**No.**

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In the
Supreme Court of the United States

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MARK WAYNE GRAY, Petitioner -Appellant

v.

DEAN BORDERS**,** Warden
Respondent-Appellee

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit 18-16604

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# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Should CERTIORARI be granted to review two unreasonable and unconstitutional decisions of the state court:

1) Whether the 5th Amendment (right to be free from self-incrimination) and 6th (denial of assistance of counsel) and 14th amendments were violated by the trial judge allowing the prosecutor to seize 18 pages of letters written by petitioner to his attorney and then allowed the prosecutor to question petitioner, in front of the jury, on the contents of his communications to his attorney;In this non-certified issue, the prosecution read to the jury from the attorney-client letters confidential communications between the two, attorney and client, and used the letters to get petitioner to admit he was not completely truthful (lied!) to that attorney and his own mother based on those confidential communications. The California Court of Appeal (CCA) factually, erroneously stated that was allowable since the petitioner was reading those letters on the stand. The trial judge clearly concluded that, NO, petitioner was not reading the letters on the stand.

` Since the CCA unreasonably determined this erroneous statement from the evidence before the court, 2254(d)(2), the bar to the issuance of a habeas corpus petition was lifted and the petition should have granted on that issue alone.

2) Whether the appellate court of California, ignored its own Attorney General's concession of Constitutional error that the jury was never told that AMBIEN was a controlled substance. The coup de grace to petitioner's right to jury trial was the CCA ignoring the state concession of error, and, on its own motion, without any regard whatsoever to the state appellate briefing, bypassing the trial jury entirely, and taking judicial notice of an element necessary to add five years to the sentence, namely, that Ambien contained a controlled substance.

## PARTIES TO THE PROCEEDINGS

There are no parties to the proceeding other than those named in the caption of the case.

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**PAGE**

**CASES**

**CONSTITUTION**



**28 U.S.C.**



**STATUES**



**INSTRUCTIONS**



**OTHER**

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## PETITION FOR WRIT OF CERTIORARI

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Petitioner Mark Gray, respectfully petitions the Court for a writ of certiorari to review the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's denial of the section 2254 petition for a writ of habeas corpus.

## WHY THIS PETITION SHOULD BE GRANTED

It is argued here that there was insufficient evidence to support the jury's factual finding that Gray administered a controlled substance to the victim to facilitate sexual penetration with a foreign object in violation of Cal. Penal Code § 12022.75.

Additionally, it is argued that the appellate court could not, by using judicial notice of the contents of Ambien, bypass the uninformed jury, and

provide missing evidence that Ambien *contained* the controlled substance, Zolpidem, in violation of the Sixth and Fourteenth Amendments and *Apprendi v. New Jersey,* 530 U.S. 466 (2000). Since the prosecution failed to offer any evidence of this fact at trial, that Ambien *contained* a controlled substance, there was insufficient evidence to support the five year enhancement which was imposed.

This issue boils down to the rather simple premise that, after a thorough reading of the trial record, which this attorney has done, no juror, rational or otherwise, could begin to conclude that Ambien *contained* a controlled substance. And without "something" in the record to show that Ambien contained the chemical Zolpidem, the five year enhancement provision could not have been proven beyond a reasonable doubt.

**INTRODUCTION of NON-CERTIFIED ARGUMENT**

Gray has proven in his pleading that the CCA unreasonably interpreted the facts based on the record of the trial in this case and therefor this case falls within the exception to the deference to a state decision of AEDPA in 28 U.S.C. § 2254(a)(2) in that the CCA opinion is based on an unreasonable determination of the facts in light of the evidence presented in the state court.

The CCA referred to actual letters written by Gray to his attorney as "notes being employed by a witness" that did not consist of "a pretrial attorney-client communication." 1-ER-101-102. The facts were opposite this CCA statement.

These were pretrial letters from client to attorney, some prepared at the request of the attorney in order to better represent Gray. 4RT 917-918; 4RT 933, 974.

A further unreasonable determination of the facts was that the CCA erroneously stated that Gray actually reviewed the letters *while* testifying, 1-ER-102-103, *even though the trial court expressly concluded otherwise.* ["They were taken to the witness stand, they were not used at the witness stand."] 2-ER-171. The prosecutor was able to use the letters to impeach Gray and to get him to admit he lied to both his attorney and his own mother, while he was testifying.

## OPINIONS BELOW

On November 25, 2020, the Ninth Circuit Court of Appeals, in a three page Memorandum Opinion, affirmed the district court denial of petitioner's habeas corpus petition filed under 28 U.S.C. 2254 and denied a certificate of appealability on the question whether he was denied the right to a fair trial after the trial court compelled the disclosure to the prosecution of letters Gray had written his attorney. (Dkt 49-1.)

(Appendix A, 9th Ckt. Memorandum Opinion .)

The Order of the United States District Court for the Eastern District of California reversing the Magistrate's grant of the petition as to the Ambien Issue and denying the issue of violation of attorney client privilege and the privilege against self-incrimination and denied a certificate of appealability on August 7, 2018, Dkt 57 and is Appendix B.

The opinion of the California Court of Appeal is attached as Appendix C.

The Civil Dockets of both District Court and Ninth Circuit is appendix D.

## JURISDICTION

The Ninth Circuit affirmed the denial of the habeas corpus petition an on March 25, 2021 denied a petition for rehearing. (Dkt 59.)

The jurisdiction of this Court is, thus timely invoked under 28 USC Section 1254 (1). *Hohn v. United States,* 524 U.S. 236 (1998).

## STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

A defendant in a criminal case must have the right to Due Process of Law, and the Fifth and Fourteenth Amendment to the U.S. Constitution.

28 U.S.C. section 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT OF THE CASE

Petitioner was charged in the Shasta County Superior Court with multiple felony and misdemeanor counts which resulted in convictions for sexual penetration with a foreign object, spousal rape, multiple burglaries, invading another's privacy by secretly videotaping and also, a special allegation for

administering a controlled substance and more. Needless to say, petitioner Gray suffered numerous convictions revolving around a very difficult breakup between him and his wife, S.G.

When the case finally went to trial, Gray carried 18 pages of attorney-client correspondence with him, between himself and his lawyer, to the stand. Over objection from Gray and his attorney that the documents Gray carried with him were privileged attorney-client material, they were seized and turned over to the prosecutor. The prosecutor then proceeded to cross-examine Gray on the contents of the seized documents, getting admissions from Gray that he lied to his own attorneys and his own mother about details of the case. The prosecutor then argued to the jury that Gray was not to be believed in anything he told the jury because of such lies.

Gray was convicted and received a sentence of 20 years and 2 months in state prison.

On appeal, things looked up for the petitioner when his state appellate attorney succeeded in gaining a concession from the Attorney General, in respondent's brief, that a five year enhancement for administering a controlled substance to his wife had insufficient evidence to support the jury's true finding. Not for long. The appellate court ruled *they* as a CCA could take judicial notice of the Physicians Desk Reference wherein it was contained that the sleeping pill, alleged to be given to S.G. by Gray, contained a small amount of the controlled substance.

Petitioner fared better before the federal Magistrate who granted the 2254 petition, on the impropriety of the CCA who bypassed clear insufficiency of the evidence that Ambien was a controlled substance by taking judicial notice of Ambien containing a controlled substance.

But the District Court judge overruled the Magistrate and denied both claims of the petition and granting a Certificate of Appealability only as to the insufficiency of the evidence issue and bypassing the prosecution use of attorney-client letters of petitioner to convict him.

This certiorari petition responds to the denial of petitioner's appeal to the 9th Circuit Court of Appeal.

## STATEMENT OF FACTS

### A. Preliminary Statement

The CCA statement of facts deserves no presumption of correctness as it was replete with errors and omissions. Every sentence set forth below is tied to the record of trial. The CCA opinion is not.

As far as the certified issue, a detailed statement of facts of the entire prosecution and defense is not necessary.

The same applies to the uncertified issue of violation of attorney client privilege. A detailed factual statement is not necessary to frame that violation which occurred entirely in court during the trial. Those facts will be discussed in the argument of the issue.

A short statement of factual back ground follows.

Petitioner and his wife were having problems and in August 2007 she moved out of the family house, taking their young daughters with her. 1RT 175-178. She found a house to rent and appellant helped her move her things. They made an informal agreement to share custody of their children.

Odd things began to happen within months of the moving out. Over a period of that year and the next, her tires were slashed, items disappeared from her car and from the garage of her house.

At some point, appellant's wife began to suspect appellant as the culprit. 1RT 198. She made reports to the police each time things went missing from her car or her house. At some point she hired a private investigator who videotaped appellant entering her minivan, registered only to him, in the college parking lot where she was attending school, and removing items from the van.

On September 12, 2008 she filed a temporary restraining order against appellant, on September 14 she called the police to report items had been taken from her van while it was parked outside her place of work. 2RT 595-96, 602. Appellant admitted to a police investigator that he took the items as he thought they were community property. 2RT 596-97.

Four days later an arrest warrant was obtained for appellant and a search warrant for his house. During the search of appellant's house, an investigator pushed the button on a video recorder and the tape in it began to play. 3RT 708-709. Tapes revealed appellant having sex with his wife in 2003 where she appeared to be asleep. 2RT 302, 317-318. She did not recall that incident. 2RT

339. In another tape from August 2007, appellant shaved his wife's pubic area while she slept. 2RT 302, 317-318.

During their search the officers found a bottle of Ambien in a drawer. 3RT 708-09, 753. Inside the bottle an investigator saw blue tablets and crushed white powder with blue flecks inside a piece of paper. 3RT 709-710. Later, at trial, that same investigator testified the date listed on the container was after the time frame of the sex-related charges with appellant's wife. 3RT 740.

It was the prosecution theory that petitioner drugged his wife, with whom he was still living, with the controlled substance and then digitally penetrated her and therefore received an extra five years enhancement added to his sentence.

## ARGUMENT

### I Certiorari Should Be Granted Because Insufficient Evidence Existed in Violation of Appellant's Due Process Right under the Fourteenth Amendment to a Jury Finding Based on Proof Beyond a Reasonable Doubt That Ambien Is a Controlled Substance Within the Meaning of Cal. Penal Code Section 12022.75.

When the evidence creates only a reasonable speculation about a fact necessary for conviction, it is insufficient to satisfy the *Jackson v. Virginia*, 443 U.S. 307 (1979) standard and the defendant is entitled to relief. *Newman v. Metrish*, 543 F.3d 793, 796 (6th Cir. 2008); *O'Laughlin v. O'Brien*, 568 F.3d 287, 302 (1st Cir. 2009).

In addition, a defendant is entitled to relief if the adjudication of a claim in state court "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court

proceeding." 28 U.S.C. § 2254(d)(2). This provision applies to factual issues, as opposed to legal ones. *McMullan v. Booker*, 761 F.3d 662, 671 (6th Cir. 2014).

Factual issues relate to basic, primary, or historical facts – facts in the sense of a recital of external events and the credibility of their narrators. *Ibid*.

When an issue is a factual one, a federal court determines two AEDPA issues: (1) whether the state court's finding was an unreasonable determination of the facts in light of the evidence under section 2254(d)(2), and (2) whether the state court's decision unreasonably applied federal law under section 2254(d)(1). *Maxwell v. Roe*, 606 F.3d 561, 576 (9th Cir. 2010).

Section 2254(d)(2) applies when a state court makes a finding that is unsupported by sufficient evidence. *Taylor v. Maddox*, 366 F.3d 992, 999 (9th Cir.2004). A state-court factual finding is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Wood v. Allen*, 558 U.S. 290, 301 (2010).

However, a factual finding will be overturned when the federal court is convinced that the state "appellate panel, applying the normal standards of appellate review, could not reasonably conclude that the finding is supported by the record." *Taylor v. Maddox*, *supra,* 366 F.3d at 1000.

In addition, when a state court makes factual findings, but does so under a misapprehension as to the correct legal standard, the resulting factual determination is unreasonable and no presumption of correctness attaches to it. *Id*. at 1001.

For example, when a state appellate court employs an erroneous legal standard when deciding an issue, such as placing the burden of proof on the defendant instead of the prosecution, the federal court conducts de novo rather than deferential review. *Caliendo v. Warden*, 365 F.3d 691, 698 (9th Cir. 2004). The burden of showing that a state court's factual determination is unsupported by the record rests with the petitioner. *Cook v. Schriro*, 538 F.3d 1000, 1015 (9th Cir. 2008).

### A. Applying the Standard of Review Above to the Issue of Sufficiency of the Evidence, There Was Insufficient Evidence the Jury Ever Found Beyond A Reasonable Doubt That Ambien Was a Controlled Substance

In connection with Count 1, where appellant Gray was charged with and convicted of sexual penetration with a foreign object (Pen. Code, § 289, subd. (d)), it was alleged Gray "administered a controlled substance, to wit: AMBIEN, in violation of Penal Code section 12022.75." 2-ER-117; 1CT 209.

Section 12022.75 does not refer to Ambien as a controlled substance. The statute provides, as relevant to this case: "Any person who, in the commission or attempted commission of any offense specified in paragraph (2), administers any controlled substance listed in Section 11054, 11055, 11056, 11057, or 11058 of the Cal. Health and Safety Code to the victim shall be punished by an additional and consecutive term of imprisonment in the state prison for five years."[1] (Cal. Pen. Code, § 12022.75, subd. (b)(1).) "Ambien" is not listed as a controlled

[1] Sexual penetration in violation of Penal Code section 289, subdivision (d) is one of the offenses listed in paragraph (2) of subdivision (b) of section 12022.75.

substance under Cal. Health and Safety Code sections 11054, 11055, 11056, 11057 or 11058.

And no evidence of Ambien's chemical structure was offered at trial to show that it falls under any of these provisions.

The prosecution failed to meet its burden to prove appellant administered a controlled substance in violation of Penal Code section 12022.75 during the commission of the offense associated with Count 1.

The court instructed the jury pursuant to CALCRIM No. 3183 as follows: "If you find the defendant guilty of the crime charged in Count 1, you must then decide whether the People have proved the additional allegation that the defendant administered a controlled substance to [S.G.] during the commission of that crime. You must decide whether the People have proved this allegation for this crime. [¶] To prove this allegation, the People must prove that: [¶ ] 1[.] In the commission of sex penetration with a foreign object when the victim was unconscious, the defendant administered Ambien to [S.G.]; [¶] 2[.] The defendant did so for the purpose of committing the crime of sex penetration with a foreign object when the victim was unconscious. [¶] A person administers a substance if he applies it directly to the body of another person by injection, or by any other means, or causes the other person to inhale, ingest, or otherwise consume the substance. [¶] The People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you

must find that the allegation has not been proved." 2-ER-118-120; 2 CT 443; 4 RT 1046-1047.

It is evident from the court's instruction to the jury and from the absence of any affirmative evidence in the record, that the jury was never asked to determine if Ambien constituted a controlled substance under one of the relevant Health and Safety Code provisions.

And even if the jurors had been asked to make that determination, there was no evidence from which they could do so.

A conviction or finding on a special allegation that is not supported by substantial evidence violates the defendant's Fourteenth Amendment to due process and must be reversed.

Under the Due Process Clause of the Fourteenth Amendment, a person may not be convicted of a crime "except upon proof of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia, supra* at 315 (1979).

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.]" *Jackson v. Virginia, supra*, 443 U.S. at p. 319.

The court "must resolve the issue in light of the *whole record* . . . [and] judge whether the evidence of each of the essential elements . . . is *substantial*. . . . .' [Citation.]" *People v. Johnson,* 26 Cal.3d 557, 577 (1980).

In so doing, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id*. at p. 578.)

Here, there was no dispute as to whether appellant Gray possessed Ambien. But by the same token, there was no testimony about that substance beyond its name, Ambien, and use as a sleep aid. 2-ER-121-122, 123-125; 3RT 708-709, 753, 810-811.

Investigator Hyatt testified about the medication's appearance, where it had been found, the dosage, and the date listed on the container. 2-ER-121-123, 124; 3RT-708-710, 740.

Appellant Gray testified he had gotten the prescription to help him fall asleep. 2-ER-125; 3RT 810.

The prosecutor offered no evidence to show that the chemical structure of Ambien included one of the controlled substances listed in Cal. Health and Safety Code sections 11054, 11055, 11056, 11057 or 11058.

In fact, based on the evidence which was presented, it is indiscernible which of these statutes, or if any one of them, would apply to the medication at issue in the present case.

Respondent's brief in the state court conceded this issue, 1-ER-66. But the CCA rejected the concession and treated the issue as one of harmless error that

the element of administering a controlled substance was *presumed* to be satisfied by an instruction mentioning only AMBIEN and not the controlled substance itself which is ZOLPIDEM. 1-ER-67-68.

Gray was quoted in his federal petition by the magistrate as follows:

> Petitioner argues that the California Court of Appeal improperly resolved his claim by relying on a theory not raised or briefed by the parties and by failing to address the claim of insufficient evidence actually raised. ECF no. 23 at 16. He argues the state court decision is not entitled to deference under AEDPA because it "totally rejected a sufficiency of the evidence analysis and took the tack the CCA itself could supply the missing element." ECF No. 1 at 49. This court agrees.

1-ER-69

The magistrate went on to note that there were other California State cases, published and unpublished under factual circumstances which are substantially similar to the facts of this case. Those cases, including the California Supreme Court, decided those cases "solely on the issue raised."

The magistrate concluded: "Because the CCA did not reach the merits of petitioner's insufficiency of the evidence claim, this court will address the claim de novo." 1-ER-70.

The magistrate concluded that even if the jurors had been asked to decide if Ambien were a controlled substance, there was nothing to help them in the evidence presented to them to make that decision. And taking judicial notice of a PDR as to what Ambien contained, long after the jury had been discharged, completely violates trial by jury.

In *United States v. Gaudin,* 28 F.3d 943, 951-52 (9th Cir. 1994)(*en banc*), unanimously affirmed by the Supreme Court, 515 U.S. 506 (June 19, 1995), the Ninth Circuit reversed a district court decision of a trial judge who took away from the jury the element of materiality of a loan application misstatement. That case was properly relied upon by the magistrate in this case since the essential element that Ambien contained a controlled substance, Zolpidem was never given to the jury but supplied by judicial notice by an appellate court. 1-ER-72.

The district court disagreed with the magistrate, however, and that is next discussed.

### B. The Federal District Court on its Own, Without Referring to the CCA Opinion, Changed The Magistrate's Findings to State that Ambien is Simply a Generic Name for Zolpidem

At Appendix B p. 6 (1-ER lines 13-19,) the district court, by interlineation, changed the magistrates opinion so that it stated that Ambien is just a generic name for Zolpidem. The jury was never told this. Even the CCA opinion never referred to Ambien as simply a brand name for Zolpidem.

The CCA opinion at Appendix C, p.32,1-ER-110, referred to the Physicians Desk Reference at the bottom of that page as Ambien being the chemical compound "Zolpidem Tartrate".

In turn, a tartrate is a salt or ester of the organic compound tartaric acid, a dicarboxylic acid. (https://pubchem.ncbi.nlm.nih.gov/compound/Tartarate)

As stated in the CCA opinion Ambien ***contains*** Zolpidem Tartarate but it never asserts they are one in the same as the federal district court asserts.

And further stated in that opinion, under H & S Code section 11057 (d) a controlled substances includes "any material, compound, mixture or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers is possible within the specific chemical designation: 32 Zolpidem."

The jury was only told to find that Ambien was the controlled substance. That was just plain wrong. Both the CCA and the district court judge took more than a shortcut, they violated well established Supreme Court law by taking this issue from the jury, as was pointed out by the magistrate.

The magistrate was also correct, at Appendix C pg. 31, that the CCA, violated *Apprendi v. New Jersey,* 530 U.S. 466 (2000).

But since the district court judge overruled the magistrate, it is contended below that the magistrate was right all along. And, the *Apprendi* issue is next argued since the COA specifically authorized that issue. 1-ER-0.

### C. Federal Constitutional Law Precluded the CCA from Making Additional Findings of Fact on Appeal, Through Judicial Notice, Which Bypassed the Trial Jury Which Never Made That Finding

#### 1. The District Court Never Relied on AEDPA to Overrule the Magistrate but Instead Relied on a Footnote in the California Supreme Court's *Davis* Case to Equate Ambien to Simply a Generic Version of Zolpidem.

It is a violation of a defendant's right to jury trial under the Sixth Amendment to have the court fill the evidentialry gap in the prosecution's case with evidence not presented to the trial court or jury. *Apprendi*, *supra,* held, "Other than the fact of a prior conviction, *any fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi, supra,* 530 U.S. at 491, italics added.

There can be no argument to the contrary that a requisite fact necessary to support the enhancement of petitioner Gray's sentence by five years under Cal. Penal Code section 12022.75 is that the substance at issue be one of the controlled substances enumerated in Cal. Health and Safety Code sections 11054 through 11058.

*Ambien* is not listed as a controlled substance. An element of proof that Ambien *contains* a controlled substance is missing from the evidence presented to the jury. The prosecutor failed to make this necessary connection in any form while the case was still pending before the jury.

Judicial notice now, of a fact needed to fill that gap in the evidence, runs afoul of appellant Gray's right to jury trial under the federal constitution.

## II UNCERTIFIED ISSUE

**The Trial Court Deprived Appellant of His Due Process Rights under the Fourteenth Amendment and His Sixth Amendment Right to Counsel and His Fifth Amendment Right to Be Free from Self Incrimination When it Compelled the Disclosure of His Confidential Communications Attorney-client Communications to the Prosecutor During the Trial**

### A. Summary of Argument.

The trial court erred as a matter of law and violated appellant's due process rights to the law and to a fair trial in violation of the Fourteenth Amendment and his right to counsel under the Sixth Amendment and his Fifth Amendment right to be free from self incrimination when it confiscated, copied, and disclosed to the prosecution, letters containing privileged confidential communications between appellant and his attorney after the court concluded appellant waived the privilege by reviewing the letters before testifying.

Appellant contends the court's ruling is such an egregious violation of the attorney-client privilege, his right to counsel, and to be free from self-incrimination that these denials and that of his due process rights infected the trial to such an extent that Certiorari must be granted and the judgment must be reversed in its entirety.

### B. The Trial Judge Handed Attorney-Client, Privileged Documents to the Prosecution on a Silver Platter

After reviewing the documents in camera, the court stated it was "allowing disclosure to the prosecution. I've reviewed it. There's no thought processes recorded of an attorney in any of these documents. So we're not talking about attorney work product . [¶] The six page and the 12 page document are a letter to Dear, Josh, which I assume is Josh Lowery. That was [appellant's] court appointed public defender of the public defender's office . . . ." 2-ER-163; 4RT 933. The court continued, "clearly [appellant] used the documents to refresh his memory whether he took these documents to the witness stand or not they would be discoverable because he reviewed the documents himself to refresh his memory and, in fact, the documents did refresh his memory and the documents were prepared for the purpose of refreshing his memory." *Id.* The court clarified that it found the documents constituted attorney-client privileged materials, but that disclosure was appropriate since appellant had relied on the documents to refresh his recollection. 2-ER-165-166; 4 RT 935-936.

Appellant's attorney objected on the basis that the documents were created by appellant to communicate with his attorney and the fact that appellant later reviewed the documents to refresh his recollection did not destroy the privileged nature of the documents. *Id.* And of course defense counsel was correct on the law, California Evidence Code section 771 could not override attorney client privilege.

Section 771, subdivision (a) provides that an adverse party may request a writing used by a witness to refresh his memory.

But, Evidence Code Section 954 gives a client the privilege of refusing to disclose a confidential communication between the client and his lawyer if the privilege is claimed by the client or one authorized to claim it on his behalf.

For purposes of section 954, a confidential communication is information transmitted between client and lawyer in the course of their relationship and "in confidence by a means which, so far as the client is aware, discloses the information to no third person" other then those to whom disclosure is necessary to accomplish the purpose for which the lawyer was consulted. § 952. It includes legal opinions or advice given by the lawyer in the course of the relationship. *Ibid*.

Successful invocation of the lawyer/client privilege has three requirements: (1) a communication, (2) intended to be confidential, and (3) made within the scope of the lawyer- client relationship. *Sullivan v. Superior Court,* 29 Cal. App. 3d 64, 69, (1972).

Because the claim of privilege is an affirmative objection to a request for material otherwise discoverable, the party asserting the privilege must establish the elements of the privilege before the burden shifts to the requesting party. *Gonzalez v. Superior* Court, 33 Cal.App.4th 1539, 1549 (1995).

The court and the prosecutor both agreed there was no evidence appellant actually reviewed the two letters while testifying. 2-ER-171;4RT 973. Appellant's attorney argued disclosing the contents of the two letters to the prosecutor was no different than calling defense counsel to the witness stand to discuss communications she had with appellant while preparing for trial since the letters were relied on to assist in preparing for his defense. 2-ER-172; 4RT 974.

The court nevertheless disclosed the two letters to the prosecutor stating the attorney-client privilege did not override Evidence Code section 771. 2-ER-173-174; 4RT 975-976. The Writ should be granted.

## CONCLUSION

The jury was not properly instructed concerning the five year enhancement nor were vital facts put before that jury to prove the enhancement. There was insufficient evidence to support the five year enhancement. Certiorari should issue as to that conviction and double jeopardy prevents its retrial.

The CCA ran roughshod over the attorney client privilege; that too should result in a granting of Certiorari.

Respectfully submitted,
/s/Charles R. Khoury Jr.

**CERTIFICATE OF COMPLIANCE PURSUANT TO SUPREME COURT RULES**
**RULE 33**

This brief complies with the length limits permitted by Rule 33-1. The brief is under 40 pages excluding exempted portions. The brief's type size and type face comply with Rule 33.2(a)(b).

/s/ Charles R. Khoury Jr. September 26, 2021

IN THE
SUPREME COURT OF THE UNITED STATES

_____

GRAY v. BORDERS ARMANT

**PROOF OF SERVICE**

I hereby certify that I am a member of the Bar of the Supreme Court of the United States and not a party to this action and that on this 26th Day of September 2021 a petition for In Forma Pauperis Status and petition for Certiorari with volume of exhibits, were e- mailed to the email of counsel for the Respondent justain.riley@doj.ca.gov
I declare under penalty of perjury that the foregoing is true and correct.

Respectfully submitted,
/s/CHARLES R. KHOURY JR.

Executed on September 27TH 2021

By: _____
/S/CHARLES R. KHOURY JR.
Attorney for PETITIONER