

1 CLIFF GARDNER
State Bar # 93782
2 1448 San Pablo Ave.
Berkeley, CA 94702
3 510-524-1093
Casetris@aol.com
4
5 Attorneys for Petitioner
David Crawford

6
7 IN THE SUPERIOR COURT
8 OF THE STATE OF CALIFORNIA
9 SAN MATEO

10 IN RE DAVID CRAWFORD,) No.:
11)
12 Petitioner,) Superior Court Case No.
13) 19-SM-013902-A
14 On Habeas Corpus.)
15 _____

16
17
18
19 PETITION FOR WRIT OF HABEAS CORPUS AND
20 MEMORANDUM OF POINTS AND
21 AUTHORITIES IN SUPPORT THEREOF
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION: HE SAID, SHE SAID, BUT WITH A TWIST	3
JURISDICTIONAL ALLEGATIONS	7
CLAIMS FOR RELIEF	8
VERIFICATION	22
MEMORANDUM OF POINTS AND AUTHORITIES	23
Introduction	28
Procedural Statement	31
Statement of Facts	33
Argument	52
I. Mr. Crawford Has Established A Prima Facie Case That False Evidence Was Presented From (1) Ms. Capri About A Corroborating Text To Dr. Gorney And (2) Both Ms. Capri And Ms. McGill About A Spontaneous Declaration	52
II. Mr. Crawford Has Established A Prima Facie Case That Defense Counsel's Failure To Impeach Ms. Capri's Testimony About The Text to Dr. Gorney Constituted Ineffective Assistance Of Counsel.	58
III. Mr. Crawford Has Established A Prima Facie Case That Material New Evidence Exists Which Would Result In A Different Outcome At Trial.	62
Conclusion	65

1 INTRODUCTION: HE SAID, SHE SAID, BUT WITH A TWIST

2
3 On the morning of September 15, 2019, Renee Capri and her husband David
4 Crawford argued. There were no other witnesses to the argument. Both Ms. Capri and
5 Mr. Crawford testified at trial. The jury would hear two very different explanations of
6 what happened.

7
8 Ms. Capri told jurors that the two argued on September 14, and again on the
9 morning of September 15. As the argument became heated, Mr. Crawford put his hands
10 around her neck and strangled her. Twice.

11
12 Mr. Crawford told jurors he did no such thing; instead they argued, Ms. Capri
13 came at him; when she dug her fingernails into his arms he pushed her away. Ms. Capri
14 believed Mr. Crawford was cheating on her; she sought full custody of the couple's two
15 children and these domestic violence allegations were part of a campaign to obtain full
16 custody and, with it, a significantly enhanced monetary award as part of the divorce.

17
18 He said, she said.

19
20 As California decisions have long recognized, in these type of cases -- where jurors
21 hear two different and sharply conflicting reports from the only two eyewitnesses to an
22 event -- the jury's role is largely to assess the credibility of the two parties. (*Knight v.*
23 *South Orange Community College District* (2021) 60 Cal.App.5th 854, 871; *Meeks v.*
24 *Autozone, Inc.* (2018) 24 Cal.App.5th 855, 865.) So it was here. Both parties were
25 certainly aware of this common-sense characterization of the jury's role in such cases.
26 Thus, during trial, both parties sought to corroborate their respective versions of events.

27
28 For its part, the prosecution sought to corroborate Ms. Capri's version of events by

1 introducing evidence that Ms. Capri told two people about the incident in real time, right
2 after it happened. On direct examination, Ms. Capri testified that she sent a text to Dr.
3 Beth Gorney, the therapist she and Mr. Crawford had been jointly seeing. In that text, sent
4 shortly after the alleged choking incident, Ms. Capri said she described "what happened."
5 Ms. Capri also told jurors that she called her best friend, Julie McGill and "told her what
6 happened" as well.

7
8 The state did not introduce the text to Dr. Gorney. Nor did the state call Dr. Gorney
9 to corroborate Ms. Capri's testimony. But the state did call Julie McGill.

10
11 Ms. McGill came into court and confirmed her best friend's version of events,
12 telling jurors that Ms. Capri had called her that morning, hysterical, and said that Mr.
13 Crawford had "grabbed my neck and choked me." Although Ms. McGill's testimony as to
14 what Ms. Capri told her was plainly hearsay, the trial court permitted jurors to hear this
15 testimony as a "spontaneous declaration" -- a statement made under the immediate stress
16 of an event before there has been an opportunity for reflection

17
18 If credible, and taken together, the text to Dr. Gorney and Ms. McGill's testimony
19 constituted powerful corroborating evidence. After all, as far as the jury knew, Ms. Capri
20 had confirmed the circumstances of the event twice. And once was to a therapist.
21 Recognizing the force of this evidence, during his closing argument the prosecutor
22 understandably urged jurors to find Ms. Capri credible -- and convict Mr. Crawford --
23 precisely because her testimony about the events was consistent with the versions she gave
24 right after the event.

25
26 For its part, the defense presented evidence from police who saw the scratches on
27 Mr. Crawford's arm, and from Brandee Kraznich, who Ms. Capri herself described as her
28 "good friend" for ten years. Ms. Capri told Ms. Krzanich that if she obtained full custody

1 of the children that meant “the more money I get” in any divorce settlement. And after an
2 initial hearing where Superior Court Judge Lee *denied* full custody to Ms. Capri, awarding
3 Mr. Crawford 20% custody, Family Court Services advised Ms. Capri that “if there is a
4 finding of domestic violence against the father, it will be recommended that the mother
5 have sole legal custody of the children” It was only *after* this hearing, and *after*
6 learning that a domestic violence finding would ensure full legal custody of the children,
7 that Ms. Capri decided to cooperate with the state in its domestic violence prosecution.

8
9 On this record -- with corroborating evidence from both sides -- jurors were plainly
10 concerned about Ms. Capri’s credibility. They deliberated nearly 12 hours over the course
11 of three days. Jurors returned with 11 questions for the court. Twice jurors indicated they
12 were deadlocked. Ultimately, the state dismissed one count and the jurors returned a split
13 verdict, convicting Mr. Crawford of two misdemeanors but hanging on a third count.

14
15 He said, she said.

16
17 But with a twist. Ms. Capri sued Mr. Crawford for divorce. During that lawsuit the
18 parties engaged in discovery. And during that discovery, albeit after trial, Mr. Crawford
19 learned that the powerful corroborating evidence which the jury considered in their nearly
20 12-hour deliberation was nothing of the sort.

21
22 At trial, the defense did not impeach Ms. Capri’s testimony that she explained
23 “what happened” in a text to Dr. Gorney on the morning of September 15. Newly
24 discovered evidence -- including the texts actually received by Dr. Gorney herself --
25 establish that this testimony was false. Not only do Ms. Capri’s own telephone records
26 show no morning text to Dr. Gorney, but Dr. Gorney’s own records show she received no
27 morning text message about “what happened.” To the contrary, although the records show
28 Ms. Capri *did* send a text to Dr. Gorney on September 15, that text was sent in the

1 afternoon, and said nothing at all about a choking incident. But jurors evaluating Ms.
2 Capri's credibility never knew Ms. Capri's testimony about the corroborative text was
3 false.

4
5 There is more. As noted, at trial (six months after the September 15 incident) Ms.
6 McGill told jurors that in a spontaneous declaration on the morning of September 15, Ms.
7 Capri said that Mr. Crawford "grabbed my neck and choked me." Newly discovered
8 evidence -- WhatsApp messages from Ms. McGill to Ms. Capri only two days after this
9 "spontaneous declaration" -- now show that Ms. McGill's contemporaneous recollection
10 of Capri's spontaneous declaration was very different. At that time (with no jurors
11 present), and in contrast to her later trial testimony, Ms. McGill described the incident *not*
12 as involving a brutal strangulation, but as involving "verbal abuse" and a "threat[] to
13 strangle." But jurors never heard this much more contemporaneous recollection of Ms.
14 Capri's September 15 statements.

15
16 These issues will be discussed below. At this early stage of the proceedings, this
17 Court need not decide if relief is required. Instead, the court "assum[es] the petitioner's
18 factual allegations are true" and assesses whether petitioner has established a prima facie
19 case for relief on his claims. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.) If so, an
20 Order to Show Cause should issue and the state should be required to file an Answer to the
21 Petition which formally admits or denies the factual allegations of the Petition. (*Ibid.*)

22
23 As discussed in the memorandum which accompanies this Petition, following
24 *Duvall's* mandate to assume the truth of the factual allegations of the Petition, Mr.
25 Crawford has established a prima facie case for relief. To resolve this case, jurors had to
26 decide whether Ms. Capri and Ms. McGill were credible. They deliberated for nearly 12
27 hours, twice said they were deadlocked and ultimately returned a split verdict. But these
28 jurors did not know that Capri fabricated a text to Dr. Gorney and lied to the jury. Nor did

1 they know that Ms. McGill's contemporaneous texts to Capri told a very different story
2 about the content of the "spontaneous declaration." An Order to Show Cause should issue
3 and the state required to file an Answer to the Petition.

4 5 JURISDICTIONAL ALLEGATIONS 6

7 Petitioner David Crawford, through counsel, files this petition for writ of habeas
8 corpus. By this verified petition, Petitioner alleges as follows:

9 10 I.

11 Mr. Crawford is unlawfully in the custody of the San Mateo County Probation
12 Department pursuant to a judgment of the Superior Court for San Mateo in *People v.*
13 *Crawford*, Case Number 19-SM-013902-A.

14 15 II.

16 Mr. Crawford was convicted of one count of assault in violation of Penal Code
17 section 245 and infliction of injury on a spouse in violation of section 273.5 (a). (Exhibit
18 A at pp. 919-920.)¹ On August 20, 2020 Mr. Crawford was sentenced to three years
19 probation, 10 days of county jail time, 104 hours of domestic violence counseling and 200
20 hours of community service. (Exhibit A at pp. 938-941.) Because Mr. Crawford is still
21 serving his three year probationary period, he is still in custody for purposes of seeking
22 habeas relief. (*In re Hernandez* (2019) 33 Cal.App.5th 530, 542.)

23 24 III.

25 Mr. Crawford pled not guilty. He was tried by jury. He testified at trial and has
26

27 1. References to RT are to the Reporter's Transcripts of Proceedings. For the court's
28 convenience, a PDF of the Reporter's Transcript has been attached on a disc as Exhibit A.

1 always maintained his innocence.

2
3 IV.

4 On the advice of trial counsel, Mr. Crawford did not appeal.

5
6 V.

7 As to the claims raised in paragraphs VI-X of this Petition, no other petitions for
8 writ of habeas corpus have been filed. Mr. Crawford has no adequate remedy at law.
9 Because this Petition for Writ of Habeas Corpus is being filed within a reasonable time of
10 the discovery of facts on which the claims are based, the claims presented in this Petition
11 are timely.

12
13 CLAIMS FOR RELIEF

14 VI.

15 Mr. Crawford's judgment of conviction has been unlawfully and unconstitutionally
16 imposed in violation of his constitutional rights as guaranteed by the state constitution, the
17 Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and
18 Penal Code section 1473. The state presented false evidence and argument at trial. The
19 following facts now known to Petitioner support this claim:

20
21 A. On November 1, 2019, the San Mateo District Attorney charged petitioner
22 David Crawford with having committed four offenses against his wife,
23 Renee Capri, on September 15, 2019. (November 1, 2019 Complaint,
24 attached as Exhibit B; Exhibit A at pp. 806, 813-816.) The District Attorney
25 charged assault, infliction of an injury on a spouse, battery on a spouse and
26 false imprisonment in violation of Penal Code sections 245, 273.5,
27 subdivision (a), 243, subdivision (e)(1) and 236 respectively. (Exhibit A at
28 pp. 806, 813-816.)

1 B. The state called five witnesses in its case-in-chief and rested on March 5,
2 2020. (Exhibit A at pp. 430, 512.) The defense called six witnesses and
3 rested on March 9, 2020. (Exhibit A at pp. 720, 779.)
4

5 C. The only witnesses to the argument on September 15, 2019 were Mr.
6 Crawford and Ms. Capri. Both agreed that they were arguing on the
7 morning of September 15, 2019.
8

9 D. Ms. Capri told jurors that as they argued, Mr. Crawford put his hands around
10 her neck, strangled her and then let go. (Exhibit A at pp. 144, 146.) She
11 ended up on the ground, and Ms. Capri thought he might have pulled her
12 back to a standing position and then strangled her a second time. (Exhibit A
13 at pp. 146-147.) She did not resist. (Exhibit A at pp. 149-150.) After he left
14 the room, she walked down the hall to her office to check her emails.
15 (Exhibit A at p. 150.) He came back into the office, pulled her ponytail
16 back, and started yelling at her. (Exhibit A at p. 151.) After Mr. Crawford
17 let go, she left the house through the garage and went outside to hide in the
18 neighbor's bushes. (Exhibit A at pp. 151-152.) While in the bushes, Capri
19 saw Crawford get into his car and leave. (Exhibit A at pp. 153-154.)
20

21 E. Mr. Crawford told jurors that on the morning of September 15, 2019, he and
22 Ms. Capri argued. (Exhibit A at pp. 213-214.) When Ms. Capri slapped and
23 grabbed Mr. Crawford's left arm digging in her fingernails, he pushed her
24 away. (Exhibit A at p. 593.) When she began swatting him with her hands,
25 he used both hands to push her away from him. (Exhibit A at p. 593.) She
26 continued swatting, he continued pushing her away and he urged her to calm
27 down. (Exhibit A at pp. 594-595, 696.) He then walked away. (Exhibit A
28 at p. 596.)

- 1 F. Ms. Capri testified that on the day of the strangling, she told two people
2 about the event. (Exhibit A at p. 158.) One was her best friend, Julie
3 McGill. (Exhibit A at p. 158.) Another was the couple's therapist, Dr. Beth
4 Gorney. (Exhibit A at p. 158.)
5
- 6 G. Ms. Capri testified that she "texted our couples therapist and basically said,
7 'I don't know if it's okay for me to reach out, because I know you see us as a
8 couple, not me individually.'" (Exhibit A at p. 158.) Ms. Capri "explained
9 to her briefly via text what happened." (Exhibit A at p. 158.) Ms. Capri
10 provided a copy of this text to the prosecution. (Exhibit A at pp. 202-203.)
11 She told police this text was sent as she was hiding in the bushes outside the
12 house that morning. (Exhibit H at pp. 1146-1147.)
13
- 14 H. The text was not introduced into evidence at trial. (Exhibit A at pp. 103,
15 850.)
16
- 17 I. Dr. Gorney was not called as a witness by the state to confirm that Ms. Capri
18 had sent a text that morning explaining "what happened." (Exhibit A at pp.
19 103, 850.)
20
- 21 J. Ms. Capri testified that after the strangling incident, and while hiding in the
22 bushes, she telephoned her best friend, Julie McGill. (Exhibit A at p. 154.)
23 She "told her what happened." (Exhibit A at p. 155.)
24
- 25 K. Ms. McGill was called as a witness. Ms. McGill testified that on the
26 morning of September 15, while she was still in bed, Ms. Capri called and
27 "sounded hysterical" saying she needed to change the password on her
28 phone. (Exhibit A at p. 373.) McGill recalled that in a telephone call

1 moments later Ms. Capri explained that she was in the bushes outside her
2 house and that Mr. Crawford had “grabbed my neck and choked me.”
3 (Exhibit A at p. 404.)
4

5 L. The defense called Brandee Krzanich. Ms. Capri admitted that Ms.
6 Krzanich was a “close friend” for nearly ten years. (Exhibit A at p. 306.)
7 According to Ms. Krzanich, they were “best friends.” (Exhibit A at p. 763.)
8 Ms. Capri spoke to Ms. Krzanich about her divorce proceeding, telling her
9 (1) if she obtained full custody of the children “the more money I get” in any
10 divorce settlement and (2) “she had a noose around [Mr. Crawford’s] neck”
11 with respect to custody. (Exhibit A at pp. 770, 772.)
12

13 M. In closing argument, the prosecutor repeatedly emphasized to jurors just how
14 credible Renee Capri was. (Exhibit A at pp. 825, 843-845, 847.) Similarly,
15 the prosecutor told jurors that Julie McGill was credible. (Exhibit A at p.
16 842.) The prosecutor argued that Ms. Capri was consistent in her version of
17 events, stressing that her testimony was consistent with “that frantic phone
18 call on the morning of September 15th[.]” to Julie McGill. (Exhibit A at pp.
19 843-844, 847.) Ms. Capri should be believed because her testimony was not
20 “impeached in any meaningful way on cross-examination, meaning no one
21 could point to previous statements that were markedly different.” (Exhibit A
22 at p. 843.) Instead, her story remained consistent; there was “no date and
23 time when her testimony changed or switched.” (Exhibit A at p. 847.)
24

25 N. The jury began deliberations on the afternoon of March 10, 2020,
26 deliberating uninterrupted for the remainder of the day for over two and a
27
28

1 half hours. (3/10/2020 Minute Order, attached as Exhibit C at pp. 996-998.)²

2
3 O. On March 11, 2020 the jury deliberated a full day, over six hours.
4 (3/11/2020 Minute Order, attached as Exhibit C at pp. 999-1000.)

5
6 P. On March 12, 2020, the jury deliberated for over three hours before reaching
7 a verdict. (3/12/2020 Minute Order, attached as Exhibit C at pp. 1002-
8 1003.)

9
10 Q. In total, the jury deliberated for 11 hours and 52 minutes over the course of
11 these three days. During deliberations, the jury sent 11 notes to the court.
12 (Exhibit A at p. 917.) Several notes advised the court that the jury was
13 hopelessly deadlocked. (Exhibit C at pp. 999-1000; Exhibit A at pp. 918-
14 921.)

15
16 R. The prosecution dismissed the count four false imprisonment charge.
17 (Exhibit A at p. 802.) As to the remaining three counts, the jury returned a
18 split verdict, convicting of assault and injuring a spouse but hanging on the
19 count three battery charge. (Exhibit A at pp. 918-921.)

20
21 S. In September 2019 Ms. Capri filed for divorce. During the divorce
22 proceedings the parties engaged in discovery. In that process Mr. Crawford
23 uncovered evidence which was never presented to the jury.

24
25 T. On the evening of September 17, 2019 there were numerous WhatsApp
26 messages between Ms. Capri and Ms. McGill. (WhatsApp Messages,

27
28 2. For the Court's convenience, the minute orders from trial have been collected and
attached as Exhibit C.

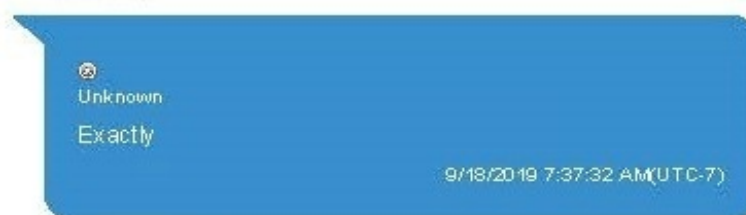
1 attached as Exhibit D.) This was only two days after the “spontaneous
2 declaration” in which, according to Ms. McGill’s trial testimony, Ms. Capri
3 confirmed that Mr. Crawford strangled her.
4

5 U. In one message, Ms. McGill compliments Ms. Capri on being “an excellent
6 example for [Ms. Capri’s daughter Lauren]” that “women are strong and
7 verbal abuse is not ok.” (Exhibit D at p. 1029.)
8

9 V. Later that same night (September 17), Ms. McGill sent Ms. Capri a text
10 urging her to read an article on the internet entitled “11 Subtle Signs You
11 Might Be In An Emotionally Abusive Relationship.” (Exhibit D at p. 1036.)
12

13 W. Ms. Capri replied early the next morning, making clear that she had read the
14 article about the “11 subtle signs” of an emotionally abusive relationship.
15 Ms. Capri noted that “[Crawford] does but all the three things.” (Exhibit D
16 at p. 1037.)
17

18 X. Ms. McGill then responds:
19
20



24 Source Extraction :
File System



28 Source Extraction :
File System

Unknown
And now he has added physical abuse on top of it
9/18/2019 7:38:08 AM(UTC-7)

Source Extraction:
File System

Unknown
And the worst kind with threatening to strangle you
9/18/2019 7:38:32 AM(UTC-7)

Source Extraction:
File System

(Exhibit D at p 1037, emphasis added)

Y. Seconds later Ms. Capri sends a WhatsApp message back about looking for a new apartment:

Unknown
Once I get my phone I'm going to text Ruth and ask her if the next step is getting an apartment and if so I want to work on finding a rental in Menlo Park. That's going to take several weeks and I just want to be out of this house or have him out of this house
9/18/2019 7:38:54 AM(UTC-7)

Source Extraction:
File System

(Exhibit D at p. 1038.)

Z. Also on September 17 -- two days after the alleged strangling -- Ms. Capri sent Ms. McGill a message suggesting that they get someone from the

Central Intelligence Agency to follow Mr. Crawford and catch him being unfaithful.



Source Extraction:
File System

(Exhibit D at p. 1028.)

AA. Jurors deciding the credibility of Ms. McGill’s in-trial characterization of the “spontaneous declaration” -- that Capri said Mr. Crawford “grabbed my neck and choked me” -- never heard that in private WhatsApp messages between Capri and McGill only days after the “spontaneous declaration,” (1) McGill urged her friend to read an article about “subtle signs” of emotionally abusive relationship, (2) McGill noted that “verbal abuse is not ok,” and (3) McGill characterized Mr. Crawford’s conduct as a “threat” to strangle Ms. Capri. Nor did jurors know that Ms. Capri never objected to that characterization.

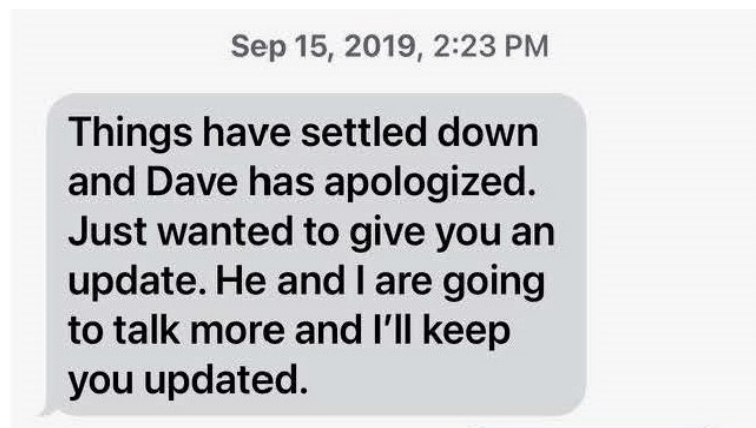
VII.

Mr. Crawford’s judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution, the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Penal Code section 1473. The state presented false evidence and argument at trial. The following facts now known to Mr. Crawford support this claim:

- 1 A. Mr. Crawford incorporates the facts alleged in Paragraph VI above.
- 2
- 3 B. Ms. Capri testified that after the strangling incident she sent a text message
- 4 to Dr. Gorney in which she told Dr. Gorney “what happened.” (Exhibit A at
- 5 p. 158.) She provided a screen shot of the text to the prosecution. (Exhibit
- 6 A at pp. 202-203; Dr. Gorney Text Screenshot, attached as Exhibit G at p.
- 7 1081.) Capri alleged the text was sent that morning from the bushes.
- 8 (Exhibit H at pp. 1146-1147.)
- 9
- 10 C. That screen shot shows that the text to Dr. Gorney contained at least 105
- 11 words. (Exhibit G at p. 1081.)
- 12
- 13 D. During the discovery process in connection with the divorce action, Dr.
- 14 Gorney was ordered to provide a word count of all texts she received from
- 15 Ms. Capri from July 2019 through September 2019. (*See Word Count*
- 16 *Certificate for Texts from Renee Capri to Dr. Gorney (7/1/19-9/27/19,*
- 17 *attached as Exhibit E.) Ms. Capri did not send a 105 (or more) word text on*
- 18 *September 15 or any other date thereafter. (Ibid.)*
- 19
- 20 E. Later, Dr. Gorney was ordered to provide all texts sent to and from Ms.
- 21 Capri on September 14 and 15, 2019. (*Capri v. Crawford*, 19FAM02249,
- 22 *Order of January 31, 2022, attached as Exhibit I, at p. 1188.)*
- 23
- 24 F. On September 14, Ms. Capri sent Dr. Gorney several texts regarding an
- 25 argument she and Mr. Crawford had on the way home from their September
- 26 14 therapy session with Dr. Gorney. (Exhibit F at pp. 1071-1079.)
- 27
- 28 G. In those texts, Ms. Capri noted that Mr. Crawford “won’t even attempt to say

sorry” and that “the problem from my perspective is he doesn’t own his own behavior or apologize for it.” (Exhibit F at pp. 1075, 1078.)

H. Dr. Gorney’s text records show that Ms. Capri did not send a text to Dr. Gorney on the morning of September 15, shortly after the alleged attack, “describing what happened.” Instead, Dr. Gorney’s records show that on the afternoon of September 15, Ms. Capri sent Dr. Gorney a text picking up on her September 14 texts expressing concern that Mr. Crawford had refused to “even attempt to say sorry” or “apologize for [his behavior].” Ms. Capri texted Dr. Gorney as follows:



(Exhibit F at p. 1079.)

I. Ms. Capri testified she woke up on the morning of September 15 between 8:15 and 8:30. (Exhibit A at p. 144.) The screen shot of the Gorney text shows it was taken at 9:41 a.m., though it does not state what date the screenshot was taken. (Exhibit G.) Ms. Capri's telephone records do not show a text to Dr. Gorney between 8:15 and 9:41 that morning, or any other time that morning. (Trial Exhibit P at p. 144.)

J. Jurors deciding whether Ms. Capri was telling the truth about having sent a

1 September 15, 2019 text to Dr. Gorney describing the attack never heard that
2 Ms. Capri's telephone records do not show that any such text was ever sent.
3 They never heard that Dr. Gorney's text records (1) do not show that any
4 such text was ever received and (2) show that the only text Dr. Gorney
5 actually did receive from Ms. Capri on September 15 was in the afternoon
6 and had nothing at all do with an assault and strangling but was instead a
7 continuation of her texts to Dr. Gorney from September 14.
8

9 VIII.

10 Mr. Crawford's judgment of conviction has been unlawfully and unconstitutionally
11 imposed in violation of his constitutional rights as guaranteed by the state constitution and
12 the Sixth and Fourteenth Amendments to the United States Constitution. Mr. Crawford's
13 trial counsel failed to discover and present evidence showing that Ms. Capri's testimony
14 about having sent a confirming text to Dr. Gorney was false. His trial counsel also failed
15 to present evidence showing that WhatsApp messages sent between Ms. McGill and Ms
16 Capri on September 17 and September 18 undercut Ms. McGill's trial testimony about Ms.
17 Capri's statements in her "spontaneous declaration" of September 15. To the extent this
18 evidence was available and could have been presented, counsel's failures constitute
19 ineffective assistance of counsel. The following facts now known to Mr. Crawford
20 support this claim:
21

22 A. Mr. Crawford incorporates the facts alleged in Paragraphs VI and VII above.
23

24 B. At trial, Ms. Capri admitted that she showed the prosecution a copy of the
25 text she claimed to have sent to Dr. Gorney on the morning of September 15.
26 (Exhibit A at pp. 202-203.)
27

28 C. Under state law, because Ms. Capri showed this text to a third party, it was

1 no longer privileged.

2
3 D. During the divorce proceedings, San Mateo Superior Court Judge Woolard
4 reached this precise conclusion and ordered Dr. Gorney to disclose any texts
5 received from Ms. Capri on September 14 and September 15, 2019. (*Capri*
6 *v. Crawford*, 19FAM02249, Order of January 31, 2022, attached as Exhibit
7 I, at p. 1188.)

8
9 E. To the extent that impeaching evidence about the text to Dr. Gorney could
10 have been presented at trial, including Ms. Capri's telephone records and the
11 actual texts Dr. Gorney received, trial counsel's failure to do so fell below
12 the appropriate standard of care.

13
14 F. To the extent that the WhatsApp messages between Ms. Capri and Ms.
15 McGill were discoverable prior to trial, defense counsel's failure to do so,
16 and to present that evidence, fell below the appropriate standard of care.

17
18 G. Given that this case came down to a credibility contest between Mr.
19 Crawford and Ms. Capri, and that jurors deliberated more than 11 hours,
20 indicating they were deadlocked, before returning a divided verdict, defense
21 counsel's failure to present evidence showing that Ms. Capri had lied both to
22 police and the jury about a text to Dr. Gorney undermines confidence in the
23 outcome of trial.

24
25 H. Similarly, defense counsel's failure to present evidence showing that
26 WhatsApp messages between Ms. Capri and Ms. McGill directly undercut
27 Ms. McGill's trial testimony also undermines confidence in the outcome of
28 trial.

IX.

Mr. Crawford's judgment of conviction has been unlawfully and unconstitutionally imposed in violation of his constitutional rights as guaranteed by the state constitution, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Penal Code section 1473. New evidence exists, evidence which was unavailable at trial, that more likely than not would have changed the outcome at trial. The following facts now known to Petitioner support this claim:

- A. Petitioner incorporates the facts alleged in Paragraphs VI, VII and VIII above.
- B. In Paragraph VI above petitioner alleged (and presented evidence) showing that Ms. McGill's testimony about what Ms. Capri said in her "spontaneous declaration" was false and could have been impeached. In Paragraph VII above petitioner alleged (and presented evidence) showing that Ms. Capri's testimony about sending a text to Dr. Gorney describing the incident was false and could have been impeached.
- C. In Paragraph VIII, Petitioner has alleged that to the extent this evidence was available to diligent trial counsel, trial counsel's failure to present that evidence constituted ineffective assistance of counsel.
- D. In the alternative, Petitioner alleges that to the extent any of this evidence was *not* available to diligent counsel, the evidence constitutes new evidence within the meaning of Penal Code section 1473, which, had it been presented at trial, would more likely than not have resulted in a different verdict.

X.

1 Petitioner's judgment of conviction has been unlawfully and unconstitutionally
2 imposed in violation of his constitutional rights as guaranteed by the state constitution as
3 well as the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States
4 Constitution. Even if none of the errors specified above alone requires a new trial, the
5 combination of those errors with one another require relief. Petitioner hereby
6 reincorporates the facts and claims in all prior paragraphs and all factual allegations in the
7 attached Memorandum of Points and Authorities filed in support of this petition.

8
9 WHEREFORE, petitioner prays that this Court:

- 10
11 1. Take judicial notice of all pleadings and filings in both *People v. Crawford*,
12 19-SM-013902-A;
13
14 2. Order Respondent to show cause why Petitioner is not entitled to the relief
15 sought;
16
17 3. After full consideration of the issues raised in the petition, vacate the
18 judgment and sentence imposed upon Petitioner, and
19
20 4. Grant such other and further relief as may be appropriate.

21
22 Dated: August 3, 2023

Respectfully submitted,

23
24 CLIFF GARDNER

25
26 By Cliff Gardner
27 Attorney for Petitioner
28

VERIFICATION

I, Cliff Gardner, declare that I am an attorney for Petitioner David Crawford. I make this verification for Petitioner because of his absence from the county where I have my office. I have read the attached Petition for Writ of Habeas Corpus and Memorandum of Points and Authorities in Support Thereof and believe the matters stated therein to be true. On that basis, I allege they are true.

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

Executed this 3rd day of August 2023 at Berkeley, California.

Cliff Gardner

1 CLIFF GARDNER
State Bar # 93782
2 1448 San Pablo Ave.
Berkeley, CA 94702
3 510-524-1093
Casetris@aol.com
4 Attorneys for Petitioner
5 David Crawford

6
7 IN THE SUPERIOR COURT
8 OF THE STATE OF CALIFORNIA
9 SAN MATEO

10
11 IN RE DAVID CRAWFORD,)
12)
13 Petitioner,)
14)
15)
16 On Habeas Corpus.)

No.:
Superior Court Case No.
19-SM-013902-A

17
18
19
20
21 MEMORANDUM OF POINTS AND AUTHORITIES
22 IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS
23
24
25
26
27
28

TABLE OF CONTENTS

TABLE OF AUTHORITIES	26
INTRODUCTION	28
PROCEDURAL STATEMENT	31
STATEMENT OF FACTS	33
A. David Crawford And Renee Capri.	33
B. The Months Leading Up To The September 15 Argument.	33
C. Evidence And Argument The Jury Heard About The September 15 Argument.	35
1. The conflicting accounts by Ms. Capri and Mr. Crawford.	35
2. The prosecution’s corroborating evidence.	36
3. The prosecutor’s argument.	39
D. Jury Deliberations.	40
E. Evidence The Jury Never Heard.	41
1. The text messages McGill and Capri refused to disclose, the text messages they deleted and the text messages they forgot to delete.	42
2. The text message to Dr. Gorney.	49
ARGUMENT	52
I. MR. CRAWFORD HAS ESTABLISHED A PRIMA FACIE CASE THAT FALSE EVIDENCE WAS PRESENTED FROM (1) MS. CAPRI ABOUT A CORROBORATING TEXT TO DR. GORNEY AND (2) BOTH MS. CAPRI AND MS. MCGILL ABOUT A SPONTANEOUS DECLARATION.	52
A. The Relevant Facts.	52
B. Because All Parties Recognized That Credibility Was The Key Issue In This Case, The Presentation Of False Evidence Directly Supporting Ms. Capri’s Credibility Requires Issuance Of An Order To Show Cause.. ...	53
II. MR. CRAWFORD HAS ESTABLISHED A PRIMA FACIE CASE THAT DEFENSE COUNSEL’S FAILURE TO IMPEACH MS. CAPRI’S TESTIMONY ABOUT THE TEXT TO DR. GORNEY CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.	58
A. The Relevant Facts.	58

1	B.	Because All Parties Recognized That Credibility Was The Key Issue	
2		In This Case, Defense Counsel’s Failure To Impeach Ms. Capri In	
3		Connection With The Gorney Text Fell Below The Standard Of Care	
4		And Requires Issuance Of An Order To Show Cause..	59
5	III.	MR. CRAWFORD HAS ESTABLISHED A PRIMA FACIE CASE THAT	
6		MATERIAL NEW EVIDENCE EXISTS WHICH WOULD RESULT IN A	
7		DIFFERENT OUTCOME AT TRIAL.	62
8	A.	The Relevant Facts.	62
9	B.	Because It Is Reasonably Probable That Had The Jury Been Presented	
10		With The New Evidence At Least One Juror Would Have Voted To	
11		Acquit, An Order To Show Cause Must Issue..	63
12	CONCLUSION		65

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Alcorta v. Texas</i> (1957) 355 U.S. 28	55
<i>Giglio v. United States</i> (1972) 405 U.S. 150	53
<i>Hall v. Director of Corrections</i> (9th Cir. 2003) 343 F.3d 976	54
<i>Hinton v. Alabama</i> (2014) 571 U.S. 263	60
<i>Maxwell v. Roe</i> (9th Cir. 2010) 628 F.3d 486	54
<i>Miller v. Pate</i> (1967) 386 U.S. 1	55
<i>Napue v. Illinois</i> (1959) 360 U.S. 264	53, 55
<i>Strickland v. Washington</i> (1984) 466 U.S. 668	59, 60
<i>United States v. Agurs</i> (1976) 427 U.S. 97	53, 54, 57
<i>Wiggins v. Smith</i> (2003) 539 U.S. 510	60

STATE CASES

<i>Capri v. Crawford</i> , 19FAM02249	16, 19
<i>In re Ferguson</i> (1971) 5 Cal.3d 525	54
<i>In re Hall</i> (1981) 30 Cal.3d 408	54
<i>In re Merkle</i> (1960) 182 Cal.App.2d 46	54
<i>Knight v. South Orange Community College District</i> (2021) 60 Cal.App.5th 854	3
<i>People v. Centeno</i> (2014) 60 Cal.4th 659	60
<i>People v. Duvall</i> (1995) 9 Cal.4th 464	6, 30
<i>People v. Figueroa</i> (1986) 41 Cal.3d 714	57
<i>People v. McDaniel</i> (1976) 16 Cal.3d 156	62
<i>People v. Rucker</i> (1980) 26 Cal.3d 368	57
<i>People v. Seaton</i> (2001) 26 Cal.4th 598	54
<i>People v. Soojian</i> (2010) 190 Cal.App.4th 491	62
<i>In re Sakarias</i> (2005) 35 Cal.4th 140	57
<i>In re Sanders</i> (1999) 21 Cal.4th 697	28

In re Wright (1978) 78 Cal.App.3d 788 54, 57

STATE STATUTES

Evidence Code section 912 37, 59, 60

Evidence Code section 1240 37

Penal Code section 243 8, 31

Penal Code section 245 7, 8, 31

Penal Code section 273.5 7, 8

Penal Code section 1473 passim

INTRODUCTION

“[M]istakes in the criminal justice system are sometimes made.” (*In re Sanders* (1999) 21 Cal.4th 697, 703.) And when they are, habeas corpus is available to ensure “the person being punished is actually guilty of the crimes of which he or she was convicted.” (*Ibid.*)

Petitioner in this case was charged with several counts of domestic violence involving his wife, Renee Capri, on September 15, 2019. He has maintained his innocence since day one. After protracted jury deliberations -- deliberations during which jurors asked 11 questions and twice returned to court telling the judge they were deadlocked -- the jury hung on one count but convicted on two others. The current Petition for Writ of Habeas Corpus is based on evidence never presented to the jury, evidence which directly undercuts the state’s case and just as directly supports the defense theory of the case. As the Supreme Court envisioned in *Sanders*, petitioner is employing the Great Writ to ensure “the person being punished is actually guilty of the crimes of which he . . . was convicted.” (21 Cal.4th at p. 703.)

This is especially important here given the remarkable comments of Judge Davis at sentencing. Judge Davis presided over the trial, learning that Ms. Capri filed for divorce on September 26, 2019 -- 11 days after the alleged incident -- and that she told a close friend the more custody she got of the couple’s two children, “the more money I get.” (Exhibit A at p. 185, 770.) Prior to a November 15, 2019 custody hearing before Judge Amara Lee, Ms. Capri had resolved *not* to cooperate with the domestic violence prosecution. (Exhibit A at p. 275.)

But on that date, everything changed. Judge Lee denied Ms. Capri’s request for full custody, awarding Mr. Crawford 20 % custody of the children. (Exhibit A at p. 267 [Ms.

1 Capri seeks full custody], 346 [Judge Lee awards Mr. Crawford 20 % custody].) That
2 same day Ms. Capri was told in writing by Family Court Services that “if there is a finding
3 of domestic violence against the father, it will be recommended that the mother have sole
4 legal custody of the children” (11/15/2019 Family Court Services Report, attached as
5 Exhibit M, at pp. 1230, 1232.)

6
7 At trial, Ms. Capri admitted that she decided to cooperate with the domestic
8 violence prosecution was only *after* Judge Lee’s November 15 custody ruling giving Mr.
9 Crawford 20 % custody . (Exhibit A at p. 276.) Ms. Capri sought full custody of the
10 children during the divorce action (Exhibit A at p. 272), despite telling police repeatedly
11 that Mr. Crawford “is good to [the children],” “[h]e’s supportive of all things they do,” and
12 he was “a really good dad[.]” (9/20/2019 Transcript of Renee Capri Police Interview,
13 attached as Exhibit H at pp. 1153-1154.) She later told her good friend Brandee Krzanich
14 that if she got full custody of the children “the more money I get.” (Exhibit A at p. 770.)
15 In light of all this evidence, at sentencing Judge Davis recognized that Ms. Capri and her
16 counsel had employed the criminal justice system to gain leverage in connection with the
17 pending divorce:

18
19 THE COURT: I'm going to be straight with everyone here. This case
20 troubles me, and it's not the facts as found to be true by the jury that presents
21 any particular troubling circumstances to me. I mean, I've dealt with a
22 number of these type of cases.

23 What's troubling to me here is that this Court gets the sense -- and it's
24 through no fault of either of the attorneys that are handling this particular
25 case -- but it's clear to this Court that nothing this Court does here is about
26 this case. That everything that has transpired during the course of this case
27 was done with an eye towards the family law case where based upon what
28 this Court has reviewed young, innocent, impressionable children are being
used as pawns, and that is offensive to this Court.

(Exhibit A at p. 934.)

1 In seeking habeas relief Mr. Crawford recognizes that habeas courts often harbor
2 skepticism when faced with a claim of innocence after a jury trial. From an institutional
3 perspective, that skepticism may well be necessary. After all, substantial resources are
4 expended in providing a jury trial. And here, although jurors twice indicated they were
5 unable to reach a decision, and they ultimately hung on one count, they convicted on two
6 other counts. Such verdicts cannot and should not lightly be set aside.

7
8 But the fact of the matter is that it is in precisely this situation -- that is, where a
9 jury has unanimously found a defendant guilty -- that the Supreme Court has recognized
10 “mistakes . . . are sometimes made.” At the end of the day, Mr. Crawford’s claims of error
11 will require the Court to determine whether this is one such case, whether Judge Davis’
12 was correct in noting that “everything that has transpired . . . was done with an eye towards
13 the family law case,” and whether relief is required.

14
15 At this point, however, the ultimate question of whether relief is required is not
16 before the Court. Instead, as petitioner noted in his Petition, the Court has the
17 considerably simpler task of deciding whether petitioner has pled a prima facie case for
18 relief. In making this assessment, the court must “assum[e] the petitioner’s factual
19 allegations are true” and assess whether petitioner has established a prima facie case for
20 relief on any of his claims. (*People v. Duvall* (1995) 9 Cal.4th 464, 474-475.)

21
22 Here, there should be no genuine dispute as to whether a prima facie case has been
23 established. Jurors deciding this case did not know that Ms. Capri had lied to the jury and
24 fabricated a text to Dr. Gorney. They did not know that Ms. McGill’s WhatsApp
25 messages told a very different story about the content of the “spontaneous declaration”
26 Ms. McGill so vividly recalled for the jury at trial six months later. Even without this new
27 evidence, jurors deliberated nearly 12 hours, returned with 11 questions for the Court, said
28 they were deadlocked twice, and still refused to convict on all counts. In light of this new

1 evidence, an Order to Show Cause should issue and the state required to file an Answer to
2 the Petition.

3
4 PROCEDURAL STATEMENT

5
6 In 2020, the San Mateo District attorney filed a four-count information against
7 David Crawford. (Exhibit A at pp.806, 813-816.) Mr. Crawford was charged as follows:

- 8
9 1) Count one charged Mr. Crawford with a September 15, 2019 assault
10 in violation of Penal Code section 245. (Exhibit A at p. 813.)
11 2) Count two charged a September 15, 2019 infliction of an injury on a
12 spouse in violation of section 273.5, subdivision (a). (Exhibit A at
13 pp.814-815.)
14 3) Count three charged a September 15, 2019 battery on a spouse in
15 violation of section 243, subdivision (e)(1). (Exhibit A at p. 816.)
16 4) Count 4 charged a September 15, 2019 false imprisonment in
17 violation of section 236. (Exhibit A at p. 806.)

18 Mr. Crawford pled not guilty and trial began on March 3, 2020. (Exhibit A at
19 pp.85, 103.) The state called five witnesses, resting on March 5, 2020. (Exhibit A at pp.
20 430, 512.) The defense called six witnesses, resting on March 9, 2020. (Exhibit A at pp.
21 720, 779.) Jurors began deliberating the next day. (Exhibit A at pp. 798, 911.)

22 The jury continued deliberations on March 11, 2020. That afternoon the jury sent
23 the trial court a note that the jury was deadlocked: "We seem to be hopelessly divided on
24 all three counts with little hope of converging . We have been trying to listen to each
25 other's views can't convince each other otherwise." (Exhibit C at p. 1000.)

26 Deliberations continued on March 12, 2020. (Exhibit A at p. 917; Exhibit C at p.
27
28

1 1000.)³ On the afternoon of March 12, the jurors returned to court, again indicating they
2 were “at an impasse” but that a re-reading of testimony might help. (Exhibit A at p. 917.)
3 The trial judge advised the jurors to return to the jury room and provide a note to the court
4 as to what testimony would be helpful. (Exhibit A at p. 917.) Shortly thereafter (eight
5 minutes later) and without responding to the court’s suggestion, jurors returned a verdict
6 finding Mr. Crawford guilty of a misdemeanor violation as charged in counts one and two.
7 (Exhibit A at pp. 919-920; Exhibit C at p. 1003.) Jurors could not agree as to the count
8 three charge and it was dismissed. (Exhibit A at p. 921.)
9

10 The court sentenced Mr. Crawford on August 20, 2020. The court placed Mr.
11 Crawford on three years probation for the charges in counts one and two and ordered him
12 to (1) serve 10 days of county jail time, (2) attend 104 hours of domestic violence
13 counseling and (3) undertake 200 hours of community service. (Exhibit A at pp. 938-941.)
14
15
16
17
18
19
20
21
22
23
24
25

26
27 3. The Reporter’s Transcript of March 12, 2020 incorrectly has a date of March 20,
28 2020 on the caption page. But the clerk’s minutes make clear the verdicts were returned
on March 12. (*See* Exhibit C at pp. 1002-1004.)

1 STATEMENT OF FACTS

2
3 A. David Crawford And Renee Capri.

4
5 Petitioner David Crawford and Renee Capri met at Rice University in Houston,
6 Texas. (Exhibit A at pp. 522-523.) After graduating, they moved to California. (Exhibit
7 A at pp. 522-523.) They married in 2001 and soon thereafter had two children together, a
8 boy and a girl. (Exhibit A at p. 127.) Around 2009, the family moved into their home in
9 Atherton on Rebecca Lane. (Exhibit A at p. 127.)

10
11 Mr. Crawford grew up on a small ranch in Tucson. (Exhibit A at p. 699.)
12 Crawford was one of twelve children. (Exhibit A at p. 699.) After graduating from Rice
13 University, Mr. Crawford moved to California for graduate school at Stanford University.
14 (Exhibit A at pp. 522-523, 760.) Mr. Crawford was the breadwinner of the family.
15 (Exhibit A at pp. 513-514.) He was hard working and very focused on building wealth
16 and opportunities for his family. (Exhibit A at pp. 514, 710.) Ms. Capri had an equally
17 important role as the primary caregiver for the children. (Exhibit A at pp. 513-514.)

18
19 Although the couple were in love, in recent years the marriage had grown strained.
20 (Exhibit A at pp. 128, 139, 513-514.) Mr. Crawford had a demanding job that required
21 him to work long hours and travel often. (Exhibit A at pp. 335-336.) The couple
22 struggled with communication, finding time together, and intimacy. (Exhibit A at pp. 128,
23 518.) Ms. Capri suspected that Crawford was cheating on her with a client named
24 Chelsea. (Exhibit A at p. 128.)

25
26 B. The Months Leading Up To The September 15 Argument.

27
28 The argument at the heart of this case occurred on September 15, 2019. But the

1 argument did not occur in a vacuum.

2
3 In June of 2019, the entire family went to their Lake Tahoe vacation home together.
4 (Exhibit A at p. 133.) While there, Ms. Capri harbored suspicions that Mr. Crawford was
5 cheating on her because he was texting a woman from work. (Exhibit A at p. 133.)
6

7 Shortly after this trip, Mr. Crawford went back to the lake to “get away” and “think
8 about the relationship.” (Exhibit A at pp. 135-136.) Ms. Capri believed he was there with
9 another woman and she confronted him about this. (Exhibit A at p. 136.) Mr. Crawford
10 admitted to talking to another woman over the phone while in Lake Tahoe, and he later
11 explained that he was having an emotional relationship with a woman named Chelsea.
12 (Exhibit A at pp. 136-137, 523-524.) It was at this point, that the couple decided to begin
13 marriage counseling with Dr. Beth Gorney. (Exhibit A at p. 138.)
14

15 In August, approximately one month before the September 15 argument, Mr.
16 Crawford said he was going to dinner that evening at a steakhouse. (Exhibit A at p. 130.)
17 When Ms. Capri called the steakhouse, she learned there was no reservation in Mr.
18 Crawford’s name. (Exhibit A at p. 130.) She then called Mr. Crawford’s assistant at work
19 who explained that he had a dinner reservation for that evening at another restaurant
20 named Tamarine. (Exhibit A at pp. 129-130.) After consulting with her friend Julie
21 McGill, Ms. Capri went to the restaurant to confront Mr. Crawford. (Exhibit A at pp. 132-
22 133.) Ms. Capri saw Mr. Crawford having a drink with Chelsea and approached them, red
23 in the face. (Exhibit A at p. 525.) Mr. Crawford introduced the two and Ms. Capri
24 immediately left the restaurant. (Exhibit A at pp. 525-526.)
25

26 On September 14 -- the day before the incident -- Mr. Crawford and Ms. Capri had
27 a counseling session with Dr. Gorney. (Exhibit A at p. 139.) On the car ride to the
28 session, they argued. (Exhibit A at pp. 139-140.) The argument continued after their

1 counseling session while on the way to pick up their daughter from a friend's house.
2 (Exhibit A at p. 142.) They continued arguing about various topics and nothing was
3 resolved that day. (Exhibit A at pp. 143-144.)

4
5 C. Evidence And Argument Jurors Heard About The September 15 Argument.

6
7 At trial, the jury heard two conflicting versions of events as to what happened on
8 September 15, 2019: Mr. Crawford's and Ms. Capri's. Thus, the question for the jury
9 centered purely on credibility. The jury then heard what the prosecution said was evidence
10 corroborating Ms. Capri's version of events.

11
12 1. The conflicting accounts by Ms. Capri and Mr. Crawford.

13
14 Mr. Crawford told jurors that on the morning of September 15, 2019, he and Ms.
15 Capri woke up in their shared bedroom in their Atherton home. (Exhibit A at pp. 213-
16 214.) He wanted to continue a conversation they began the previous day. The
17 conversation quickly turned ugly. Ms. Capri accused him of using work as an excuse
18 when he really was going to visit Chelsea later that day. (Exhibit A at pp. 214, 592.) Mr.
19 Crawford said he did not want to continue to explain himself to her. (Exhibit A at p. 592.)

20
21 At that point, Ms. Capri reached out and grabbed Mr. Crawford's left arm while
22 telling him to stop running from his problems. (Exhibit A at p. 593.) He pushed Capri
23 away. (Exhibit A at p. 593.) When she began swatting him with her hands, he used both
24 hands to push her away from him. (Exhibit A at p. 593.) She continued swatting, digging
25 her nails into his arm and scratching him, and he continued pushing her away and he urged
26 her to calm down. (Exhibit A at pp. 593-595, 696.) He then walked away. (Exhibit A at
27 p. 596.) Before leaving the bedroom suite, he told her he did not want a divorce so if she
28 wanted one, she would need to file the papers. (Exhibit A at pp. 598-599.) Although Ms.

1 Capri would later deny ever scratching Mr. Crawford, Defense Exhibit AA showed the
2 scratch marks, and police officer Romero confirmed that he too saw the injuries when he
3 arrested Mr. Crawford on September 20. (Exhibit A at pp. 149-150, 2125 [Ms. Capri
4 denies inflicting wounds], 353, 355, 620-623.)

5
6 Ms. Capri told a very different story. On the morning of September 15, 2019, she
7 woke up between 8:15 and 8:30 am. (Exhibit A at p. 144.) Mr. Crawford was already
8 awake and getting ready in the couple's bathroom. (Exhibit A at p. 144.) Ms. Capri told
9 Mr. Crawford that he had traumatized their daughter the day before by yelling at Ms. Capri
10 in front of her. (Exhibit A at p. 144.) According to Ms. Capri, Mr. Crawford put his
11 hands around her neck, strangled her and then let go. (Exhibit A at pp. 144, 147.) She
12 ended up on the ground, and Capri thought he might have pulled her back to a standing
13 position and then strangled her a second time. (Exhibit A at pp. 146-147.)

14
15 Ms. Capri maintained that although she was being strangled, she did not resist.
16 (Exhibit A at pp. 149-150.) She let her arms dangle by her sides, and did nothing to try
17 and stop the strangulation. (Exhibit A at pp. 149-150.) Mr. Crawford let go and said
18 something about getting a divorce before leaving the room. (Exhibit A at p. 148.)

19
20 Ms. Capri did not call police. She did not rush to check on her children. She did
21 not flee from the house. She did not seek medical care. Instead, she walked down the hall
22 to her office so she could check her emails. (Exhibit A at p. 150.) Ms. Capri told jurors
23 that Mr. Crawford came into the office, pulled her ponytail back, and started yelling at her.
24 (Exhibit A at p. 151.) It was at that point, after Mr. Crawford let go, that Ms. Capri left
25 the house through the garage and went outside to hide in the neighbor's bushes. (Exhibit
26 A at pp. 151-152.) While in the bushes, Capri saw Crawford get into his car and leave.
27 (Exhibit A at pp. 153-154.)

1 In short, jurors heard two starkly different versions of events. The verdict would
2 therefore depend on whom jurors found most credible. Recognizing this, the prosecution
3 presented what it said was credible evidence to corroborate Ms. Capri's version of events.
4

5 2. The prosecution's corroborating evidence.
6

7 Ms. Capri told jurors that in the immediate aftermath of the strangling, she told two
8 people about the event. (Exhibit A at p. 158.) One was her best friend, Julie McGill.
9 (Exhibit A at p. 158.) Another was the couple's therapist, Dr. Gorney. (*Ibid.*)
10

11 As to Dr. Gorney, Ms. Capri testified that after the strangling incident "I texted our
12 couples therapist and basically said, 'I don't know if it's okay for me to reach out, because I
13 know you see us as a couple, not me individually.'" (Exhibit A at p. 158.) Ms. Capri
14 recalled that "I explained to her briefly via text what happened." (Exhibit A at p. 158.)
15 Ms. Capri told jurors not only that Dr. Gorney received the text, but that she (Ms. Capri)
16 had provided a screenshot of the text to the prosecution. (Exhibit A at pp. 202-203.)
17

18 Of course, because the text had been disclosed to the prosecution, it was therefore
19 no longer privileged. (Evidence Code section 912, subdivision (a).) Nevertheless, the text
20 was never introduced into evidence. (Exhibit A at pp. 103, 850.) Nor was Dr. Gorney
21 called as a witness by the state to confirm that Ms. Capri had sent a text explaining "what
22 happened." (Exhibit A at pp. 103, 850.)
23

24 As to Ms. McGill, Ms. Capri told jurors that after the strangling incident, and while
25 hiding in the bushes, she telephoned Ms. McGill. (Exhibit A at p. 154.) Capri asked
26 McGill how to turn off location services on her phone because she was worried about
27 Crawford tracking her. (Exhibit A at p. 155.) Once Capri left the bushes and got in her
28 car, she "told [McGill] what happened." (Exhibit A at p. 155.)

1 Ms. McGill was called at trial to confirm Ms. Capri's testimony. The prosecution
2 argued that Capri's statements to McGill were admissible as a spontaneous statement
3 under Evidence Code section 1240. (Exhibit A at p. 63.) Defense counsel objected
4 arguing the statement could not be spontaneous because phone records indicate there was
5 at least one text message from Capri to McGill before any phone call was made that
6 morning. (Exhibit A at pp. 12, 63.) As a result, defense counsel contended that McGill's
7 testimony was simply inadmissible hearsay which did not fall within any recognized
8 exception to the hearsay rule. (2/25/2020 Defense Second Motion in Limine, attached as
9 Exhibit J, at pp. 1193-1194.)

11 The prosecution noted it did not have any electronic communications from Ms.
12 Capri or Ms. McGill and assured the court the prosecution was not trying to selectively
13 present evidence. (Exhibit A at p. 66.) The trial court was "troubled by the notion" of
14 admitting this evidence when there was a preceding text message that neither Capri or
15 McGill was willing to disclose. (Exhibit A at pp. 64-65.) The court suggested producing
16 "that one text message to allay the Court of its concerns." (Exhibit A at p. 65.) The court
17 reasoned "there should be no difficulty in producing that one text message. That's my
18 position on it." (Exhibit A at p. 66.)

20 The trial court's concern was warranted. As the prosecutor explained, both Capri
21 and McGill had decided to keep this early morning text a secret; neither was willing to
22 disclose the secret text message "to allay the Court of its concerns." (Exhibit A at p. 65.)
23 The prosecutor explained that McGill was represented by counsel, and both she and Capri
24 had objected to production of the text message. (Exhibit A at p. 66.) The prosecutor
25 nevertheless urged the Court to admit Ms. McGill's testimony, arguing that defense
26 counsel could cross-examine on the secret text. (Exhibit A at pp. 65-66, 68.) After
27 initially reserving ruling on the matter, the trial court ultimately allowed McGill's

1 testimony. (Exhibit A at pp. 71, 357-361, 371.)⁴

2
3 Ms. McGill told jurors that on the morning of September 15, while she was still
4 asleep, Ms. Capri called and “sounded hysterical” saying she needed to change the
5 password on her phone. (Exhibit A at p. 373.) When Ms. McGill said she did not know
6 how to change the password, Ms. Capri hung up. (Exhibit A at p. 373.) Ms. McGill got
7 out of bed and went to her computer in order to look up how to change a password on an
8 iPhone. (Exhibit A at p. 373.) Moments later, while Ms. McGill was still at her computer,
9 Ms. Capri called back, explaining that she was in the bushes outside her house and that
10 Mr. Crawford “had attacked her and had grabbed her neck and [] [] pushed her down[.]”
11 (Exhibit A at p. 375.) Under oath, Ms. McGill later clarified that Ms. Capri “absolutely
12 said ‘[h]e grabbed my neck and choked me.’” (Exhibit A at p. 404.)⁵

13
14
15
16 4. Ms. Capri also said she telephoned another therapist around 6:00 or 7:00 on the
17 evening of September 15. (Exhibit A at p. 156.) But no evidence was presented about
18 the phone consultation with the therapist.

19 5. The prosecution also sought to corroborate Ms. Capri’s testimony with medical
20 testimony. But at the end of the day, this testimony was neither here nor there.

21 First, the prosecutor introduced a series of photos that Ms. Capri claimed she took
22 on September 15 to document her injuries. (Exhibit A at pp. 177-178.) The prosecution
23 also called nurse practitioner Geri Archibald who not only looked at these photographs,
24 but who had examined Ms. Capri on September 20, 2019. Ms. Archibald noted “there
25 were very limited neck findings,” although she added that this was “not uncommon.”
26 (Exhibit A at p. 457.) Noting that the light was “varied” in the photographs, Ms.
27 Archibald offered her view that “there appeared to me to be some distinct redness.”
28 (Exhibit A at p. 458.) She then agreed that her observations during the examination were
“consistent with a strangulation event.” (Exhibit A at p. 457.) But to her credit, Ms.
Archibald admitted that her “opinion about the injuries . . . and what happened . . . is
based in very large part on what [Ms. Capri] told [her] that day.” (Exhibit A at p. 458.)
So again it came down to Ms. Capri’s credibility.

1 3. The prosecutor's argument.

2
3 Both parties recognized that this trial boiled down to credibility. (*See* Exhibit A at
4 p. 824.) In closing argument, the prosecutor repeatedly emphasized to jurors just how
5 credible Renee Capri was. (Exhibit A at pp. 825, 843-845, 847.) According to the
6 prosecution, and unlike Mr. Crawford, Ms. Capri "should be believed. She is reliable."
7 (Exhibit A at p. 847.) Ms. Capri simply "felt compelled to tell the truth." (Exhibit A at p.
8 845.) Similarly, the prosecutor told jurors that Julie McGill was credible because even
9 thinking about September 15th "brought tears to her eyes in court." (Exhibit A at p. 842.)
10

11 In emphasizing Ms. Capri's credibility, the prosecutor argued that she was
12 consistent in her version of events. (Exhibit A at pp. 843-844, 847.) The prosecutor
13 stressed Capri stayed consistent "in that frantic phone call on the morning of September
14 15th[]" to Julie McGill. (Exhibit A at p. 843.) Similarly, Capri was "texting Mr. Crawford
15 and saying all the same things." (Exhibit A at p. 843.)
16

17 In the state's view, Capri should be believed because her testimony was not
18 "impeached in any meaningful way on cross-examination, meaning no one could point to
19 previous statements that were markedly different." (Exhibit A at p. 843.) Instead, her
20 story remained consistent; there was "no date and time when her testimony changed or
21 switched." (Exhibit A at p. 847.)
22

23 D. Jury Deliberations.

24
25 The jury began deliberations on the afternoon of March 10, 2020, deliberating
26 uninterrupted for the remainder of the day for over two and a half hours. (Exhibit A at pp.
27 798, 911; Exhibit C at pp. 996-998.) The jury returned the next day, March 11, 2020, for a
28

1 full day of deliberations, deliberating for over six hours. (Exhibit C at pp. 999-1000.) On
2 March 12, 2020, what would be the final day of deliberation, the jury deliberated for over
3 three hours before reaching a verdict. (Exhibit C at pp. 1002-1004.) In total, the jury
4 deliberated for 11 hours and 52 minutes over the course of these three days. (Exhibit C at
5 pp. 996-1004.) Thus, even on the evidence presented, the jury deliberations show that
6 jurors viewed this as a close case.

7
8 But it is not just the length of deliberations that shows the case was close. During
9 deliberations, the jury sent 11 notes to the court. (Exhibit C at pp. 996-1004; Exhibit A at
10 p. 917.) On the second day of deliberations the jury sent seven notes to the trial court.
11 (Exhibit C at pp. 999-1000.) One note requested Officer Smiler's testimony about text
12 messages between Ms. McGill and Ms. Capri. (Exhibit C at pp. 999-1000.) On this same
13 day, the jury indicated it was hopelessly deadlocked. (Exhibit C at pp. 999-1000.) After
14 this, the jury requested readback of Mr. Crawford's testimony about "how he got [the]
15 scratch" and continued to deliberate for over two more hours. (Exhibit C at p. 1000.)

16
17 On March 12, 2020, the jury requested readback of Ms. Capri's testimony
18 "regarding the bathroom incident." (Exhibit C at pp. 1002-1004.) Still unable to reach a
19 verdict, the foreperson told the court the jury was at an impasse and did not think further
20 deliberations would help in reaching a verdict. (Exhibit C at pp. 1002-1004; Exhibit A at
21 pp. 918-921.) Again, the trial court sent the jury back for further deliberations. (Exhibit C
22 at p. 1003; Exhibit A at pp. 918-921.) The jury returned a split verdict eight minutes later,
23 convicting of assault and injuring a spouse but hanging on the count three battery charge.
24 (Exhibit A at pp. 918-921; Exhibit C at p. 1003.)

25
26 E. Evidence Jurors Never Heard.

27
28 Prior to the criminal trial in this case, Ms. Capri sued for divorce. In those

1 proceedings, Ms. Capri was ordered to produce discovery that neither Mr. Crawford nor
2 the jury had the benefit of seeing at the criminal trial.

- 3
4 1. The text messages McGill and Capri refused to disclose, the text
5 messages they deleted and the text messages they forgot to delete.

6
7 The trial record establishes one of the more curious elements of this case. As the
8 prosecutor himself noted, prior to trial both Renee Capri and Julie McGill retained counsel
9 and objected “wholesale” to release of any of their text messages. (Exhibit A at pp. 66,
10 68; 2/25/2020 People’s Motion in Limine, attached as Exhibit K, at p. 1203.) Indeed, Ms.
11 Capri told jurors that she “objected to the defense mining my phone for all the text
12 messages between me and Julie[.]” (Exhibit A at p. 281.) And as discussed above,
13 precisely because of these objections neither the trial court nor the defense would ever get
14 to see the secret text message between the two women that preceded the “spontaneous
15 declaration” of September 15. (Exhibit A at pp. 12, 63.)

16
17 But it was not just the trial court and the defense who would never see these texts.
18 Even five days after the alleged strangling incident the two women refused to disclose
19 their texts to police. At trial, Officer Smiler told jurors that he asked to see Capri and
20 McGill’s text messages that they mentioned in their police interview. (Exhibit A at pp.
21 495, 498-500.) According to the women, at that time of the interview they both had those
22 texts on their cell phones. (Exhibit A at pp. 498-499.) However, neither Capri nor McGill
23 ever turned these text messages over to police. (Exhibit A at pp. 495-496, 500-501.)

24
25 At trial they gave different reasons for this. McGill told jurors that she was unable
26 to access her texts with Ms. Capri because after the date of the incident -- September 15 --
27 her old phone had died, “and when [she] went to purchase a new phone and back
28 everything up to my new phone, [she] was told that [she] hadn’t set [her] phone up to back

up.” (Exhibit A at p. 390.) McGill tried calling Verizon in order to get these texts back but Verizon was simply unable to do so. (Exhibit A at pp. 390-391.) For her part, Ms. Capri told jurors she could not provide any of her texts with McGill because -- afraid of what would happen if Mr. Crawford saw these texts -- she had deleted them. (Exhibit A at p. 258.) So, remarkably enough, both sides of the secret text exchange had different explanations for why they could not provide these texts.

Newly discovered evidence now shows that this was only the tip of the secret-text iceberg. This new evidence shows that nearly one month before September 15, 2019, Ms. Capri and Ms. McGill moved the bulk of their communication to an end-to-end encrypted messaging application called WhatsApp. (Exhibit D; *see* Exhibit A at p. 256.)⁶

So for her part, Ms. Capri admitted deleting texts. And for her part, Ms. McGill claimed her phone died and she lost her copy of these same texts. And both switched to WhatsApp, discussing at some length how to delete those messages as well.

But despite all the focus on deleting messages, they forgot to delete one very important thread of messages. During the discovery process in connection with Ms. Capri’s divorce action, Mr. Crawford filed a motion to compel, seeking Ms. Capri’s phones be analyzed by a third-party for relevant material and that an in-camera review be performed by a discovery referee. (*See* Exhibit I at p 1187.) Mr. Crawford’s motion to

⁶. End-to-end encryption protects communications from being read or accessed by anyone other than the sender and the recipient. (*See* https://faq.whatsapp.com/791574747982248/?locale=en_US (last accessed 7/28/22.) This includes blocking access from the service provider, in this case WhatsApp itself. (*Ibid.*) The messages are secured with a lock and can only be unlocked with a unique key that only the sender and recipient can access. (*Ibid.*) Unbeknownst to jurors here, Capri and McGill discussed at some length how to delete messages and entire conversations on WhatsApp. (Exhibit D at pp. 1008-1009, 1051, 1054.)

1 compel was granted and Ms. Capri was ordered to provide her phones for inspection.
2 (Exhibit I at p. 1187.) Specifically, Ms. Capri was ordered to produce all written
3 communications she had with Julie McGill for the period of August 14, 2019 through
4 September 20, 2019. (Exhibit N at p. 1242.) Judge Woolard performed an in camera
5 review in order to “release to both counsel those communications regarding [petitioner],
6 the teenagers, the dissolution, [Ms. Capri’s] motives and planning, her allegations of
7 abuse, and her handling of evidence.” (Exhibit N at p. 1243.) At the end of that review
8 process Judge Woolard court disclosed 52 pages of WhatsApp messages that Ms. Capri
9 had neglected to delete. (Exhibit D; *see also* 8/04/2021 Judge Woolard In-Camera Review
10 Report attached at Exhibit O, at p. 1255.)
11

12 On the evening of September 17, 2019 there were numerous WhatsApp messages
13 between Ms. Capri and Ms. McGill. This was only two days after the “spontaneous
14 declaration” in which -- according to Ms. McGill’s trial testimony six months later -- Ms.
15 Capri “absolutely said ‘[Crawford] grabbed my neck and choked me.’” In a message dated
16 September 17, Ms. McGill compliments Ms. Capri on being “an excellent example for
17 [Ms. Capri’s daughter Lauren]” that “women are strong and verbal abuse is not ok.”
18 (Exhibit D at p. 1029.)
19

20 Later that same night (September 17), Ms. McGill sent Ms. Capri another message.
21 Under the state’s theory, of course, Ms. Capri had already told McGill that Mr. Crawford
22 had put his hands around her neck twice and strangled her. Nevertheless, in this late night
23 message Ms. McGill urges Ms. Capri to read an article on the internet entitled “11 Subtle
24 Signs You Might Be In An Emotionally Abusive Relationship.” (Exhibit D at p. 1036.)
25

26 Ms. Capri replies early the next morning. This is three days after the “spontaneous
27 declaration” in which she “absolutely said ‘[h]e grabbed my neck and choked me.’”
28 (Exhibit A at p. 404.) Ms. Capri makes clear that she has read the article about the “11

1 subtle signs” of an emotionally abusive relationship and, after reading it, concludes:
2 “[Crawford] does but all the three things.” (Exhibit D at p. 1037.) To which McGill then
3 responds:

4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A screenshot of a WhatsApp message from an 'Unknown' contact. The message is in a blue bubble and says 'Exactly'. The timestamp at the bottom right is '9/18/2019 7:37:32 AM(UTC-7)'.

Unknown
Exactly
9/18/2019 7:37:32 AM(UTC-7)

Source Extraction :
File System

A screenshot of a WhatsApp message from an 'Unknown' contact. The message is in a blue bubble and says 'You have been abused for years'. The timestamp at the bottom right is '9/18/2019 7:37:41 AM(UTC-7)'.

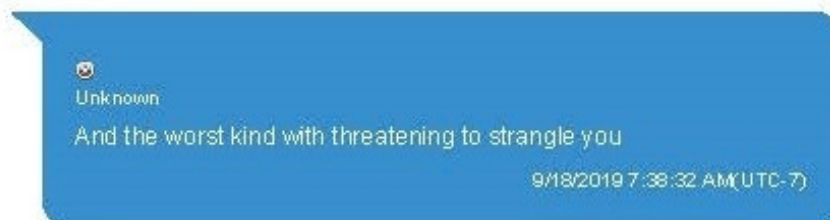
Unknown
You have been abused for years
9/18/2019 7:37:41 AM(UTC-7)

Source Extraction :
File System

A screenshot of a WhatsApp message from an 'Unknown' contact. The message is in a blue bubble and says 'And now he has added physical abuse on top of it'. The timestamp at the bottom right is '9/18/2019 7:38:08 AM(UTC-7)'.

Unknown
And now he has added physical abuse on top of it
9/18/2019 7:38:08 AM(UTC-7)

Source Extraction :
File System

A screenshot of a WhatsApp message from an 'Unknown' contact. The message is in a blue bubble and says 'And the worst kind with threatening to strangle you'. The timestamp at the bottom right is '9/18/2019 7:38:32 AM(UTC-7)'.

Unknown
And the worst kind with threatening to strangle you
9/18/2019 7:38:32 AM(UTC-7)

Source Extraction :
File System

(Exhibit D at p 1037, emphasis added)

Seconds later Ms. Capri sends back a WhatsApp message. (Exhibit D at p. 1038.)
She does not correct Ms. McGill’s characterization of the event. She does not write back

1 and say “what do you mean ‘threaten me?’” She does not write back and say “I did not tell
2 you he ‘threaten[ed] to strangle’ me, I told you he actually did strangle me.” Instead, she
3 sends back a message about looking for a new apartment:
4



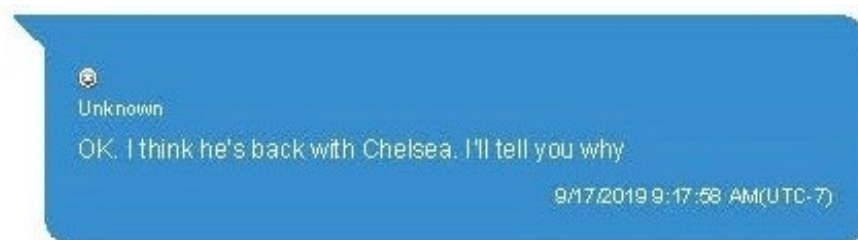
10 Source Extraction:
File System

11

12 (Exhibit D at p. 1038.)

13

14 But these are not the only WhatsApp messages which call into question the trial
15 testimony of both Ms. Capri and Ms. McGill. On September 17 -- again just two days
16 after Ms. Crawford allegedly strangled Ms. Capri twice -- Ms. Capri and Ms. McGill
17 devote considerable attention to Ms. Capri’s belief that Mr. Crawford was having an
18 affair:
19



25 Source Extraction:
File System



Source Extraction:
File System

Unknown

Originally he invited me to come up for dinner after the Payne party and I said I'd be happy to come to dinner with him in San Francisco because I can easily ride the train and I'm free all day Friday whatever time he wants. He was only wanting me to come up if I would stay late with him and drink and hang out in a hotel. The idea of dinner wasn't enticing enough to him for me to come up. Now he wants to stay the night in San Francisco on Friday

9/17/2019 9:18:45 AM(UTC-7)

Source Extraction:
File System

Unknown

Yeah I hope he starts it up with her

9/17/2019 9:20:13 AM(UTC-7)

Source Extraction:
File System

(Exhibit D at p. 1026.) Ms. Capri thought that Mr. Crawford was “going to be with [Chelsea] on Friday night.” (Exhibit D at p. 1027.) When she asked what McGill thought of “[her] theory,” McGill responded: “He is nicer to you when she is involved.” (Exhibit D at p. 1027.) After this exchange, Ms. Capri suggested (and Ms. McGill approved) getting someone from the Central Intelligence Agency to follow Mr. Crawford and catch him being unfaithful:

Unknown

I wonder if after I made the CIA guy we can get him to track day and catch him with her

9/17/2019 9:23:58 AM(UTC-7)

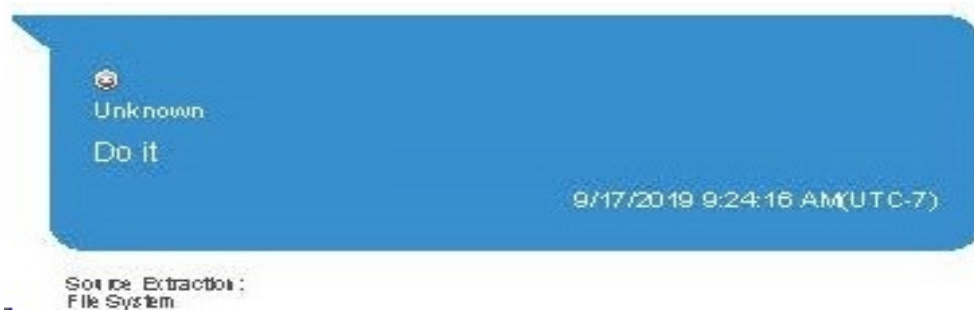
Source Extraction:
File System

Unknown

Yeah baby.

9/17/2019 9:24:13 AM(UTC-7)

Source Extraction:
File System



(Exhibit D at p. 1028.)

Ms. Capri and Ms. McGill’s focus on catching Mr. Crawford in the act of being unfaithful is difficult to reconcile with their testimony that only two days earlier Mr. Crawford had violently assaulted Ms. Capri by strangling her, pulling her by her hair and then strangling her a second time. If Mr. Crawford was indeed the violent husband who strangled his wife twice, it is hard to imagine why Capri and McGill would want to risk further violence by having him trailed by a CIA agent and caught in the act of being unfaithful. This is especially true here, where -- if Ms. Capri’s own testimony at trial is to be believed -- the few days following the violent attack (precisely when these WhatsApp messages were sent) were the most physically painful for her as a result of the alleged strangulation. (Exhibit A at p. 156.) Moreover, if Ms. Capri had genuinely been violently strangled twice by Mr. Crawford, that is more than reason enough to seek a divorce. It is hard to imagine the purpose of Ms. Capri then scheming with her best friend about getting a CIA agent to “catch [David] with [Chelsea].” (Exhibit D at p. 1028.) In short, these

1 WhatsApp messages undercut the state's version of events; they express concern about
2 Mr. Crawford being with another woman, not with actions in brutally strangling his wife.⁷

3
4 Jurors deciding the credibility of Ms. McGill's in-court characterization of the
5 "spontaneous declaration" -- that Capri "absolutely said [Mr. Crawford] 'grabbed my neck
6 and choked me'" -- never heard that in private WhatsApp messages between Capri and
7 McGill only days after this "spontaneous declaration," (1) McGill urged her friend to read
8 an article about "subtle signs" of emotionally abusive relationship, (2) McGill noted that
9 "verbal abuse is not ok," (3) McGill characterized Mr. Crawford's conduct as a "threat" to
10 strangle Ms. Capri, (4) Ms. Capri did not object to that characterization and (5) both
11 women were actively and deliberately concealing and deleting their communication with
12 one another.⁸

13
14
15

⁷ In light of other information revealed during the civil discovery process, the
16 continued existence of these 52 pages of WhatsApp messages is itself remarkable. Under
17 oath, McGill admitted that after receiving a subpoena for text messages between she and
18 Capri, rather than providing those messages, she destroyed them:

19 Q: [by petitioner's counsel]: So even though a subpoena was sent to you
20 asking for communications between you and Ms. Capri, you deleted those
21 communications, correct?

22 A: [by Ms. McGill] Yes. (Deposition of Julie McGill, attached as Exhibit
23 P, at pp. 1265.)

24⁸ Nor did jurors know that Ms. McGill had not been entirely forthcoming
25 about her activities on the morning of September 15. As noted above, Ms. McGill told
26 jurors she was sleeping when Ms. Capri called that morning. (Exhibit A at p. 373.)
27 When confronted with telephone records showing that she was texting numerous cell
28 phone numbers prior to Ms. Capri's call, McGill testified that "I don't believe" the
records. (Exhibit A at p. 396.) But during the discovery process connected to the
divorce, Ms. McGill finally admitted recognizing cell numbers she had texted that
morning. (Deposition of Julie McGill, attached as Exhibit P at p. 1263.)

1 2. The text message to Dr. Gorney.

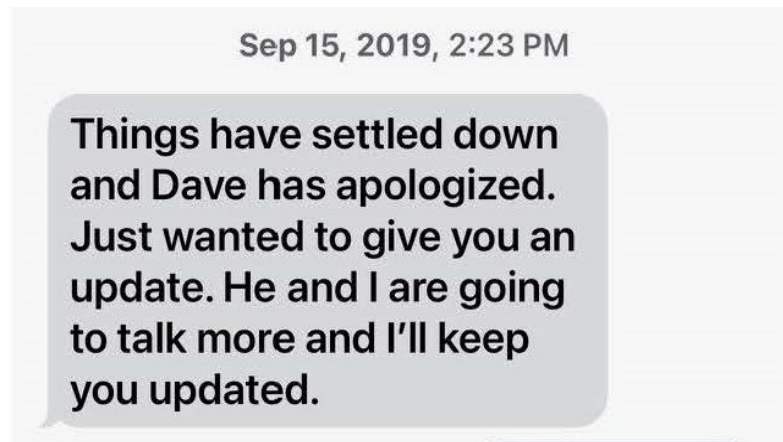
2
3 As discussed above, Ms. Capri told jurors that on September 15, 2019, she sent a
4 text message to Dr. Gorney. (Exhibit A at p. 158.) In this text she told Dr. Gorney “what
5 happened.” (Exhibit A at p. 158.) She provided a screen shot of the text to the
6 prosecution. (Exhibit A at pp. 202-203; Exhibit G at p. 1081.)
7

8 According to Ms. Capri, she woke up between 8:15 and 8:30 on September 15.
9 (Exhibit A at p. 144.) Shortly after the fight, she hid in some bushes outside the house.
10 (Exhibit A at pp. 152-153.) She was there for three to five minutes. (Exhibit A at p. 154.)
11 Ms. Capri sent the text to Dr. Gorney “from the bushes.” (Exhibit H at p. 1146-1147.)
12

13 During the discovery process in connection with the divorce action, Dr. Gorney was
14 ordered to provide the texts she received from Ms. Capri on September 14 and 15. These
15 records show that on September 14, Ms. Capri sent several texts regarding an argument
16 she had with Mr. Crawford on the way home from their therapy session with Dr. Gorney
17 that same day. (Exhibit F at pp. 1071-1079.) Ms. Capri noted that Mr. Crawford “won’t
18 even attempt to say sorry” and she felt “disregarded and disrespected.” (Exhibit F at pp.
19 1075-1076.) She conveyed that “the problem from my perspective is he doesn’t own his
20 own behavior or apologize for it.” (Exhibit F at p. 1078.) So the September 14 texts all
21 reflected a similar theme: Ms. Capri’s concern about Mr. Crawford’s refusal to apologize
22 for their argument.
23

24 The next day -- September 15 -- was the day of the incident. Just as she testified,
25 Ms. Capri did indeed text Dr. Gorney. But she did *not* send a text in the morning from the
26 bushes, immediately after the alleged attack, “describing what happened.” Instead, on the
27 afternoon of September 15, Ms. Capri sent a text picking up with her September 14
28

1 concern that Mr. Crawford had refused to “even attempt to say sorry” or “apologize for
2 [his behavior]” on September 14. Ms. Capri texted Dr. Gorney telling her that finally:



11
12 (Exhibit F at p. 1079.)

13
14 Ms. Capri’s telephone records are entirely consistent with Dr. Gorney’s records. As
15 noted above, Ms. Capri said she sent the text to Dr. Gorney “from the bushes” outside her
16 home that morning. (Exhibit H at pp. 1146-1147.) But Ms. Capri’s telephone records
17 from September 15 do not show that any such text was ever sent. (Trial Exhibit P at p.
18 144.) And as noted above, the only text Dr. Gorney received from Ms. Capri that day was
19 on the afternoon of September 15, and did not describe “what happened” during a fight
20 between the couple.

21
22 Jurors deciding whether Ms. Capri was telling the truth about having sent a
23 September 15, 2019 text to Dr. Gorney describing the attack never heard that Dr. Gorney
24 never received such a text. Jurors never heard that the sole text Dr. Gorney actually did
25 receive from Ms. Capri on September 15 had nothing at all do with an assault and
26 strangling but was a continuation of her texts to Dr. Gorney on September 14.

1 ARGUMENT

2
3 I. MR. CRAWFORD HAS ESTABLISHED A PRIMA FACIE CASE THAT FALSE
4 EVIDENCE WAS PRESENTED FROM (1) MS. CAPRI ABOUT A
5 CORROBORATING TEXT TO DR. GORNEY AND (2) BOTH MS. CAPRI AND
6 MS. MCGILL ABOUT A SPONTANEOUS DECLARATION.

7 A. The Relevant Facts.

8
9 As noted above, jurors heard two very different versions of what happened on
10 September 15. Ms. Capri said Mr. Crawford strangled her, twice. Mr. Crawford said this
11 did not happen; Ms. Capri came at him and he pushed her away.

12
13 Because it has been discussed above in the Statement of Facts, there is no need to
14 review the state's corroborating evidence in any detail. In brief, the state sought to
15 corroborate Ms. Capri's version of events by introducing her testimony that after Mr.
16 Crawford left the house that morning, she (1) sent a text to therapist Dr. Beth Gorney
17 describing exactly what happened and (2) called her best friend Julie McGill and "told her
18 what happened." The text to Dr. Gorney was never introduced at trial and the state did not
19 call Dr. Gorney as a witness. But the state did call Julie McGill who told jurors that in a
20 telephone call on the morning of September 15, Ms. Capri "absolutely said '[h]e grabbed
21 my neck and choked me.'" (Exhibit A at p. 404.) In closing argument, the prosecutor
22 urged jurors to find Ms. Capri credible because she was never impeached with any
23 inconsistent statements and, to the contrary, her post-incident statements were entirely
24 consistent with "that frantic phone call on the morning of September 15th[]" to Julie
25 McGill. (Exhibit A at pp. 843-844.)

26
27 Nor is there any need to review in detail what the truth was. In fact, there was no
28 morning text from Ms. Capri to Dr. Gorney describing "what happened." Instead, the only

1 text which Ms. Capri sent to Dr. Gorney on September 15 was an *afternoon* text which
2 made no mention at all of any strangling incident. And although six months later Julie
3 McGill would tell jurors that on September 15, Ms. Capri “absolutely said ‘[Mr.
4 Crawford] grabbed my neck and choked me,’” in WhatsApp messages sent between
5 September 17 and 18, (1) Ms. McGill describes the abuse as “verbal abuse[,]” (2) Ms.
6 McGill urges Ms. Capri to read an article on the internet about “subtle signs” of an
7 emotionally abusive relationship (3) Ms. McGill states that Mr. Crawford has added
8 physical abuse to emotional abuse because he is “threatening to strangle you” and (4) they
9 scheme about finding him with another woman.

10
11 At this stage of the habeas process the question is simple. It is not whether relief is
12 required. It is whether -- assuming the truth of Mr. Crawford’s factual allegations -- he
13 has established a prima facie case that false evidence was presented. As discussed below,
14 as to this question there should be no dispute. A prima facie case has been established and
15 an Order to Show Cause issued.

16
17 B. Because All Parties Recognized That Credibility Was The Key Issue In This
18 Case, The Presentation Of False Evidence Directly Supporting Ms. Capri’s
19 Credibility Requires Issuance Of An Order To Show Cause.

20 The Due Process Clause prevents the prosecution in a criminal case from
21 introducing false evidence and imposes a duty on the prosecution to correct false
22 testimony when it has been introduced. (*United States v. Agurs* (1976) 427 U.S. 97, 103.
23 *See also Napue v. Illinois* (1959) 360 U.S. 264, 269.) The prosecution’s obligation to
24 correct false testimony applies whether the prosecutor affirmatively elicits the false
25 evidence on direct examination, or simply allows the false evidence to come in during
26 defense counsel's cross-examination. (*See, e.g., Giglio v. United States* (1972) 405 U.S.
27 150; *Napue v. Illinois, supra*, 360 U.S. at p. 264.)

1 For sound policy reasons, this obligation to correct false testimony exists even if the
2 prosecutor did not intentionally elicit the false evidence. (*People v. Seaton* (2001) 26
3 Cal.4th 598, 647.) As the Supreme Court has noted in this very context, in assessing
4 whether Due Process has been violated, what matters is “the character of the evidence, not
5 the character of the prosecutor.” (*United States v. Agurs, supra*, 427 U. S. at p. 110.
6 *Accord Maxwell v. Roe* (9th Cir. 2010) 628 F.3d 486, 506 [granting relief where false
7 evidence was presented by the prosecution, where the evidence was material, even though
8 the prosecution presented the evidence in “good faith”]; *Hall v. Director of Corrections*
9 (9th Cir. 2003) 343 F.3d 976, 981-982, 985. [same].)

11 California law is similar. In addition to the Due Process obligation to grant relief
12 where false evidence has been introduced, California law imposes a separate obligation to
13 grant relief if “false evidence that is substantially material or probative on the issue of guilt
14 or punishment was introduced against a person at any hearing or trial relating to his
15 incarceration.” (Penal Code section 1473, subd. (b)(1).) It is immaterial whether the
16 prosecution actually knew or should have known of the false nature of the evidence. (Pen.
17 Code §1473, subd. ©)); *In re Hall* (1981) 30 Cal.3d 408, 424.)

19 With respect to the standard of prejudice, under California law relief is required
20 when false evidence is presented whenever there is a reasonable probability the trier of
21 fact could have arrived at a different decision in the absence of the false evidence. (*See,*
22 *e.g., In re Wright* (1978) 78 Cal.App. 3d 788, 807-808 and n. 4. *Accord In re Ferguson*
23 (1971) 5 Cal.3d 525; *In re Merkle* (1960) 182 Cal.App.2d 46.) Under federal law, a
24 conviction obtained through the use of false or misleading testimony must be reversed “if
25 there is any reasonable likelihood that the false testimony could have affected the
26 judgment of the jury.” (*United States v. Agurs, supra*, 427 U.S. at p. 103.)

1 The United States Supreme Court has applied this standard of prejudice many
2 times. Where the state presents false evidence which directly supports the state's theory as
3 to the critical disputed issue in the case, relief is required under this standard. (*Miller v.*
4 *Pate* (1967) 386 U.S. 1.) Similarly, where the state presents false evidence which directly
5 supports the credibility of a critical prosecution witness, relief is also be required under
6 this standard. (*Napue v. Illinois, supra*, 360 U.S. 264.) The converse is also true; where
7 the state presents false evidence which directly undercuts the defense theory as to the
8 critical issue in the case, relief is required. (*Alcorta v. Texas* (1957) 355 U.S. 28, 31-32.)

9
10 *Alcorta* is a very useful case in applying the standard of prejudice. There,
11 defendant was charged with murder in the killing of his wife. Defendant admitted the
12 killing; his defense was that he killed in a heat of passion. The defense theory was that
13 defendant killed his wife when he found her kissing her lover, Mr. Castilleja. (355 U.S. at
14 pp. 28-29.) At trial, Mr. Castilleja testified that he was a "casual friend" of the victim and
15 had no romantic relationship with her at all. After defendant was convicted, he sought
16 habeas relief, presenting testimony from Mr. Castilleja that his trial testimony was false
17 and he and the victim had been lovers for some time. (355 U.S. at pp. 30-31.)

18
19 The Supreme Court granted relief, precisely because the false testimony "tended
20 squarely to refute" the only defense presented -- heat of passion. (355 U.S. at p. 31.) The
21 Court noted that truthful testimony would have corroborated petitioner's version of events
22 and "might well have" resulted in "petitioner's defense [being] accepted by the jury . . ."
23 (355 U.S. at pp. 31-32.) The Court reversed defendant's murder conviction. (355 U.S. at
24 p. 32.)

25
26 Here, it does not matter whether the federal or state test is applied. Nor does it
27 matter that Ms. Capri and Ms. McGill may together have fooled not only the trial court and
28

1 the defense, but the prosecution as well. Mr. Crawford's theory of defense was that Ms.
2 Capri was not a credible witness and should not be believed. In light of Ms. Capri's
3 statements to her good friend Brandee Kraznich -- that with full custody of the children
4 "the more money I get" -- the defense theory was that Capri was testifying falsely about
5 domestic violence to obtain full custody of the children and increase the amount of money
6 she received in the divorce.

7
8 The corroborating evidence which the state presented at trial -- testimony about the
9 Gorney text and McGill's testimony about the "spontaneous declaration" -- both undercut
10 the defense theory. Just as in *Alcorta*, then, the false evidence about this corroborating
11 evidence "tended squarely to refute" the only defense presented. And just as in *Alcorta*,
12 accurate testimony about the Gorney text, and Ms. McGill's more-contemporaneous
13 recollection of the "spontaneous declaration" contained in her WhatsApp messages, would
14 have directly corroborated the defense theory. Moreover, just as in *Napue*, the false
15 evidence did not support the credibility of witnesses that were somehow tangential to the
16 state's case. To the contrary, the false evidence directly supported the credibility of the
17 two most critical prosecution witnesses -- Ms. Capri and Ms. McGill. Although jurors
18 heard testimony about a corroborating text to Dr. Gorney, and a corroborating spontaneous
19 declaration to Julie McGill, the truth was quite a bit different. There was no September 15
20 corroborating text to Dr. Gorney; in fact, the only text actually sent to Dr. Gorney on
21 September 15 makes no mention of any incident at all. And Ms. McGill's WhatsApp
22 messages to Ms. Capri only two to three days after the incident were wholly inconsistent
23 with her trial testimony six months later that Ms. Capri "absolutely said '[h]e grabbed my
24 neck and choked me.'" (Exhibit A at p. 404.) Moreover, as also noted above, other
25 WhatsApp messages also undercut the state's theory -- if Mr. Crawford had indeed
26 violently assaulted Ms. Capri by twice strangling her, it seems unlikely Ms. McGill and
27 Ms. Capri would be referencing articles about "subtle signs" of abuse or expressing a need
28 to catch him with another woman.

1 Even without both the Gorney text and the WhatsApp messages, the jury
2 deliberations show that jurors had a difficult time with the case. As noted above, they
3 deliberated nearly 12 hours, returned with 11 questions, twice indicated they were
4 deadlocked, and refused to convict on all counts. Under state law, these objective indicia
5 have long been recognized to reflect a close case. (*See In re Sakarias* (2005) 35 Cal.4th
6 140, 167 [ten-hour deliberation where jury suggests it is deadlocked shows close case];
7 *People v. Figueroa* (1986) 41 Cal.3d 714, 722 [indication of deadlock after two days
8 indicates close case]; *People v. Rucker* (1980) 26 Cal.3d 368, 391 [nine-hour jury
9 deliberation shows close case"]; *People v. Woodard* (1979) 23 Cal.3d 329, 341 [six-hour
10 deliberation demonstrates a close case]; *People v. Pearch* (1991) 229 Cal.App.3d 1282,
11 1295 [juror questions and requests for readback show a close case]; *People v. Epps* (1981)
12 122 Cal.App.3d 691, 698 [refusal to convict on all counts shows close case].)

13
14 As also noted above, under federal law relief is required when there is “any
15 reasonable likelihood that the false testimony could have affected the judgment of the
16 jury.” (*United States v. Agurs, supra*, 427 U.S. at p. 103.) Under state law, relief is
17 required whenever there is a reasonable probability the trier of fact could have arrived at a
18 different decision in the absence of the false evidence. (*In re Wright, supra*, 78
19 Cal.App.3d at pp. 807-808 and n. 4.) Here, the false testimony (1) allowed the state to
20 undercut the entire defense theory of the case (that Ms. Capri and Ms. McGill were not
21 credible) and (2) directly supported the state’s contrary theory of the case. Under either
22 standard of prejudice, Mr. Crawford has established a prima facie case for relief and an
23 Order to Show Cause should issue.

1 II. MR. CRAWFORD HAS ESTABLISHED A PRIMA FACIE CASE THAT
2 DEFENSE COUNSEL’S FAILURE TO IMPEACH MS. CAPRI’S TESTIMONY
3 ABOUT THE TEXT TO DR. GORNEY CONSTITUTED INEFFECTIVE
4 ASSISTANCE OF COUNSEL.

5 A. The Relevant Facts.

6 During trial Ms. Capri testified that shortly after the incident she sent a text to Dr.
7 Gorney “explain[ing] to her briefly via text what happened.” (Exhibit A at p. 158.) In
8 open court Ms. Capri admitted that she had provided a copy of this text to the prosecution.
9 (Exhibit A at pp. 202-203.)
10

11 As is now clear from the new evidence discussed above, Dr. Gorney never received
12 any text from Ms. Capri describing such an incident. (Exhibits E, F.) To the contrary, the
13 only text she received from Ms. Capri on September 15 had no reference at all to a
14 strangling incident. (Exhibit F at p. 1079.) But because defense counsel never presented
15 this evidence, jurors evaluating Ms. Capri’s credibility never knew this.
16

17 The record shows why counsel never presented this information. When called by
18 defense counsel, Dr. Gorney testified that Mr. Crawford had waived his psychotherapist-
19 patient privilege, and was willing to have Dr. Gorney testify. (Exhibit A at p. 729.) But
20 because Ms. Capri had not waived the privilege, Dr. Gorney would not testify about any
21 privileged communications because she “d[id] not have the consent of both parties.”
22 (Exhibit A at p. 724; *see* Exhibit A at p. 200.)
23

24 In the context of this case, defense counsel’s decision to accede to Dr. Gorney’s
25 assertion of the privilege was curious. As noted, in defense counsel’s presence Ms. Capri
26 had admitted disclosing the Gorney text to the prosecution. (Exhibit A at pp. 202-203.) In
27 addition, discovery provided to defense counsel prior to trial showed that Ms. Capri had
28

1 discussed a text to Dr. Gorney with Officer Smiler and provided a copy to her friend
2 McGill. (Exhibit H at pp. 1146-1147.) Capri told Officer Smiler that while in the bushes
3 on September 15 she texted Dr. Gorney the following:

4
5 I texted the therapist from – from the day before, and I basically said, ‘I
6 don’t know if I’m allowed to text you because you see us as a couple, but
7 this just happened.’ I screenshotted the text and gave it to [Julie] because
8 that – I deleted the text from my phone afterward, fearing he was going to
9 get my phone.

10 [S]o I texted the therapist, basically . . . everything that happened. He put his
11 hands around my neck. He – I – can’t remember. Julie has it.

12 (Exhibit H at pp. 1146-1147.)

13 Thus, because the text message has been disclosed to numerous third parties, any
14 privilege as to this text was waived. (Evidence Code section 912, subdivision (a).)
15 Indeed, there should be no dispute on this point; during the civil discovery process, San
16 Mateo Superior Court Judge Woolard reached this precise conclusion, ruling that “the
17 privilege was waived by sharing or discussing the substance with third-parties other than
18 counsel.” (Exhibit I at p. 1188.) As a result, Judge Woolard ordered Dr. Gorney to
19 disclose a record of the texts she received from Ms. Capri on September 14 and September
20 15. (*Ibid.*)

21 B. Because All Parties Recognized That Credibility Was The Key Issue In This
22 Case, Defense Counsel’s Failure To Impeach Ms. Capri In Connection With
23 The Gorney Text Fell Below The Standard Of Care And Requires Issuance
24 Of An Order To Show Cause.

25 Both the United States and California Constitutions give defendants in criminal
26 cases a right to the effective assistance of counsel. A “convicted defendant's claim that
27 counsel’s assistance was so defective as to require reversal of a conviction or death
28 sentence has two components.” (*Strickland v. Washington* (1984) 466 U.S. 668, 687.)

1 The defendant must first show that counsel’s performance fell below an objective standard
2 of reasonableness. (466 U.S. at p. 688.) In addition, a defendant must also prove that but
3 for counsel’s errors there is a “reasonable probability” that the result of the proceeding
4 would have been different. (*Strickland v. Washington, supra*, 466 U.S. at p. 693.)

5
6 This prejudice standard does *not* require a defendant to prove counsel’s deficient
7 performance “more likely than not altered the outcome of the case.” (*Id.* at p. 693.)
8 Rather, defendant need only show a “probability sufficient to undermine confidence in the
9 outcome.” (*Strickland v. Washington, supra*, 466 U.S. at p. 694.) Where state law
10 requires a unanimous verdict, and the defendant establishes that at least one juror could
11 reasonably have reached a different result absent counsel’s deficient performance, the
12 *Strickland* test is satisfied and relief is required. (*See, e.g., Wiggins v. Smith* (2003) 539
13 U.S. 510, 537. *See also People v. Centeno* (2014) 60 Cal.4th 659, 677 [same].)

14
15 Here, in order to impeach Ms. Capri’s testimony about sending the text to Dr.
16 Gorney, defense counsel had to obtain (1) a copy of the text Ms. Capri said she had sent to
17 Dr. Gorney (and later disclosed to the prosecution) and (2) a copy of the texts Dr. Gorney
18 actually received from Ms. Capri on September 14 and 15. The record shows that defense
19 counsel did not pursue this area because he believed that Ms. Capri retained (and asserted)
20 her psychotherapist-patient privilege in these materials. But as Judge Woolard later ruled,
21 in light of Evidence Code section 912, subdivision (a), defense counsel’s understanding
22 was fundamentally wrong and “the privilege was waived by sharing or discussing the
23 substance with third-parties other than counsel.” (Exhibit I at p. 1188.) Defense counsel’s
24 failure to appreciate that the privilege had been waived plainly fell below an objective
25 standard of reasonableness. As the Supreme Court has concluded in this exact situation, a
26 lawyer’s “ignorance of a point of law that is fundamental to his case combined with his
27 failure to perform basic research on that point is a quintessential example of unreasonable
28 performance.” (*Hinton v. Alabama* (2014) 571 U.S. 263, 270.) Ms. Crawford has

1 established a prima facie case as to the performance prong of *Strickland*.

2
3 He has also established a prima facie case as to prejudice. At trial, jurors heard that
4 Ms. Capri corroborated her version of events in a nearly contemporaneous text to Dr.
5 Gorney sent on the very morning of the alleged attack. Even on this record, jurors
6 deliberated nearly 12 hours, sent 11 notes to the court, twice indicated they were
7 deadlocked and ultimately returned a split verdict.

8
9 But counsel could have impeached Ms. Capri's testimony that she sent a confirming
10 text to Dr. Gorney that morning. He could have shown that she sent no text at all that
11 morning, and that her afternoon text to Dr. Gorney did not even mention a strangling
12 incident. On the record of this close case, one or more jurors could reasonably have
13 concluded that Ms. Capri's false testimony about the Gorney text undercut her credibility.
14 That is all that is required; Mr. Crawford has pled a prima facie case of prejudice. An
15 Order to Show Cause should issue on this claim.

1 III. MR. CRAWFORD HAS ESTABLISHED A PRIMA FACIE CASE THAT
2 MATERIAL NEW EVIDENCE EXISTS WHICH WOULD RESULT IN A
3 DIFFERENT OUTCOME AT TRIAL.

4 A. The Relevant Facts.

5
6 Penal Code section 1473, subdivision (b)(3)(A) provides that habeas relief is
7 appropriate where “[n]ew evidence exists that is credible, material, presented without
8 substantial delay, and of such decisive force and value that it would have more likely than
9 not changed the outcome at trial.” Subdivision (b)(3)(B) goes on to provide that “[f]or
10 purposes of this section, ‘new evidence’ means evidence that has been discovered after
11 trial, that could not have been discovered prior to trial by the exercise of due diligence, and
12 is admissible and not merely cumulative, corroborative, collateral, or impeaching.” The
13 final Senate Bill Floor Analysis for this legislation proposing this standard made clear that
14 “[t]he ‘more likely than not’ standard proposed by the bill is clear and is a standard
15 familiar to the court.” (Senate Rules Committee, Floor Analysis of Senate Bill No. 1134
16 (8/1/16) at p. 77.)

17
18 This standard is nearly identical to the standard trial courts routinely apply in
19 assessing new evidence that is presented at a new trial motion. The new trial motion
20 standard requires the new evidence to be “such as to render a different result probable on
21 retrial.” (*People v. McDaniel* (1976) 16 Cal.3d 156, 178.) And for purposes of assessing
22 whether new evidence is sufficient to merit relief in a new trial motion -- that is, whether
23 the new evidence is sufficient to make a different outcome likely -- a hung jury is a
24 different (and more favorable) outcome than a guilty verdict. (*See, e.g., People v. Soojian*
25 (2010) 190 Cal.App.4th 491, 521.) So taken together, new evidence merits relief in
26 habeas proceedings when it is more likely than not that at least one juror would have
27 returned a more favorable verdict.

1 The question here is whether Mr. Crawford has presented a prima facie case that
2 the new evidence would meet this standard. It is to that question Mr. Crawford now turns.

3
4 B. Because It Is Reasonably Probable That Had The Jury Been Presented With
5 The New Evidence At Least One Juror Would Have Voted To Acquit, An
6 Order To Show Cause Must Issue.

7 There is one significant piece of evidence here which meets the test for new
8 evidence -- “evidence that has been discovered after trial, that could not have been
9 discovered prior to trial by the exercise of due diligence, and is admissible and not merely
10 cumulative, corroborative, collateral, or impeaching.” Here, the September 2019
11 encrypted WhatsApp messages between Ms. Capri and Ms. McGill were not discoverable
12 prior to trial by the exercise of due diligence.

13
14 So the question becomes whether the WhatsApp messages themselves were likely
15 to “change the outcome.” They were. After all, we now know that two days *after* Ms.
16 Capri’s “spontaneous declaration,” Ms. McGill sent a message to Ms. Capri telling her that
17 she is “setting an excellent example” for Capri’s daughter Lauren “[t]hat wom[e]n are
18 strong. And verbal abuse is not ok[.]” (Exhibit D at p. 1029.) Later that same night, Ms.
19 McGill sent Ms. Capri an article entitled “11 Subtle Signs You Might Be In An
20 *Emotionally Abusive Relationship*.” (Exhibit D at p. 1036, emphasis added.) And after
21 Ms. Capri responded by saying that Mr. Crawford “does but all three things” (Exhibit D at
22 p. 1037), Ms. McGill sent four messages in succession:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A screenshot of a WhatsApp message. The message is in a blue bubble and says "Exactly". Above the text is a small profile picture of a person with a red status. The name "Unknown" is above the bubble. The timestamp "9/18/2019 7:37:32 AM(UTC-7)" is at the bottom right of the bubble.

Unknown
Exactly
9/18/2019 7:37:32 AM(UTC-7)

Source Extraction:
File System

Unknown
You have been abused for years
9/18/2019 7:37:41 AM(UTC-7)

Source Extraction:
File System

Unknown
And now he has added physical abuse on top of it
9/18/2019 7:38:08 AM(UTC-7)

Source Extraction:
File System

Unknown
And the worst kind with threatening to strangle you
9/18/2019 7:38:32 AM(UTC-7)

Source Extraction:
File System

(Exhibit D at p. 1037.) Significantly, McGill characterized Crawford's abuse as "threatening to strangle" and nowhere in the WhatsApp messages does Ms. Capri correct this statement. (Exhibit D at pp. 1006-1058.) Later, they talk about getting a CIA agent to track Mr. Crawford and catch him cheating. (Exhibit D at p. 1028.)⁹

⁹ Because individual messages in the WhatsApp thread do not have an associated phone number or contact name, it is not always clear who is the author of an individual message. However, from context the above-cited four messages appear to be authored by Julie McGill.

1 This evidence is certainly new. As discussed above, and at trial, Renee Capri and
2 Julie McGill “wholesale objected” to production of any and all of their communications.
3 (Exhibit A at pp. 66, 68; Exhibit K at p. 1203.) Although these messages were sent on
4 September 17 and 18 -- just days after the September 15 argument in this case -- Mr.
5 Crawford had no access to this information prior to receiving it in discovery during the
6 divorce proceedings. These messages were only produced as a result of a court order by
7 Judge Woolard. (Exhibit L at pp. 1219-1221.) One or more jurors could reasonably find
8 from this evidence alone that -- contrary to the testimony of both Ms. Capri and Ms.
9 McGill -- Ms. Capri did *not* tell Ms. McGill that Mr. Crawford had “grabbed my neck and
10 choked me.” One or more jurors could have found that if Ms. Capri had genuinely been
11 strangled (and told Ms. McGill of the strangulation), there would be no need to focus on
12 fanciful schemes involving CIA agents catching him cheating. Under this circumstance,
13 and assuming the truth of petitioner’s factual allegations as required by *Duvall*, petitioner
14 has pled a prima facie case for relief based on the discovery of new evidence and an Order
15 to Show Cause should issue.

1 CONCLUSION

2

3 For all the reasons discussed above, petitioner respectfully requests that an Order to

4 Show Cause issue, requiring the state to show cause why relief should not be granted.

5

6 Dated: August 3, 2023

Respectfully submitted,

7

8 CLIFF GARDNER

9

10 /s/Cliff Gardner

11 By Cliff Gardner

12 Attorney for Petitioner

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

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 August 3, 2023, I served the within:

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

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

Office of the District Attorney
San Mateo County
400 County Center
3rd Floor
Redwood City, CA 94063

I declare under penalty of perjury that the foregoing is true. Executed on August 3, 2023 in Berkeley, California.

Declarant