapna thought Ajay
23 was trying to stop her from returning to the United States. (*Ibid.*) Sapna said that by re-
24 opening the case, police would help her return to the United States. (*Ibid.*) When Sangita
25 expressed concern that Ajay would get in trouble for something he did not do, Sapna
26 explained "No, nothing will happen to Ajay." (Sangita Declaration at para. 6.)

1 Sangita explained that because Sapna was her first cousin she was too scared to
2 initially come forward because she felt like it would be going against her family. (Sangita
3 Declaration at para. 10.) In fact, Sangita’s mother told her to not to get involved in this
4 “family mess” and to “keep my thoughts to myself.” (*Ibid.*)

5
6 As she explains in her declaration, Sangita also knew Ajay Dev and his family
7 because Ajay’s father was also from Boria. (Sangita Declaration at para. 1.) She was,
8 however, not close with Ajay’s family until 2009 when she became romantically involved
9 and married Ajay’s brother Sanjay. (*Ibid.*) As a result of her connection to Sanjay Dev,
10 petitioner recognizes a factfinder could view her declaration as an attempt to help
11 petitioner, her brother-in-law.

12
13 Fortunately, however, in 2005 -- well before Sangita became involved with Sanjay
14 Dev -- Sangita shared the contents of the conversations she had with Sapna with her
15 friend Nisha Singh. (Sangita Declaration at para. 7.) Ms. Singh is a Nepali citizen
16 currently living in Adelaide, Australia and obtaining her Master’s degree in Education at
17 Flinders University. (Declaration of Nisha Singh (“Nisha Singh Declaration”) attached as
18 Exhibit D, at para. 1.) Ms. Singh confirmed that Sangita shared this conversation with
19 her sometime in 2005. (*Id.* at para. 2) At the time, Ms. Singh was Sangita were both
20 attending college in Kathmandu and were roommates at a local hostel. (Sangita
21 Declaration at para. 7; Nisha Singh Declaration at para. 1.)

22
23 Ms. Singh recalled that Sangita told her about a conversation she had with a
24 childhood friend of hers named Sapna. (Nisha Singh Declaration at para. 2.) Sangita had
25 been talking on the telephone with someone and was very upset. (*Ibid.*) After she got off
26 the phone, Ms. Singh asked Sangita what was wrong. (*Ibid.*) Sangita explained that she
27 had been discussing a childhood friend who had falsely accused someone in her village of
28 sexual assault. (*Ibid.*) Sangita told Ms. Singh that this friend Sapna had told her that the

1 allegations were false. (*Ibid.*) Sangita shared that Sapna told her that she (Sapna) had
2 made up sexual assault allegations against her adoptive father. (*Ibid.*)⁷

3
4 Sangita also told her cousin Kumari Nisha Deo about her conversation with Sapna.
5 (Sangita Declaration at para. 8.) Kumari is nurse in Dharan, Nepal. (Declaration of
6 Kumari Nisha Deo (“Kumari Declaration” attached as Exhibit E, at para. 1.) Kumari also
7 remembered Sangita sharing this conversation with her, recalling that sometime after
8 Sapna left for America, everyone in the village was talking about Sapna’s passport fraud
9 case, her sexual allegations against Ajay and her return to America. (*Ibid.*) Kumari asked
10 Sangita about this. (*Ibid.*) Sangita said she had talked with Sapna who told her nothing
11 had happened between her and Ajay. (*Ibid.*) According to Sangita, Sapna said Ajay was
12 very strict, wanted Sapna to follow Nepali culture and had caused Sapna’s break up with
13 her boyfriend. (*Ibid.*) Sapna told her that she (Sapna) was very angry with Ajay so she
14 told police that Ajay touched her even though it was not true. (*Ibid.*)⁸

15
16 In short, if jurors found Sangita credible, they could find that -- just as Sapna said -
17 - the allegations were made up because she was angry and trying to get back to the United
18 States. But there is much more.

23
24 ⁷ Ms. Singh does not know Sapna. (Nisha Singh Declaration at para. 3.) And
25 she has only met Sangita’s husband Sanjay Dev and her in-laws sometime after Sangita
26 married Sanjay in 2009. (*Ibid.*) Ms. Singh has never met anyone named Ajay Dev.
(*Ibid.*)

27 ⁸ Kumari knows Sapna because she (Kumari) visited Sangita many times in
28 her village and Sangita’s house was next door. (Kumari Declaration at para. 1.) Because
of these visits, she also knows Ajay Dev and his family but is not close with them. (*Ibid.*)

1 **b. Sapna tells Dinesh Deo that she had to reinstate the sexual**
2 **assault allegations to return to the United States and**
3 **would put “Ajay in jail like he had put her in jail.”**

4 Sapna also talked to her long time family friend Dinesh Deo about the allegations.
5 Dinesh and his wife Kalpana Deo live in Woodland, California but are originally from
6 Nepal. (Declaration of Dinesh Deo (“Dinesh Declaration”) attached as Exhibit G, at para.
7 1.) Dinesh is originally from the same village as both Ajay’s and Sapna’s families.
8 (*Ibid.*) As such he has long been close friends with both Ajay Dev and his family as well
9 as Sapna Dev and her family. (*Ibid.*) Dinesh came to the United States in 2005 on a
10 lottery visa. (*Ibid.*)

11
12 Dinesh recalled Ajay and Sapna returning to Nepal in 2003 for a visit. (*Id.* at para.
13 2.) Sapna seemed very happy and adjusted to life in the United States. (*Ibid.*) He saw
14 Sapna again in Nepal again in 2004 when she was having trouble with her passport. (*Id.*
15 at para. 3.) Sapna explained to him that she believed Ajay and his family had reported her
16 for passport fraud. (*Ibid.*)

17
18 The next time Dinesh saw Sapna was after he had moved to the United States. (*Id.*
19 at para 4.) In 2006, Sapna and Dinesh worked at Rite Aid together. (*Ibid.*) They would
20 occasionally eat lunch together and speak in Nepali. (*Ibid.*) In Nepal, Dinesh had heard
21 about Sapna’s sexual assault allegations against Ajay because everyone in the community
22 was talking about it. (*Ibid.*) During one of these lunches, Dinesh asked Sapna about the
23 allegations. (*Ibid.*) Sapna became very angry and told Dinesh that she was sure Ajay had
24 been the person who reported her passport fraud and got her arrested. (*Ibid.*) Sapna
25 explained that while she had dropped the charges, once she was stuck in Nepal she had to
26 reopen the criminal case against Ajay in order to return to the United States and maintain
27 her green card. (*Ibid.*) Sapna said that she would put Ajay in jail like he had put her in
28 jail. (*Ibid.*)

1 In short, if jurors found Dinesh credible, they could find that -- just as Sapna said -
2 - the allegations were made up because she was angry and trying to get back to the United
3 States. But there is still more.

4
5 **c. Sapna tells Bhabendra Yadav -- a friend of Sapna's**
6 **grandmother -- that she lied when she accused Ajay of**
7 **sexual assault.**

8 Sapna also spoke with Bhabendra Yadev about the allegations. Bhabendra not
9 only has a Master's Degree in Education from Janta College Itahari but also a Bachelor in
10 Law from Mahendra Bindeshori College Rajbiraj. (Declaration of Bhabendra Yadav
11 ("Bhabendra Declaration") attached as Exhibit H, at para. 1.) Although he is now retired
12 from the post, he was a headmaster of a government high school located next door to
13 Sapna's family home in Boria. (*Id.*) As such, he knows Sapna's family well including
14 her biological parents Birendra Deo and Prabha Deo and her grandmother Laxmi Deo.
15 (*Id.*) In fact, he was good friends with Laxmi and has spent a lot of time in her home.
16 (*Id.*)⁹

17
18 Bhabendra recalled Sapna's 2004 return to Nepal for her sister's wedding. (*Id.* at
19 para. 2.) Sapna spent a lot of time at her grandmother Laxmi's home during this visit.
20 (*Ibid.*) When Bhabendra would visit Laxmi, Sapna would sometimes also be in the home.
21 (*Ibid.*)

22
23 Bhabendra recalled a particular time when he was in the home with Laxmi and
24 Sapna and Laxmi asked Sapna about the rape allegations against Ajay. (*Ibid.*) Sapna said
25 the allegations were not true. (*Ibid.*) Sapna explained that although Ajay was a good

26
27 ⁹ Bhabendra also knows Ajay Dev's family because they also are from Boria.
28 (Bhabendra Declaration at para. 1.) Although he remembers Ajay as a young boy, he
does not know him well and has no current relationship with him. (*Id.*)

1 father to her, he was very controlling and wanted her to live like a Nepali woman. (*Ibid.*)
2 But she wanted to live like an American woman. (*Ibid.*) According to Sapna, Ajay told
3 her that if she continued to live like an American woman he would return her to Nepal.
4 (*Ibid.*) Sapna admitted that she filed the false rape allegations to scare Ajay but that she
5 had withdrawn the allegations and hoped to reconcile with him. (*Ibid.*)

6
7 Bhabendra saw Sapna again at Laxmi's home. (*Id.* at para. 3.) This was after a
8 passport fraud case was filed against Sapna. (*Ibid.*) Sapna seemed very sad and afraid
9 and explained that she thought Ajay and his family were behind the fraud case. (*Ibid.*)
10 But when Bhabendra saw Sapna next she was happy and said that she would return to
11 America because she knew the "laws and rules of America." (*Ibid.*) She said she had
12 planned to return to America and reconcile with Ajay and Peggy but because they had
13 tried to keep her in Nepal by reporting her for passport fraud she had instead alerted the
14 police in America to reopen the case against Ajay. (*Ibid.*) When Bhabendra expressed
15 concern about Ajay, Sapna became angry and said "If I have to speak a lie for my life I
16 shall speak, I cannot live in Nepal." (*Id.* at para. 6.)

17
18 In short, if jurors found Bhabendra credible, they would find that Sapna had made
19 up the allegations -- she had decided to "speak a lie for [a] life" in America -- and re-
20 opened the case precisely so she could return to America. But there is even more.

21
22 **d. Sapna tells Ranjana Deo -- a good friend -- that in order to**
23 **return to the United States she had reinstated the sexual**
24 **assault allegations against Ajay.**

25 Sapna spoke with her good friend and distant relative Ranjana Deo about the
26 allegations. Ranjana is a teacher at the government elementary school in Nepal and
27 teaches grades one to five. (Declaration of Ranjana Deo ("Ranjana Declaration")
28 attached as Exhibit I, at para. 1.) She and Sapna are distant relatives and she has known

1 Sapna Dev since she was born. (*Ibid.*) Their childhood homes are a very short walk from
2 each other. (*Ibid.*)

3
4 Ranjana recalled Sapna returning from the United States with Ajay in 2003. (*Id.* at
5 para. 2.) Sapna seemed happy, self-confident, and healthy. (*Ibid.*) After Ranjana shared
6 with Sapna some difficulties she was having in her own life, Sapna confided to her that
7 although Ajay and Peggy were very loving they were also very controlling. (*Id.* at para
8 3.) Sapna explained that in America, at the age of 18, children make their own decisions
9 but that Ajay and Peggy wanted Sapna to act like a Nepali girl with less freedom. (*Ibid.*)
10 Sapna told Ranjana that they threatened to send her back to Nepal if she behaved like an
11 American girl. (*Ibid.*) She said she was very worried about this. (*Ibid.*)

12
13 Ranjana saw Sapna again when Sapna returned to Nepal in 2004. (*Id.* at para. 6.)
14 At this time, Sapna was having trouble with the Nepali courts over her passport. (*Ibid.*)
15 She was very angry with Ajay because she believed that he had reported her to the Nepali
16 authorities. (*Ibid.*) Sapna told Ranjana that a detective in America was going to help her
17 return to the United States but she would need to testify against Ajay in return. (*Ibid.*)
18 Sapna said that the detective told her that if she did not testify there would be no way for
19 her to return to the United States. (*Ibid.*)

20
21 If jurors found Ranjana credible, they would find that Sapna agreed to testify
22 against Ajay because it was the only way to return to America. As the reader may by now
23 expect, there is still more.

1 e. Sapna tells her good friend Shweta Deo that she was
2 “furious” with Ajay and lied to police that he sexually
3 assaulted her.

4 Sapna spoke with her good friend Shweta Deo about the allegations. Shweta has a
5 Master’s Degree in social science and is currently a teacher in Nepal and India.

6 (Declaration of Shweta Deo (“Shweta Declaration”) attached as Exhibit J, at para. 1.)

7 Shweta recalled visiting with Sapna when she returned to Nepal after moving to the
8 United States. (*Id.* at para. 4.) Sapna told Shweta that she was very happy living in the
9 United States, she drove a car to school and that Ajay had left her property in his will.

10 (*Id.* at para. 5.) Sapna explained that men and women in America make their own
11 decisions, they can decide who to marry, to live together, or to have a baby. (*Ibid.*)

12 Sapna told Shweta that she liked the American lifestyle and could not return to the Nepali
13 lifestyle. (*Ibid.*) But Sapna said that Ajay did not want her to date anyone and she argued
14 with Ajay over these rules. (*Id.* at 7.) Ajay wanted Sapna to return to Nepal for a
15 semester so that she could be back in Nepali culture. (*Ibid.*)

16
17 Shweta saw Sapna again on her next visit to Nepal. (*Id.* at para 8.) During this
18 visit, Sapna said that Ajay did not trust her anymore and that he and Peggy had taken her
19 out of the will. (*Ibid.*) Sapna said she was “furious” with Ajay because he contacted her
20 boyfriend who then broke up with her. (*Ibid.*) She then filed a police report alleging that
21 Ajay sexually abused her. (*Ibid.*) She explained that she did this to find a way to stay in
22 America even without Ajay's help. (*Ibid.*) Sapna said she felt badly that she had falsely
23 accused Ajay and so she later withdrew her allegations. (*Ibid.*)

24
25 Sometime later but during this same visit, Sapna told Shweta that her passport had
26 been taken away and that she wanted to reopen the case against Ajay so that she could
27 return to the United States. (*Id.* at para. 9.) Sapna said it would be easy for her to lie
28 about the sexual abuse allegations because she had boyfriends so she knew about sex.

1 (*Ibid.*) Sapna was very angry and blamed Ajay for her passport problems. (*Ibid.*) Sapna
2 said that she did not want to live in Nepal and that after she returned to the United States,
3 she would withdraw the case against Ajay. (*Id.* at para. 10.)
4

5 If jurors found Shweta credible, they would find that Sapna falsely accused Mr.
6 Dev because she was angry, and she continued to lie about the allegations in order to get
7 back to America. But yet again, there is still more.
8

9 **f. Sapna’s own sister Madhuri admits that Sapna lied in**
10 **accusing Ajay of sexual assault.**

11 In a January 2018 Facebook message to Ajay’s brother Sanjay Dev, Sapna’s own
12 sister Madhuri Deo conceded that Sapna lied in order to “get to Amrika” and then stuck
13 with that lie in order avoid being deported:
14

15 [Sapna] want to take revenge and get to Amrika [sic]. . . . The only way to
16 come to Amrika [sic] was to come testify against Ajay uncle. We did not
17 know that he will be put in jail long time. Now Sapna say that if she helps
18 she will go to jail and get deported. . . . Sapna has lied many times in the
19 past. She had no choice. Police say to her they will help if Sapna testify for
20 rape. . . . We know that she was not raped. . . . We also tell Sapna to tell the
21 truth that this never happen but she scared now.

21 (Declaration of Sanjay Dev (“Sanjay Declaration”) attached as Exhibit K at paras. 3-4,
22 Attachment 2 at p. 2-3.)
23

24 **3. Forensic and documentary evidence from Michael Mullen**
25 **directly undercuts Sapna’s credibility.**

26 As noted above, the state introduced pornographic videos found on the Devs home
27 computer. The state’s trial evidence showed that some of the pornography was accessed
28 on September 26, 2003 between 8:36 a.m. and 8:56 a.m. (10 CT 2866.)

1 Sapna testified that Ajay showed her these pornographic videos before sexually
2 assaulting her. (4 RT 792-803.) On cross-examination, Sapna was clear that “there was
3 no way that [she] wanted to watch them” herself. (6 RT 1288.) When defense counsel
4 asked Sapna if she watched these videos by herself, she swore “no, not by myself.” (6 RT
5 1289.)

6
7 New evidence shows Sapna was lying about this as well. Trial exhibit 813 is an e-
8 mail Ajay sent to Peggy at her place of work. (15 RT 4102.) Ajay sent the email from his
9 work computer at the Department of Water Resources at 8:48 on the morning of
10 September 26 -- precisely when someone was accessing the pornographic video at the
11 Dev home. (Email of September 26, 2003, attached as Exhibit L.) Defense counsel
12 offered this email at trial, but the trial court excluded it. (18 RT 4878-4881.) The
13 appellate court upheld that ruling noting that defense counsel had not established a
14 sufficient foundation for admission of the e-mail because -- although counsel called
15 network administrator Michael Mullen to testify that remote access was not possible in
16 2003 when the e-mail was sent -- counsel did not ask Mr. Mullen “whether any computer
17 that made the date and time stamp was functioning properly.” (Exhibit A at 46.)

18
19 Mr. Mullen has now been asked these precise questions. (Declaration of Michael
20 Mullen (“Mullen Declaration”) attached as Exhibit M, at para. 1-10.) Mr. Mullen
21 controlled all aspects relating to the hardware and software for 140 employee computers
22 in the Bay Delta Office when Ajay worked. (*Id.* at paras. 1-2.) As noted above, at trial
23 Mr. Mullen testified that based on how the computer system at the Bay Delta Office
24 worked, Ajay could not remotely access his work email account in 2003. (15 RT 4016-
25 4019.) He has now confirmed that the September 26, 2003 email sent from Ajay Dev’s
26 work email to Peggy Dev at 8:48 a.m. was sent from a computer with a correct date and
27 time stamp. (Mullen Declaration at paras. 4-8.) In other words, Ajay had an alibi and
28 Sapna was lying about the pornography as well.

1 **4. Certified Nepali Court documents directly undercut Sapna’s**
2 **credibility and confirm that she lied to be eligible for adoption**
3 **and an easy path to citizenship.**

4 As noted above, according to Sapna’s 1998 Nepali passport her date of birth was
5 January 5, 1984. This made her one-month shy of her sixteenth birthday on the date her
6 adoption became final on December 6, 1999. (5 RT 979-980; 9 CT 2502; 14 CT 4074.)
7 At trial Sapna testified that this she was in fact born on January 5, 1984. (4 RT 701.)
8

9 The defense offered proof that Sapna lied in order to be adopted and ease her path
10 to United States citizenship, and was lying at trial as well. In fact, her real date of birth
11 was April 28, 1983 -- which meant she was *over* 16 at the time of the adoption and could
12 *not* qualify for the relatively easy route to citizenship through adoption. To prove this, the
13 defense offered a series of Nepali court documents which found Sapna guilty of using a
14 false date of birth to obtain a passport, specifically using a false January 5, 1984 date of
15 birth instead of the correct April 28, 1983 date. (2 RT 112-113, 135-137; 6 RT 1364-
16 1367; 5 CT 1162, 1219; 6 CT 1532, 1549, 1665; 7 CT 1838-1858, 1875-1900.) The trial
17 court refused to introduce any of these documents because they were not properly
18 authenticated. (2 RT 112-113, 137; 6 RT 1364-1367.) Although defense counsel offered
19 numerous documents in an effort to authenticate these judicial records, the appellate court
20 upheld this ruling, concluding that “none of the certifications . . . contain an attestation
21 that the copy of the foreign language writing . . . was a true or correct copy of the verdict
22 of the Saptari District Court or the decision of the appellate court of the Rajbiraj
23 Division.” (Exhibit A at 27.)
24

25 The documents have now been authenticated with proper certifications showing
26 that -- in fact -- the “foreign language [opinions]” provided to the trial court were indeed
27 a “true or correct copy of the verdict of the Saptari District Court [and] the decision of the
28 appellate court of the Rajbiraj Division.” (Declaration of Mr. Dil Kumar Bardewa

1 (“Bardewa Declaration”) attached as Exhibit U; Declaration of Mr. Roshan Kumar
2 Bhattarai (“Bhattarai Declaration”) attached as Exhibit V.) These official court
3 documents show that the Nepali courts held a trial and determined based on all the
4 evidence presented that Sapna’s correct birthday was in fact April 28, 1983. (Exhibit
5 500, 502.)

6
7 The real date of Sapna’s birth was important for several reasons. First,
8 12 of the 76 counts on which the jury convicted required the state to prove beyond a
9 reasonable doubt that when the charged incident occurred, Sapna was either 14 to 15
10 years old (counts 24, 26, 29, 34, 36), less than 16 years old (counts 23, 28, 33) or less than
11 18 years old (counts 56, 59, 62). (4 CT 868, 869, 869-871, 873-874, 882-885) The
12 charges alleging that she was either 14 to 15 years old or under 16 years old were alleged
13 to have occurred between April 28, 1999 and January 4, 2000. (4 CT 868-874.) The
14 charges alleging that she was under 18 years old were alleged to have occurred between
15 April 28, 2001 and January 4, 2002. (4 CT 882-885.) Thus, in order to convict on these
16 counts the jury would have had to believe Sapna that she was born on January 5, 1984 --
17 if she was born on April 28, 1983 (as the Nepali court documents showed), the jury could
18 not convict on these 12 counts. The properly authenticated Nepali documents are directly
19 relevant to evaluating whether the state carried its burden of proving beyond a reasonable
20 doubt this element of these 12 charges.

21
22 But the Nepali judicial documents are important for another reason as well. If
23 Sapna was indeed born on April 23, 1983, then the adoption could be voided and her path
24 to American citizenship was that much harder. Thus, in assessing Sapna’s motive to
25 make up the allegations -- and fairly assess the defense theory that Sapna was lying
26 because she was concerned about the adoption being voided -- it was critical for jurors to
27 consider the Nepali court documents explaining exactly why the Nepal courts found her
28 to have lied about her birth date.

1 **5. Enhanced audio of the pretext call makes clear that Sapna’s**
2 **translation of Ajay’s statement “But you had sex with me when**
3 **you were 18” is incorrect.**

4 As discussed in detail above, the pretext call was a mixed bag. The state relied on
5 Sapna to translate Ajay’s statements spoken in Nepali. (5 RT 962; 9 CT 2480, 15 CT
6 4176.) The state relied on an expert for translation. (14 RT 3841-3842.) According to
7 Sapna, at one point Mr. Dev said, “But you had sex with me when you were 18.” (15
8 CT 4176.) The defense expert who translated the pretext call testified that although
9 Ajay’s statement was inaudible, he ruled out Sapna’s translation because he could hear
10 the first syllable of the word in dispute which was incompatible with any Nepali word
11 connoting “sex.” (14 RT 3866-3867.) The prosecutor relied on Sapna’s translation in
12 urging jurors to convict. (18 RT 4982-4983.)

13
14 This portion of the pretext call has now been enhanced. (Declaration of David
15 Notowitz (“Notowitz Declaration”) attached as Exhibit N, at paras. 1-4.) Nepali
16 translator Netra Darai has now listened to that enhancement and determined that Mr. Dev
17 did *not* say “But you had sex with me when you were 18” but rather “If that [is] so
18 why did you come with me since 18 years?” (Declaration of Netra Darai (“Darai
19 Declaration”) attached as Exhibit O at paras. 1-3.) The prosecutor’s argument that this
20 portion of the pretext call constituted an admission that petitioner had sex with Sapna is
21 simply wrong. In assessing the pretext call, and counsel’s arguments, it was critical for
22 the jurors to have an accurate translation of the pivotal portions of the call.

23
24 **6. New evidence showing the prosecutor’s suggestion that**
25 **petitioner had admitted raping Sapna to his own lawyer was**
26 **false.**

27 This was not the only portion of the prosecutor’s closing argument which was
28 false. As noted above, in responding to defense counsel’s reliance on the fact that Sapna

1 changed her testimony as whether there had been a rape in Bangkok, the prosecutor told
2 jurors that the reason defense counsel asked the question was “[b]ecause Ajay told him . .
3 . . there is only one other person on the planet who knows that they had sex in the motel
4 room . . .” (19 RT 5124-5125.) In other words, the prosecutor told jurors that Ajay had
5 admitted raping Sapna to his own lawyer.

6
7 This too was false. In fact not only was the prosecutor’s argument false, but there
8 was a perfectly reasonable explanation for defense counsel’s question:

9
10 Mr. Dev never told me there was a rape or any sexual contact in Bangkok.
11 My questioning of Sapna at the preliminary hearing was only a matter of
12 strategy. If she denied that a rape occurred in Bangkok, I would argue to
13 jurors this undercut her testimony. I would have argued that it was not
14 believable Mr. Dev would rape her 2-3 times a week for several years but
15 not do so when they were traveling alone together and staying in a hotel in
16 Bangkok. If Sapna changed her testimony, as she did, and testified that she
17 was raped in Bangkok, then I would have yet another inconsistency to use
18 to prove her not credible at trial. The prosecutor’s suggestion that Mr. Dev
19 told me he raped Sapna in a hotel room in Bangkok is simply false.

20
21
22 (Declaration of Michael Rothschild (“Rothschild Declaration”) at para. 18, attached as
23 Exhibit P.) The jury never heard this evidence either.

24 7. Summary.

25 Both the prosecutor and defense counsel repeatedly made clear in closing
26 arguments, the only issue for the jury to resolve was Sapna’s credibility. (18 RT 5015,
27 5142 [prosecutor], 5020, 5061, 5116 [defense counsel]) Perhaps the prosecutor said it
28 best: “No Sapna, no case.” (18 RT 5015) Even on the record presented, the jury plainly
had some doubts about Sapna’s credibility -- it unanimously acquitted on 13 counts and 1
enhancement and was unable to reach a verdict on another 3 counts and 1 enhancement.

1 But the jury tasked with deciding whether Sapna should be believed never heard evidence
2 that was critical to this decision.

3

4 As noted above, the question before the Court now is not whether relief should be
5 granted. Instead, the question is whether -- assuming petitioner's factual allegations are
6 true -- a prima facie case for habeas relief has been pled and an Order to Show Cause
7 should issue. It is to that question petitioner now turns.

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1 ARGUMENT

2
3 I. PETITIONER HAS PLED A PRIMA FACIE CASE THAT TRIAL COUNSEL
4 RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO INVESTIGATE
5 OR PRESENT TESTIMONY DIRECTLY SUPPORTING THE PRECISE
6 THEORY OF THE CASE COUNSEL HIMSELF ELECTED TO RELY ON AT
7 TRIAL AND IN FAILING TO MOVE TO REOPEN THE CASE AFTER THE
8 PROSECUTOR PRESENTED DEMONSTRABLY FALSE ARGUMENT.

9
10 A. The Relevant Facts.

11 There is no need to repeat the facts in any detail. The state charged petitioner with
12 85 counts of improper sexual conduct with his adopted daughter Sapna, two counts of
13 showing her pornography and five related counts involving threats or false imprisonment.
14 As noted above, both sides at trial recognized that Sapna’s credibility was key to the case.
15 (18 RT 5015, 5066, 5117, 5142.)

16 As discussed in detail above, however, the jurors deciding whether Sapna was
17 “making this all up” did not have the full story:

- 18 • Jurors did not hear testimony from Sapna’s first cousin, Sangita Dev,
19 that in 2004 Sapna admitted making up the allegations because she
20 was upset about how strict petitioner was as a parent, she was afraid
21 of having the adoption reversed and she wanted to return to the
22 United States. (Exhibit C.)
- 23 • Jurors did not testimony from Sapna’s friend Dinesh Deo that Sapna
24 admitted renewing the charges against petitioner because she was
25 angry with him and she needed to make the criminal charges so she
26 could return to the United States. (Exhibit G.)
- 27 • Jurors did not hear testimony from headmaster Bhabendra Yadav
28 that Sapna admitted the allegations against petitioner were not true;
she made them out of anger over how strict a parent petitioner was
and she renewed the charges because she believed petitioner was
behind the passport fraud case in Nepal. (Exhibit H.)
- Jurors did not hear testimony from Sapna’s friend Ranjana Deo that
Sapna was angry at petitioner because she thought he was behind the

1 passport fraud case which had been brought against her and that “if
2 she did not testify [against petitioner] there would be no way for her
3 to return to the United States.” (Exhibit I.)

- 4 • Jurors did not hear from Sapna’s friend Shweta Deo that Sapna said
5 she was “furious” with Ajay when he spoke with her boyfriend who
6 then broke up with her, she made up the allegations in order to find a
7 way to stay in the United States, she felt bad about the false
8 allegations and so withdrew them but she later pursued them again
9 because she believed Ajay was involved with her Nepali passport
10 fraud case and she wanted to return to the United States. (Exhibit J.)
- 11 • Jurors did not hear from a forensic expert that at 8:48 on the morning
12 of September 26, 2003 -- the precise time someone was accessing
13 pornography at the petitioner’s home -- petitioner was at work
14 sending an email to Peggy who was at her work. (Exhibit M.) In
15 other words, Sapna had lied to the jury about accessing the
16 pornography.
- 17 • Jurors did not have information about Sapna’s Nepali convictions,
18 showing that she had been found to have lied about her birth date,
19 and that her real birth date was April 28, 1983. 2003. (Exhibit U,
20 V.)
- 21 • Jurors did not know that during the pretext call Ajay had *not* said
22 “But you had sex with me when you were 18” -- as Sapna had
23 translated -- but rather said “If that [is] so why did you come with me
24 since 18 years?” (Exhibit O.)
- 25 • Jurors did not know that the prosecutor’s argument that Ajay had
26 confessed rape to his own lawyer was entirely false. (Exhibit P.)¹⁰

18 The jury heard *none* of this evidence. And this was not because of a tactical
19 decision on defense counsel’s part. To the contrary, and very much to his credit, defense
20 counsel has not only conceded that he did not make a tactical decision not to investigate
21 or present this evidence, but he has gone further and admitted (1) this evidence was
22 consistent with his theory of defense and (2) he would have used it if had been aware of
23 it. (Rothschild Declaration at paras. 4-14.) He has also explained in some detail the truth
24

25 ¹⁰ Nor did jurors know that Sapna’s own sister admitted that her family had all
26 told “Sapna to tell the truth that this never happen but she scared now,” that Sapna wanted
27 “to take revenge and get to Amrika,” “the only way to come to Amrika was to come
28 testify against Ajay” and “[n]ow Sapna says that if she helps she will go to jail and get
deported.” (Exhibit K, Attachment 2.)

1 behind the prosecutor’s false argument in rebuttal. (*Id.* at para. 15-18.) The question is
2 whether under all these facts, Petitioner has established a prima facie case in connection
3 with his claim of ineffective assistance of trial counsel. As discussed below, he has.

4
5 B. Assuming Petitioner’s Factual Allegations Are True, Petitioner Has
6 Established A Prima Facie Case That Trial Counsel’s Failure To
7 Present Eyewitness Testimony, Expert Testimony, Properly Authenticate
8 Documentary Evidence Or Move To Reopen His Case Constituted
9 Ineffective Assistance Of Counsel.

10 The Sixth Amendment guarantees criminal defendants the right to counsel. This
11 right also guarantees the right to effective representation. (*McMann v. Richardson* (1970)
12 397 U.S. 957.)

13 When a criminal defendant seeks relief because his counsel has provided deficient
14 representation, two elements must be proven. (*Strickland v. Washington* (1984) 466 U.S.
15 668, 687.) The defendant must show (1) counsel’s performance fell below an “objective
16 standard of reasonableness,” and (2) but for counsel’s errors there is a “reasonable
17 probability” the result of the proceeding would have been different. (466 U.S. at p. 688,
18 693.) “Reasonable probability” does not require defendants to show that “counsel's
19 conduct more likely than not altered the outcome in the case.” (466 U.S. at p. 693.)
20 Instead, reasonable probability is merely “a probability sufficient to undermine
21 confidence in the outcome.” (466 U.S. at p. 694.) Where a single juror could reasonably
22 have reached a different result absent counsel’s error prejudice has been shown. (*See*
23 *Wiggins v. Smith* (2003) 539 U.S. 510, 537 [where state law requires unanimous verdict,
24 relief required where absent the error one juror could have reached a different verdict];
25 *People v. Centeno* (2014) 60 Cal.4th 659, 677 [same].)

26
27 Thus, there are two questions in connection with assessing whether petitioner has
28 established a prima facie case that he received ineffective assistance of counsel. First,

1 assuming petitioner's factual allegations are true, did counsel's failure to present evidence
2 undercutting Sapna's credibility and supporting the defense theory of the case fall below
3 an objective standard of reasonableness? Second, if so, could at least one juror have
4 reasonably reached a different result had he or she heard the evidence counsel failed to
5 present? Because the answer to both questions is yes, petitioner has pled a prima facie
6 case and an Order to Show Cause should issue as to this claim.

7
8 **1. Trial counsel's failure to present readily available evidence**
9 **directly supporting his own theory of the case and just as**
10 **directly undercutting the state's theory fell below a standard of**
11 **reasonableness.**

12 In applying the first prong of *Strickland*, the Supreme Court has long recognized
13 that where a criminal defense lawyer pursues a certain theory of defense, the lawyer's
14 failure to present readily available evidence supporting that theory is unreasonable. (*See,*
15 *e.g., Wiggins v. Smith, supra*, 539 U.S. at p. 526.) Lower federal courts throughout the
16 country agree. (*See, e.g., Dugas v. Coplan* (1st Cir. 2005) 428 F.3d 317, 328-329;
17 *Clinksdale v. Carter* (6th Cir. 2004) 375 F.3d 430-435; *Soffar v. Dretke* (5th Cir. 2004)
18 368 F.3d 441, 473; *Eve v. Senkowski* (2nd Cir. 2003) 321 F.3d 110, 126-130; *Hart v.*
19 *Gomez* (9th Cir. 1999) 174 F.3d 1067, 1071; *Pavel v. Hollins* (2nd Cir. 2001) 261 F.3d
20 210, 219; *Chambers v. Armontrout* (8th Cir. 1990) 907 F.2d 825, 828-830; *Harris v. Reed*
21 (7th Cir. 1990) 894 F.2d 871, 879.) So too does the California Supreme Court. (*See, e.g.,*
22 *People v. Frierson* (1979) 25 Cal.3d 142, 164-165 [defendant charged with murder,
23 defense counsel pursues diminished capacity defense but fails to consult with or present
24 expert testimony directly supporting this defense; held, the failure to do so was
25 unreasonable].)

26 In this case, there is no need to guess at what defense counsel's theory of the case
27 was: he was at all points attacking Sapna's credibility. There was no doubt about the
28 defense theory -- Sapna was lying. According to defense counsel "[t]his woman cannot

1 tell the truth.” (18 RT 5061.) The only question for jurors was whether “Sapna is telling
2 the truth.” (18 RT 5066.) The verdict would depend on whether “Sapna Dev has told us
3 the truth.” (18 RT 5020.) Evidence that Sapna told friends and relatives in Nepal that she
4 made up the allegations against petitioner would directly have supported this defense. As
5 defense counsel forthrightly admitted in his declaration:

6
7 This evidence is entirely consistent with and furthers the defense I
8 presented at trial that Sapna was not credible. I did not make a tactical
9 decision not to present this evidence. I was unaware of this evidence at the
10 time of trial and had I been aware of it, I would have used it.

11 (Rothschild Declaration at para. 14.)

12
13 The same is true with respect to counsel’s failure to properly authenticate and
14 introduce both the September 26 email and the documents relating to the Nepali
15 conviction. Both directly support the defense theory that Sapna was lying, albeit in
16 different ways. As for the email, the state’s evidence showed that pornography was
17 accessed from the Devs home computer from 8:36 a.m. through 8:56 a.m. on September
18 26, 2003. (10 CT 2866.) The September 26 email attached as Exhibit L shows that at
19 8:48 that morning -- squarely within the period when the pornography was being accessed
20 at the Devs home -- petitioner was at work. This means Sapna was at home accessing and
21 watching the pornography. In turn, this means Sapna lied when she denied watching the
22 pornography by herself. (6 RT 1288-1289.)

23
24 Although trial counsel tried to introduce this email at trial, the state appellate court
25 ruled that the evidence was properly excluded because counsel introduced no evidence
26 showing that the “computer that made the date and time stamp was functioning properly.”
27 (Exhibit A at 46.) Defense counsel has made clear that he did not have a tactical reason
28 for offering the email but doing so with an insufficient foundation:

1 I thought I had provided sufficient authentication to require admission of
2 the e-mail. To the extent the trial and appellate courts were correct in
3 finding that I had not done so, I did not make a tactical decision to offer the
4 evidence, but do so without providing sufficient foundation.

5 (Rothschild Declaration at para. 11.)

6 The documents relating to the Nepali conviction also directly supported the
7 defense case which trial counsel presented. These not only supported the defense theory
8 that Sapna was lying about her date of birth (which was directly relevant to whether
9 petitioner could be convicted on counts 23, 24, 26, 28, 29, 31, 33, 34, 36, 56, 59 and 62)
10 but was equally relevant to the jury assessing whether Sapna had a motive to make up the
11 charges. Defense counsel offered the evidence to show that because Sapna's birth date
12 was in fact April 28, 1983, she was very much aware her adoption could be voided,
13 thereby endangering her path to American citizenship. Yet again, defense counsel has
14 conceded that he did not have a tactical reason for offering this evidence but doing so
15 with an inadequate foundation:
16

17 I thought I had provided sufficient authentication of the Nepali court
18 opinions. To the extent the trial and appellate courts were correct in finding
19 that I had not done so, I did not make a tactical decision to offer the
20 evidence, but do so without providing sufficient authentication.

21 (Rothschild Declaration at para. 7.)

22
23 The same conclusion is warranted with respect to counsel's failure to obtain an
24 expert enhancement of the pretext call. At trial the state placed substantial reliance on a
25 Nepali statement in the pretext call. Relying on Sapna to translate the statement, the state
26 argued that Mr. Dev said "[b]ut you had sex with me when you were 18." (15 CT 4176.)
27
28

1 Recognizing the importance of obtaining an accurate translation of this exchange,
2 defense counsel hired a translator who said (1) Ajay's statement was inaudible but (2) he
3 was able to rule out Sapna's translation because he (the translator) could hear the first
4 syllable of the word in dispute which was incompatible with any Nepali word connoting
5 "sex." (14 RT 3866-3867.) Thus, defense counsel's argument was that the prosecution
6 was misinterpreting the statement. (18 RT 5019-5020, 5073). In closing argument the
7 prosecutor told the jury to reject the defense position because "if [the defense expert]
8 find[s] something that's good for the defense, [he] bring[s] it out. If [he] find[s]
9 something incriminating, [he doesn't] bring that out." (18 RT 4986-4987.)
10

11 Had defense counsel enhanced the recording before obtaining a translation -- as
12 was possible with the then-current technology -- he would have learned that the actual
13 statement petitioner made was "[i]f that [is] so why did you come with me since 18
14 years?" (Exhibit O at paras. 1-3.) This sentence quite obviously has an entirely different
15 meaning than "[b]ut you had sex with me when you were 18." As properly translated,
16 and by way of example, this exchange could refer to Sapna flying to Nepal with Ajay in
17 2003 after she was 18 years old. In other words, this new evidence also directly supports
18 the very theory defense counsel himself proposed -- that the state's translation was
19 incorrect.
20

21 Finally, defense counsel's failure to move to reopen the case to correct the
22 prosecutor's false argument that petitioner admitted the Bangkok rape to his own lawyer
23 also fell below an objective standard of case. Under California law, the trial court would
24 have abused its discretion had it not granted such a motion.
25

26 In this regard, trial courts have discretion to allow either side to reopen its case and
27 present additional evidence, even where both sides have rested, argument has begun, or
28 the jury has started deliberating. (*See, e.g., People v. Berryman* (1936) 6 Cal.2d 331, 338-

1 39; *People v. Christensen* (1890) 85 Cal. 568, 570; *People v. Ross* (1884) 65 Cal. 104.)
2 The standard is relatively straightforward: when the new evidence refutes a significant
3 portion of the state’s closing argument, a trial court abuses its discretion in failing to
4 allow a defendant to reopen his case and present the additional evidence. (*See, e.g.,*
5 *People v. Newton* (1970) 8 Cal.App.3d 359, 382-84; *People v. Frohner* (1976) 65
6 Cal.App.3d 94, 110-111.) Indeed, where trial counsel bases an argument to the jury upon
7 a false premise which can be cleared up through additional evidence, the entire purpose of
8 a criminal trial -- to search for truth by exposing the facts -- compels admission of the
9 evidence. (*See People v. Kohn* (1968) 258 Cal.App.2d 368, 377.) Accordingly, had
10 defense counsel moved to re-open to present evidence showing that the prosecutor’s
11 argument that Ajay admitted rape to his own lawyer was false, the jury would have
12 learned the truth. There is no conceivable tactical reason for defense counsel to have
13 objected to the state’s argument (as he did) but fail to ensure the jury knew the truth.
14

15 In short, assuming the truth of petitioner’s factual allegations, petitioner has pled a
16 prima facie case that defense counsel’s failure to investigate and present this readily
17 available evidence fell below an objective standard of reasonableness. Taken either
18 singly or in combination this evidence (1) directly undercut Sapna’s testimony and
19 credibility, (2) directly supported the defense theory counsel presented and (3) directly
20 undercut the state’s case. The only remaining question is whether petitioner has also pled
21 a prima facie case that counsel’s failures “undermine[d] confidence in the outcome of the
22 case.”
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28

1 **2. Because all parties recognized Sapna’s credibility was key to the**
2 **case, counsel’s failure to introduce evidence showing Sapna lied**
3 **and undercutting the state’s case could have resulted in one or**
4 **more jurors finding reasonable doubt and voting to acquit.**

5 As noted above, where counsel’s conduct falls below the standard of care, relief
6 is required whenever there is a “reasonable probability” the result of the proceeding
7 would have been different. (*Strickland v. Washington, supra*, 466 U.S. at p. 693.) Where
8 counsel’s error is in failing to present certain evidence, a defendant satisfies this standard
9 of prejudice by showing that had the evidence been presented, one juror could have
10 reasonably voted to acquit. (*Wiggins v. Smith, supra*, 539 U.S. at p. 537; *People v.*
11 *Centeno, supra*, 60 Cal.4th at p. 677.)

12 Here, as discussed above, both sides recognized the critical question the jury was
13 being asked to decide was whether Sapna was credible and testified truthfully. Defense
14 counsel failed to present testimony from Sapna’s friends and family members that Sapna
15 admitted making up the allegations because she was angry with petitioner and concerned
16 the Devs might void her adoption and jeopardize her path to becoming a citizen. He
17 failed to present testimony from her friends and family that Sapna admitted renewing the
18 charges because she believed petitioner was responsible for the passport fraud criminal
19 action against her in Nepal. He failed to properly authenticate a September 26 email
20 which would have shown Sapna was lying. He failed to properly authenticate Nepali
21 court documents which would have directly supported his motive theory, and undercut an
22 element of 12 charges. He failed to enhance of a section of the pretext call which his own
23 expert said was inaudible, and which turned out to be entirely inconsistent with the
24 translation provided by Sapna. He failed to present evidence which would have corrected
25 the prosecutor’s false assertion that petitioner confessed to his own lawyer. Taken
26 together, the evidence counsel did not present would have directly undercut Sapna’s
27
28

1 credibility, directly supported the defense theory of the case and just as directly rebutted
2 the prosecutor's point that she had no motive to lie.

3
4 In determining whether a single juror could reasonably reach a different result had
5 this evidence been presented, it is also important to note that even on the record presented
6 -- without *any* of the new evidence -- the jury deliberated more than 30 hours over the
7 course of 6 days, asked 2 questions and requested numerous items including a transcript
8 of the pretext call and to watch Sapna's police interview with Detective Hermann. (12
9 CT 3238, 3258, 3259, 3261, 3264, 3266, 3269, 3270, 3272, 3274-3275; *See, e.g., People*
10 *v. Cardenas* (1982) 31 Cal.3d 897, 907 [twelve-hour deliberations was a "graphic
11 demonstration of the closeness of this case"]; *People v. Rucker* (1980) 26 Cal.3d 368, 391
12 [nine-hour jury deliberation shows close case"]; *People v. Woodard* (1979) 23 Cal.3d
13 329, 341 [six-hour deliberation]; *People v. Thompkins* (1987) 195 Cal.3d 244 [request for
14 readback shows close case]; *People v. Williams* (1971) 22 Cal.App.3d 34, 40-41 [same].)
15 Of course, both of these requests -- to view the pretext transcript and to watch Sapna's
16 police interview -- show the jury's concern with Sapna's credibility.

17
18 Moreover, the jury acquitted petitioner of 13 counts and one enhancement and
19 hung on another 3 counts and one enhancement. (12 CT 3273, 3275.) The jury's
20 acquittals and refusal to unanimously convict on these charges also shows the case was
21 close. (*People v. Epps* (1981) 122 Cal.App.3d 691, 698 [refusal to convict on all charges
22 shows close case]; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1398 [same].) Plainly
23 jurors had concerns about Sapna's credibility.

24
25 To the extent there is any remaining question as to whether counsel's errors
26 prejudiced petitioner, the Court should consider the declaration for juror Loretta Gunter.
27 Juror Gunter was clear; "If I had been presented with this [new] evidence, and found it
28 credible, I would have found reasonable doubt and would not have voted to convict Mr.

1 Dev.” (Declaration of Loretta Gunter (“Gunter Declaration”) attached as Exhibit T at
2 para. 6.)

3
4 This declaration is admissible to show prejudice. When a defendant is litigating a
5 juror misconduct claim, Evidence Code section 1150 permits evidence showing
6 “statements made, or conduct, conditions, or events occurring, either within or without
7 the jury room” but goes on to preclude juror declarations “as to the effect of such
8 misconduct on the minds of the jurors.” (Evidence Code § 1150, subdivision (a).) Since
9 there is no claim of juror misconduct here, Ms. Gunter’s juror declaration is admissible in
10 evaluating prejudice. Nothing in § 1150 precludes -- or even addresses -- the use of juror
11 declarations for this very different purpose. Indeed, California (and other) courts have
12 long recognized the utility of precisely this type of evidence. (*See Wade v. Bernardi*
13 (1970) 4 Cal.App.3d 967, 972 [trial court granted plaintiff new trial motion in personal
14 injury case based on surprise testimony from plaintiff’s own expert; held, new trial
15 motion improperly granted where plaintiff “made no effort to show -- e.g. through
16 affidavits of jurors -- that [surprise] testimony substantially affected the jurors and
17 therefore that a different verdict could reasonably be expected”]; *Nields v. Bradshaw* (6th
18 Cir. 2007) 482 F.3d 442, 460-461 [considering juror declarations in resolving prejudice
19 prong of ineffective assistance of counsel claim]; *Salazar v. State* (Okla. Crim. App.
20 2005) 126 P.2d 625, 633 [same]; *Burns v. State* (Miss. 2001) 813 So.2d 668, 678 [same];
21 *Davis v. State* (Miss. 1993) 635 So.2d 805, 810 [same]; *Stembridge v. State* (1951) 84 Ga.
22 App. 413, 416 [in a new trial motion defendant presented affidavits from ten jurors they
23 would not have voted to convict had they heard defendant’s new evidence; held, “[W]e
24 know of no better way to show such value than by the affidavits of the ten jurors that they
25 would have voted for a verdict of not guilty had this evidence been presented to them.”];
26 *compare Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1145 [considering absence of juror
27 declarations in resolving prejudice prong of absence from sentencing claim]; *Calderon v.*
28 *Coleman* (1998) 525 U.S. 141, 149-150 [Stevens, J., dissenting][Justice Stevens - writing

1 for the only four justices to address the issue - considers juror declaration in assessing
2 prejudice from a separate constitutional violation]; *Jones v. United States* (1999) 527 U.S.
3 373, 411 [Ginsburg, J., dissenting][four justices consider juror declarations in assessing
4 prejudice from constitutional violation].)

5
6 Under all these facts, and again assuming the truth of petitioner's factual
7 allegations, petitioner has established a "reasonable probability" but for defense counsel's
8 errors the result of the proceeding would have been different -- that is, at least one juror
9 could reasonably have reached a different result. That is all that is required.

10 Accordingly, a prima facie case has been established and an Order to Show Cause should
11 issue.

1 II. PETITIONER HAS PLED A PRIMA FACIE CASE THAT NEW EVIDENCE
2 WOULD HAVE CHANGED THE OUTCOME OF TRIAL.

3 Prior to 2016, the law in California was clear. When a defendant sought habeas
4 relief based on new evidence of innocence, the defendant had to satisfy a very high
5 burden of proof by showing the new evidence “completely undermines the entire structure
6 of the case presented by the prosecution” and “point[ed] unerringly to innocence.” (*See,*
7 *e.g., In re Branch* (1969) 70 Cal.2d 200, 213; *In re Imbler* (1963) 60 Cal.2d 554, 569; *Ex*
8 *parte Lindley* (1947) 29 Cal.2d 709, 724.) If a reasonable juror could reject the new
9 evidence, petitioner had not satisfied his burden of proof. (*See In re Lawley* (2008) 42
10 Cal.4th 1231, 1239.)

11
12 In 2016 the California Legislature significantly lowered this burden of proof.
13 Penal Code section 1473, subdivision (b)(3)(A) now provide that habeas relief is required
14 when “new evidence exists that is credible, material, presented without substantial delay,
15 and of such decisive force and value *that it would have more likely than not changed the*
16 *outcome at trial.*” (Emphasis added). The final Senate Bill Floor Analysis for the
17 legislation proposing this new standard made clear that “[t]he ‘more likely than not’
18 standard proposed by the bill is clear and is a standard familiar to the courts.” (Senate
19 Rules Committee, Floor Analysis of Senate Bill No. 1134 (8/1/16) at p. 77.)

20
21 The Floor Analysis was entirely correct. This new standard is nearly identical to
22 the standard trial courts routinely apply in assessing new evidence that is presented at a
23 new trial motion. The new trial motion standard requires the new evidence to be “such as
24 to render a different result probable on a retrial.” (*People v. McDaniel* (1976) 16 Cal.3d
25 156, 178.) And for purposes of assessing whether new evidence is sufficient to merit
26 relief in a new trial motion -- that is, whether the new evidence is sufficient to make a
27
28

1 different outcome likely -- a hung jury is a different (and more favorable) outcome than a
2 guilty verdict. (*See, e.g., People v. Soojian* (2010) 190 Cal.App.4th 491, 521.)

3
4 In other words, the burden has shifted 180 degrees. Under the old law, relief was
5 proper for new evidence only where the defense proved the new evidence so powerful
6 that all 12 jurors would necessarily rely on it to reach a different verdict. Under the
7 current standard, if the new evidence could persuade even a single juror to reasonably
8 reach a different verdict, relief is required.¹¹

9
10 As discussed in some detail in the Statement of Facts, in a January 2018 Facebook
11 message to Ajay’s brother Sanjay Dev, Sapna’s sister Madhuri admitted that Sapna lied in
12 order to “get to Amrika” and then stuck with that lie in order avoid being deported:

13
14 [Sapna] want to take revenge and get to Amrika [sic]. . . . The only way to
15 come to Amrika [sic] was to come testify against Ajay uncle. We did not
16 know that he will be put in jail long time. Now Sapna say that if she helps
17 she will go to jail and get deported. . . . Sapna has lied many times in the
18 past. She had no choice. Police say to her they will help if Sapna testify for
19 rape. . . . We know that she was not raped. . . . We also tell Sapna to tell the
20 truth that this never happen but she scared now.

21 (Exhibit K, Attachment 2.)

22 This evidence is certainly new -- since the message was sent in January of 2018. If
23 deemed credible -- which is certainly reasonable given that the source is Sapna’s own

24 ¹¹ There are other similarities between the 2016 definition of new evidence in
25 section 1473 for purposes of habeas corpus proceedings and the definition of new
26 evidence for purposes of a new trial motion. The definition of new evidence for purposes
27 of a new trial motion requires the defendant to show the evidence could not have been
28 discovered with reasonable diligence, and is not merely cumulative to evidence which
was presented. (*McDaniel, supra*, 16 Cal.3d at p. 178.) The definition of new evidence
for purposes of habeas relief contains the identical limitations. (Penal Code section 1473,
subd. (B)(3)(B).)

1 sister -- a juror could reasonably find from this evidence alone that Sapna made up the
2 charges to “take revenge and get to Amrika,” that Sapna’s family had told her “to tell the
3 truth that this never happen but she scared now,” the only way for Sapna to get to the
4 United States was for her to “come testify against Ajay” and Sapna could not tell the truth
5 at trial precisely because “if she helps she will go to jail and get deported.” A juror
6 hearing this testimony from Sapna’s sister could certainly find Sapna not credible and
7 vote to acquit. Under this circumstance, and assuming the truth of petitioner’s factual
8 allegations as required by *Duvall*, petitioner has pled a prima facie case for relief under
9 state law based on new evidence and an Order to Show Cause should issue.

10
11 But there may be a great deal more to this claim. The exhibits attached to Mr.
12 Dev’s petition show that defense counsel could have but did not (1) present testimony
13 from people to whom Sapna confessed she had made up the allegations, (2) properly
14 authenticate the September 26 email, (3) properly authenticate the Nepali documents (4)
15 enhance the pretext call before having it translated and (5) prove that the prosecutor’s
16 suggestion in closing argument that petitioner had confessed was utterly false. In
17 Argument I above, petitioner contends that because this evidence could have been
18 presented with reasonable diligence, defense counsel’s performance fell below the
19 standard of reasonableness *Strickland* and the Sixth Amendment require. To the extent
20 this Court disagrees with this performance prong analysis -- and finds instead that defense
21 counsel exercised reasonable diligence but still did not discover or present this evidence -
22 - then this evidence fits squarely within the definition of new evidence set forth in
23 recently enacted section 1473, subd. (b)(3)(B) as “evidence that has been discovered after
24 trial, that could not have been discovered prior to trial by the exercise of due diligence . . .
25 .”

26
27 In short, if trial counsel failed to present the new evidence discussed in connection
28 with petitioner’s *Strickland* claim because he did not exercise reasonable diligence, then

1 the impact of that new evidence is properly assessed under the prejudice prong of the
2 *Strickland* analysis. If this Court disagrees, and finds that trial counsel did not discover
3 and present this evidence even though he exercised reasonable diligence, then the
4 evidence is newly discovered within the meaning of section 1473, subd. (b)(3)(B). In that
5 situation, the impact of the new evidence is properly assessed under section 1473, subd.
6 (3)(A) and requires the Court to determine whether the evidence “would have more likely
7 than not changed the outcome at trial” -- that is, whether one or more jurors could have
8 voted to acquit had they heard the new evidence.

9
10 For all the reasons set forth in Argument I above, and assuming the truth of
11 petitioner’s factual allegations as *Duvall* requires, if this Court finds that counsel
12 exercised reasonable diligence but still did not present this evidence, then a prima facie
13 case for relief based on new evidence has been established under state law in connection
14 with this evidence as well. In that situation, and taken singly or in combination, because
15 this new evidence directly challenges Sapna’s credibility and the state’s theory of the
16 case, a juror could reasonably find Sapna not credible (and vote to acquit) if he or she
17 assumed the truth of petitioner’s factual allegations regarding (1) Sapna’s admissions to
18 numerous friends and relatives that she made up the allegations, (2) Mr. Dev’s alibi for
19 September 26, (3) Sapna’s incorrect translation of the pretext call (4) the Nepali judicial
20 documents and (5) the prosecutor’s false closing argument. Accordingly, should the
21 Court make such a finding regarding trial counsel’s diligence, petitioner has nevertheless
22 pled a prima facie case for relief based on new evidence as to this evidence and an Order
23 to Show Cause should issue.

24
25 There is a federal constitutional component to his claim as well. In *Herrera v.*
26 *Collins* (1993) 506 U.S. 390 the Supreme Court addressed whether new evidence of
27 innocence was a valid constitutional claim in and of itself. There were five separate
28 opinions in *Herrera*. Two justices (Justices Scalia and Thomas) wrote that innocence was

1 not a freestanding claim. (506 U.S. at p. 428.) Justice Rehnquist, writing for the Court
2 “assume[d], for the sake of argument” that new evidence of innocence was a valid basis
3 for federal habeas relief. (506 U.S. at p. 417.) The remaining six justices went further,
4 concluding that a free-standing claim of actual innocence was a permissible ground for
5 habeas relief. (506 U.S. at p. 419 [O’Connor, J., joined by Kennedy, J., concurring], 429
6 [White, J., concurring] and 431-437 [Blackmun, J., joined by Stevens and Souter,
7 dissenting].)

8
9 Although the justices differed over exactly what burden of proof should be placed
10 on defendants trying to prove their innocence, there was general agreement on two
11 matters. First, there was agreement that the burden of proving innocence was properly
12 placed on the defendant. (506 U.S. at pp. 417-419, 427, 429, 442.) Second, there was
13 agreement that new evidence of innocence offered by a defendant was to be evaluated
14 against the evidence which had been presented against the defendant at trial. Thus,
15 Justice Rehnquist's opinion for the Court stated that the new evidence was to “be
16 considered in light of the proof of petitioner’s guilt at trial” (506 U.S. at p. 418.)
17 Justice O’Connor (joined by Justice Kennedy) took the same approach, comparing the
18 new evidence “to the proof at trial” and rejecting petitioner’s claim in that case precisely
19 because the new evidence “when compared to the proof at trial [was] unconvincing.”
20 (506 U.S. at p. 424, 425.) Justice White was of the same mind, reasoning that a
21 defendant’s new evidence must be evaluated based on “the entire record before the jury
22 that convicted him” (506 U.S. at p. 429.)

23
24 In applying these principles, lower federal courts have recognized that a
25 freestanding claim of innocence is cognizable both in capital and non-capital habeas
26 proceedings. (*Carriger v. Stewart* (9th Cir. 1997) 132 F.3d 463, 476 [capital]; *Swan v.*
27 *Peterson* (9th Cir. 1993) 6 F.3d 1373 [non-capital].) When a defendant alleges that new
28 evidence shows he is innocent, relief is properly denied where the “new evidence does

1 not undermine the structure of the prosecution’s case.” (*Spivey v. Rocha* (9th Cir. 1999)
2 194 F.3d 971, 979. *Accord Fuller v. Roe* (9th 1999) 182 F.3d 699, 704 [new evidence
3 claim properly rejected where the new evidence would not have impacted the
4 “overwhelming evidence” presented against defendant at trial), overruled on other
5 grounds by *Slack v. McDaniel* (2000) 529 U.S. 473.) In sum, for purposes of federal law
6 the question here is simple. Does the new evidence presented by petitioner, when
7 measured against “the proof of petitioner’s guilt at trial,” carry petitioner’s burden of
8 undermining the “structure of the prosecution’s case.”

9
10 Here too -- and for the same reasons as discussed above -- assuming the truth of
11 petitioner’s factual allegations, petitioner has pled a prima facie case for relief. The new
12 evidence presented here -- regardless of whether it consists solely of the Madhuri
13 facebook message or all the new evidence combined -- undermines the structure of the
14 state’s case. As the prosecutor conceded, “no Sapna, no case.” And if credited, the new
15 evidence shows that Sapna made up the allegations. Accordingly, petitioner has not only
16 pled a prima facie case of new evidence under state law, but federal law as well.

1 III. EVEN IF NONE OF THE ERRORS IDENTIFIED ABOVE REQUIRE
2 REVERSAL WHEN CONSIDERED ALONE, CONSIDERED TOGETHER
3 ALONG WITH ERRORS FROM THE DIRECT APPEAL, THESE ERRORS
4 DEPRIVED MR. DEV OF A FAIR TRIAL.

5 A series of errors, though independently harmless, may in some circumstances
6 “rise by accretion to the level of reversible and prejudicial error.” (*People v. Hill* (1998)
7 17 Cal.4th 800, 844.) Such cumulative error impacts a defendant’s federal Constitutional
8 right to due process. (*See, e.g., Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1179
9 [cumulative effect of significant trial errors “so infected the trial with unfairness as to
10 make the resulting conviction a denial of due process”].)

11
12 Here, the errors discussed above considered alone requires relief. But even setting
13 this aside, considered in conjunction with one another -- and with the errors petitioner
14 raised on appeal -- petitioner has pled a prima facie case of cumulative error.

15
16 Here, the errors work in tandem. The new evidence from Sapna’s sister Madhuri
17 that Sapna lied in order to “get to Amrika” and then stuck with that lie in order avoid
18 being deported and trial counsel’s failure to investigate, discover and/or present (1)
19 testimony from witnesses to whom Sapna confessed that she was lying and had made up
20 the allegations, (2) offer the Nepali court documents but do so with an inadequate
21 foundation, (3) offer the September 26 email but do so with an inadequate foundation, (4)
22 obtain an expert for the pretext call but fail to enhance the most critical portion of the call
23 once his own expert reported that it was inaudible or (5) move to reopen the case after the
24 prosecutor presented demonstrably false argument in the rebuttal portion of his closing
25 argument impacted the jury’s ability to make a fair and reasoned decision on the critical
26 question of Sapna’s credibility. So too did the errors presented on direct appeal. Because
27 Sapna’s credibility was the most important issue in the case, and because the objective
28 record of deliberations shows this was a close case even *with* the errors described above,

1 assuming the truth of petitioner's factual allegations, petitioner has pled a prima facie
2 case of prejudicial cumulative error.

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1 IV. THE PETITION IS TIMELY BECAUSE IT HAS BEEN FILED LESS THAN
2 FIVE MONTHS AFTER PETITIONER LEARNED THE TRIGGERING FACTS
3 ON WHICH THE PETITION IS BASED.

4 California law does not contain a defined time limit within which a habeas petition
5 must be filed. Instead, the rule is flexible and provides that a habeas petition should be
6 filed without “substantial delay.” (*In re Robbins* (1998) 18 Cal.4th 770, 780.)

7 “Substantial delay is measured from the time the petitioner or his or her counsel knew, or
8 reasonably should have known, of the information offered in support of the claim and the
9 legal basis for the claim.” (*Ibid.*) The facts supporting the claim, and the legal basis for
10 the claim are referred to as “triggering facts.” (*Ibid.*)

11
12 A petitioner may avoid a finding of substantial delay by alleging “facts showing
13 when information offered in support of the claim was obtained, and that the information
14 neither was known, nor reasonably should have been known, at any earlier time.” (*Ibid.*)
15 Although there are no hard and fast rules, a delay of five months between discovery of
16 triggering facts and filing a petition is not considered substantial. (*Compare In re*
17 *Stankewitz* (1985) 40 Cal.3d 391 [finding no delay where petition filed a year and a half
18 after obtaining the operative declarations]; *In re Robbins, supra*, 18 Cal.4th at pp. 795-
19 796 [finding no delay where petition filed five months after discovery of triggering
20 facts.].) Indeed, in explaining the “substantial delay” rule to the United States Supreme
21 Court, the state conceded that “a 5-month window from the discovery of triggering facts
22 to the presentation . . . of the claim was a reasonable amount of time.” (*Walker v. Martin*,
23 No. 09-996, Oral Argument Transcript, 2010 WL 4818791 (U.S.) at * 10.)

24
25 Here, petitioner’s direct appeal became final on July 18, 2017, 90 days after the
26 state supreme court denied his Petition for Review -- when petitioner’s time period to
27 seek certiorari in the United States Supreme Court expired. (*People v. Smith* (2015) 234
28 Cal.App.4th 1460, 1465.) Under California law, Mr. Dev was not entitled to appointment

1 of habeas counsel to prepare a Petition for Writ of Habeas Corpus. (Declaration of Cliff
2 Gardner (“Gardner Declaration”) at para. 4, attached as Exhibit R.)

3
4 Mr. Dev has no training in the law. (Declaration of Ajay Dev (“Dev Declaration”)
5 at para 2, attached as Exhibit Q.) He has never received training in appellate work.
6 (*Ibid.*) He has no training or experience in habeas proceedings, and no knowledge of the
7 rules governing habeas corpus proceedings. (*Ibid.*) As a result, and because he was not
8 entitled to appointment of counsel for purposes of investigating and preparing a habeas
9 petition, after Mr. Dev’s appeal was final his family put together funds to hire habeas
10 counsel, retaining current counsel on April 7, 2017 to review the record and determine if
11 there were any additional issues to present in state-court proceedings. (Gardner
12 Declaration at para. 5.) Current counsel obtained the trial transcripts from appellate
13 counsel -- they consisted of 5,275 pages of Reporter’s Transcripts in 19 volumes and
14 4,400 pages of Clerk’s Transcripts in 15 volumes. (Gardner Declaration at para. 6.) In
15 addition the record contained numerous transcript volumes of augmented record. (*Ibid.*)
16 Current counsel completed review of this nearly 10,000 pages material within four or five
17 months -- in August or September 2017. (Gardner Declaration at para. 7.)

18
19 In September 2017 current counsel wrote to Mr. Dev advising him about potential
20 areas of investigation. (Gardner Declaration at para. 8.) Current counsel met with Mr.
21 Dev in early October 2017 to discuss potential investigation. (*Ibid.*) The investigation
22 began in November 2017 and -- because it involved locating and contacting numerous
23 witnesses in foreign countries including Nepal and Australia -- it took seven months,
24 concluding in June 2018. (*Ibid.*) Mr. Dev was unaware of the factual and legal bases of
25 the claims until counsel advised him about the results of the investigation. (Dev
26 Declaration at para. 6.) Mr. Dev’s petition has been filed within weeks of learning the
27 factual bases for some of the claims. (Gardner Declaration at para. 8.)

1 In sum, petitioner and his family have acted diligently in retaining counsel to
2 pursue habeas relief. Counsel has acted diligently in reviewing the entire record,
3 planning and executing an investigation and drafting a Petition for Writ of Habeas
4 Corpus. And the Petition in this case is being filed within weeks of when petitioner and
5 his counsel learned “of the information offered in support of the claim and the legal basis
6 for the claim.” (*In re Robbins, supra*, 18 Cal.4th at p. 780.) This is well within the five
7 month window permitted under current law. (*See In re Robbins, supra*, 18 Cal.4th at pp.
8 795-796 [no delay where petition filed five months after discovery of triggering facts.];
9 *Walker v. Martin*, No. 09-996, Oral Argument Transcript at 12 [state concedes there is no
10 delay when a state petition is filed within five months after discovery of triggering facts].)
11 This Petition is timely.

CONCLUSION

For all the reasons discussed above, petitioner respectfully requests that an Order to Show Cause issue, requiring the state to specifically admit or deny the factual allegations of the Petition and show cause why relief should not be granted.

DATED: 7/12/18

Respectfully submitted,

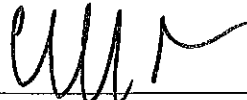
CLIFF GARDNER
LAZULI WHITT


By Cliff Gardner
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule 8.204(c)(1), I certify that the accompanying Petition for Writ of Habeas Corpus is double spaced, that a 13 point proportional font was used, and that there are 5089 words in the petition and the supporting memorandum of points and authorities is double spaced, that a 13 point proportional font was used, and that there are 20553 words in the memorandum.

Dated: 7/13/18.



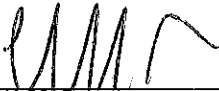
Cliff Gardner

VERIFICATION

1
2
3 I, Cliff Gardner, declare that I am an attorney for petitioner Paul Moore. I make
4 this verification for petitioner because of his absence from the county where I have my
5 office. I have read the attached petition and believe the matters stated therein to be true.
6 On that basis, I allege they are true.

7
8 I declare under penalty of perjury that the foregoing is true and correct.

9
10 Executed this 12th day of July, 2018, at Berkeley, California.

11
12 
13 _____
14 Cliff Gardner

CERTIFICATE OF SERVICE

I, the undersigned, declare as follows: I am a citizen of the United States, over the age of 18 years and not a party to the within action. My business address is 1448 San Pablo Avenue, Berkeley, California 94702.

On July 13, 2018, I served the within


PETITION FOR WRIT F HABEAS CORPUS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

upon the parties named below by depositing a true copy in a United States mailbox in Berkeley, California, in a sealed envelope, postage prepaid, and addressed as follows:

Mr. Ajay Dev, AA-0329
E19-C101-3up
Mule Creek State Prison
P.O. Box 409090
Ione, California 95640

Office of the District Attorney
301 2nd Street
Woodland, California 95695

I declare under penalty of perjury that the foregoing is true. Executed on July 13, 2018, in Berkeley, California.


Declarant