

No. 21 - _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES DAVID GORDON,

Petitioner,

v.

JOE LIZARRAGA,
Warden, Mule Creek State Prison,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. Whether a defendant's statements may be admitted into evidence when the statements were made while she was placed in segregated confinement based on mental health problems and known to be suffering from suicidal ideations, insomnia, alcohol abuse, anxiety, and depression.
- II. Whether a complaining witness's statements to law enforcement are material in a sex crimes case within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963) and for the purposes of evaluating prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984) when the statements contradict the witness's trial testimony.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS	1
STATEMENT OF THE CASE	2
A. Petitioner’s Childhood	2
B. Pre-Charges Investigation.....	3
C. Arrest and Charges	3
D. Jailhouse Letters	4
E. Trial	5
F. Direct Appeal.....	5
G. State Habeas Corpus	6
H. Federal Habeas Corpus.....	6
REASONS FOR GRANTING THE WRIT	7
A. This Court Should Grant Review to Establish that the Admission of Statements Made by a Defendant Suffering from Mental Distress and Placed in Segregation Violates Due Process.....	7
1. The Admissibility of Statements Made by Defendants Suffering Mental Distress Placed in Segregation Is Important	7
2. The Court Below Erred in Finding Petitioner’s Statements Voluntary.....	8
B. This Court Should Grant Review Because the Court of Appeals Decided an Important Federal Question in a Way That Conflicts with this Court’s Decisions in Finding That JD1’s Statements to Detective Elia Were Cumulative of Other Evidence	10
CONCLUSION	15

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Brady v. Maryland</i> , 373 U.S. 83 (1963)	<i>passim</i>
<i>Brown v. Plata</i> , 563 U.S. 493 (2011)	7
<i>Coleman v. Brown</i> , 28 F. Supp. 3d 1068 (E.D. Cal. 2014)	8
<i>Haynes v. Washington</i> , 373 U.S. 503 (1963)	8, 10
<i>Oregon v. Elstad</i> , 470 U.S. 298 (1985)	8, 10
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	15
<i>United States v. Howard</i> , 26 F.3d 134 (9th Cir. 1994)	10
<i>United States v. Kohring</i> , 637 F.3d 895 (9th Cir. 2011)	14

FEDERAL STATUTES AND RULES

28 U.S.C. §1254(1)	1
28 U.S.C. §2254	6
Sup. Ct. R. 10	10, 15

OTHER AUTHORITIES

American Psychiatric Association, <i>Diagnostic and Statistical Manual of Mental Disorders</i> (5th ed. 2013)	2, 9
Bockting et al., <i>Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population</i> , 5 Am. J. of Pub. Health 943 (May 2013)	9
Physicians' Desk Reference (58th Ed. 2004)	4
SAGE Encyclopedia of Psychology and Gender (Nadal ed. 2017)	9
Sari L. Reisner et al., <i>Psychiatric Diagnoses and Comorbidities in a Diverse, Multicity Cohort of Young Transgender Women</i> , 170(5) JAMA Pediatrics 481 (2016)	3

INDEX OF APPENDICES

Appendix A	Memorandum Opinion, Gordon v. Lizarraga, Ninth Circuit Case No. 20-15105 (Jun. 28, 2021)	1
Appendix B	Order Denying Petition, Gordon v. Lizarraga, N.D. Cal. Case No. 4:12-cv-00769-PJH (Jan. 2, 2020)	9
Appendix C	Order Denying Petition, In re Gordon, Cal. Case No. S228110 (Nov. 10, 2015)	84
Appendix D	Order Denying Petition, In re Gordon, Cal. App. Case No. A142558 (Jun. 24, 2015)	86
Appendix E	Order Denying Rehearing, Gordon v. Lizarraga, Ninth Circuit Case No. 20-15105 (Oct. 7, 2021)	89
Appendix F	Petition for Writ of Habeas Corpus (Claims 9, 12, 17), In re Gordon, Cal. Case No. S228110 (Jul. 28, 2015)	91
Appendix G	Petition for Writ of Habeas Corpus (Claims 9, 12, 17), In re Gordon, Cal. App. Case No. A142558 (Jul. 29, 2014)	101

Petitioner, Charles David Gordon,¹ respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit. The court of appeals affirmed the order of the United States District Court for the Northern District of California, denying petitioner's petition for a writ of habeas corpus.

OPINION BELOW

The memorandum opinion of the court of appeals is attached as Appendix A.

JURISDICTION

The court of appeals entered its memorandum opinion on June 28, 2021. Appendix A. The court denied rehearing on October 7, 2021. Appendix E. This petition is timely.

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the

¹ Petitioner is a transgender woman who goes by the name Angie Denise Gordon. She is referred to herein using feminine pronouns.

crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Petitioner's Childhood

When petitioner was a child, she was left at home during the day with her older brother Rick Smith. Petitioner would frequently complain that her “bottom hurt.” Unbeknownst to her parents, petitioner was being molested and raped by her brother. Petitioner was forced to have sex through fear and by plying her with alcohol and marijuana. Excerpts 16; 33.

Petitioner's trauma led her to develop alcohol and drug dependence at an early age. Petitioner's psychological condition was further exacerbated by her gender dysphoria. Excerpts 16; 33. Petitioner has suffered from gender dysphoria for the vast majority of her life.² Excerpts 15, 16.

Due to religious, family, and peer pressure, petitioner repressed her gender identity, leaving her condition untreated. Petitioner turned to alcohol and drugs as a

² Gender dysphoria “refers to the distress that may accompany the incongruence between one's experienced or expressed gender and one's assigned gender” American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 451” (5th ed. 2013) (“DSM-5”).

form of self-medication, a common outcome for adolescent transgender women. Excerpt 16; Sari L. Reisner et al., *Psychiatric Diagnoses and Comorbidities in a Diverse, Multicity Cohort of Young Transgender Women*, 170(5) JAMA Pediatrics 481, 481–486 (2016) (prevalence of alcohol dependence and non-alcohol psychoactive substance use dependence high in sample of your transgender women). Petitioner modeled her use of drugs and alcohol after her abusive older brother. *Id.*

B. Pre-Charges Investigation

Petitioner “was charged with, and convicted of, five counts in connection with her physical and sexual violence against two victims, identified as JD1 and JD2.” Appendix A at 2–3.

Detective Darlene Elia investigated the allegations related to JD1. She interviewed JD1 immediately following her allegations against petitioner. The interview was recorded, Excerpt 58. The recording was not turned over to petitioner until post-conviction proceedings. Only Elia’s notes of the interview were turned over. Excerpt 61 at 552–553. The notes omitted numerous details, which could have been used to impeach JD1.

C. Arrest and Charges

On April 1, 2009, a complaint was filed alleging petitioner committed crimes against JD1 and JD2. Excerpt 70-0952–0957. An arrest warrant issued based on the complaint. Excerpt 70-0958. Petitioner then was arrested.

On May 11, 2009, an information was filed charging petitioner with forcible rape (Cal. Pen. Code §261(a)(2)) (Count 1—JD1); oral copulation with a person under 18

(§288a(b)(1)) (Count 2—JD1); forcible rape (Count 3—JD2); forcible sodomy (§286(c)) (Count 4—JD2); and corporal injury to cohabitant (§273.5(a)) (Count 5—JD2).

D. Jailhouse Letters

Following her arrest, petitioner was taking “Elavil” (also known as Amitriptyline). Excerpt 51. Elavil is an antidepressant. Physicians’s Desk Reference 1943 (58th Ed. 2004). The medication may cause “[b]lurred vision; change in sexual desire or ability; constipation; diarrhea; dizziness; drowsiness; dry mouth; headache; loss of appetite; nausea; tiredness; trouble sleeping; and weakness.” *Id.*

Petitioner suffered suicidal ideations while taking the medication. Excerpt 41. The medication induced insomnia and anxiety in petitioner. Excerpts 33, 51.

Petitioner also was suffering from several psychological disorders while awaiting trial, including: ETOH Abuse; Situational Anxiety Disorder; and Situational Depression Disorder. Excerpt 51. She was experiencing “delusional thoughts” and was hearing Jane Doe #2’s voice. Excerpts 32, 34. At the time, petitioner declared that “pressure was building inside [her] head.” Petitioner’s altered mental state was observed by her parents. *Id.*

On top of, or more likely at the root of, all these mental problems, petitioner was in psychological turmoil due to her repressed gender identity. Excerpt 16. Petitioner had previously relied on her superficially heteronormative relationships to mask the truth of her gender identity from herself and her community. *Id.* Petitioner had further repressed the sexual trauma of her childhood and the shame arising from her gender dysphoria beneath a blanket of drug and alcohol abuse. *Id.*; Excerpt 51.

Due to her mental health condition, petitioner was placed in segregation. RT 1668; Excerpts 16, 49–50. During her time in segregation, she wrote various incriminating letters that were later introduced at trial.

At the time she wrote the letters, petitioner was “in fear for h[er] life.” RT 1643. “[I]n [her] delusional state at the time, [she] believed [that writing the letters] was the only way to save [her] life.” *Id.* She felt that her friends and family were “tampered with prior to coming [to testify].” RT 1646. In writing the letters, petitioner “was venting and voicing [her] frustration with [her] confinement and inability to do anything about the case, and waiting in a cell.” RT 1657.

E. Trial

At trial, the prosecution introduced the jailhouse letters. RT 1490, 1523-24, 1668.

JD1 testified to various facts that contradicted statements she made to Elia immediately following her accusations against petitioner. Excerpt 75 at 1201–1213, 1241–1248, 1270–1277. Lacking access to the video recording of JD1’s interview, defense counsel did not cross-examine her regarding the contradictions.

The trial court found petitioner guilty following a non-jury trial. Excerpts 70-1015; 72-1084–1086. The court sentenced petitioner to 49 years to life. Excerpts 70-1016–1019; 71-1029–1033.

F. Direct Appeal

On September 29, 2010, the court of appeal affirmed the judgment. *People v. Gordon*, Cal.App. Case No. A126961. On December 15, 2020, the California Supreme Court denied review. *People v. Gordon*, Cal. Case No. S187212.

G. State Habeas Corpus

On July 29, 2014, following habeas corpus proceedings in the Napa County Superior Court, petitioner filed a habeas petition with the state court of appeal. *In re Gordon*, Cal. App. Case No. A142558; Appendix G. The petition argued, in relevant part, that the admission of the jailhouse letters violated due process because they were involuntary; that trial counsel was ineffective in failing to discover and utilize the JD1 recording; and the State violated *Brady v. Maryland* by failing to disclose the recording. *Id.* On June 24, 2015, the court of appeal denied the petition, procedurally defaulting petitioner's jailhouse-letters and ineffective-assistance claims and denying the *Brady* claim on the merits. Appendix D.

On July 28, 2015, petitioner filed a habeas petition in the California Supreme Court, which again argued that the jailhouse letters were involuntary, that counsel was ineffective, and that the State violated *Brady*. *In re Gordon*, Cal. Case No. S228110; Appendix F. On November 10, 2015, the court denied the jailhouse-letters and *Brady* claims on the same basis as the court of appeal and denied the ineffective assistance of counsel claim solely on the merits. Appendix C.

H. Federal Habeas Corpus

Petitioner filed a federal petition and twice amended it. District-Court Docket Entries ("Docs") ##1, 12, 16. The district court had jurisdiction under Title 28 U.S.C. §2254. The second amended petition raised petitioner's jailhouse-letters and JD1-recording claims. Doc #16 at 58–60, 61–67, 86–88.

The court ordered respondent to show cause as to the claims. DC-Doc #18.

Ultimately, on January 2, 2020, the court denied the petition and granted a COA to all claims. Excerpts 2–3; Appendix B. The court addressed the claims on the merits. *Id.* Petitioner timely filed a notice of appeal and amended notice of appeal. Docs ##82, 91.

On September 30, 2020, petitioner filed the opening brief. *Gordon v. Lizarraga*, 9th Cir. Case No. 20-15105. Petitioner argued, in part, that the admission of her involuntary jailhouse letters violated due process; that trial counsel was ineffective; and that the State violated *Brady v. Maryland*.

On June 28, 2021, the court of appeal affirmed the district court’s denial.

Appendix A.

On September 8, 2021, petitioner filed a petition for rehearing arguing that the panel erred in denying the jailhouse-letter and JD1-recording claims and that the court should rehear the Sixth Amendment issue *en banc*. On October 7, 2021, the court denied rehearing. Appendix E.

REASONS FOR GRANTING THE WRIT

A. This Court Should Grant Review to Establish that the Admission of Statements Made by a Defendant Suffering from Mental Distress and Placed in Segregation Violates Due Process.

1. The Admissibility of Statements Made by Defendants Suffering Mental Distress Placed in Segregation Is Important.

In the age of mass incarceration, numerous prisoners suffering from mental health problems are placed in segregation—particularly in California. Placement of such inmates in segregation exacerbates their mental health issues. *See Brown v. Plata*, 563 U.S. 493 (2011) (upholding lower-court finding of Eighth Amendment violation, in part,

based on evidence that “inmates awaiting [mental health] care may be held for months in administrative segregation, where they endure harsh and isolated conditions and receive only limited mental health services.”); *and Coleman v. Brown*, 28 F. Supp. 3d 1068, 1095 (E.D. Cal. 2014) (“[T]he overwhelming weight of evidence in the record is that placement of seriously mentally ill inmates in California’s segregated housing units can and does cause serious psychological harm, including decompensation, exacerbation of mental illness, inducement of psychosis, and increased risk of suicide.”).

The issue of mentally ill offenders being subjected to segregation is problematic in jails as in prisons. *See California Health Policy Strategies, The Prevalence of Mental Illness in California Jails is Rising* at 3 (Feb. 2020) (“Incarcerated people experiencing a mental illness are . . . more likely to be disciplined and isolated in segregated housing (i.e., solitary confinement). Once in solitary confinement the harsh conditions of the segregation worsen the symptoms of mental illness.”).

With large numbers of jail inmates suffering from mental illness being placed in segregation, it is important for this Court to settle whether statements made by these inmates are sufficiently voluntary to allow their admission at trial.

2. The Court Below Erred in Finding Petitioner’s Statements Voluntary.

Under the Due Process Clause, when “a suspect’s statements ha[ve] been obtained . . . under circumstances in which the suspect clearly had no opportunity to exercise a free and unconstrained will, the statements [sh]ould not be admitted.”

Oregon v. Elstad, 470 U.S. 298, 305 (1985) (citing *Haynes v. Washington*, 373 U.S. 503,

514 (1963)). Petitioner’s letters were involuntarily written and improperly introduced in violation of the Fourteenth Amendment.

The court of appeal found that petitioner failed to demonstrate government coercion under the Fifth Amendment with respect to the admission of her jailhouse letters. Appendix A at 4. The court did not address the Fourteenth Amendment due process aspect of petitioner’s claim. *Id.*

Gender dysphoria is “associated with clinically significant distress or impairment in social . . . areas of functioning.” DSM-5 at 453. “Adolescents and adults with gender dysphoria before gender reassignment are at increased risk of suicidal ideation, suicide attempts, and suicides.” *Id.* at 454. “Relationship difficulties, including sexual relationship problems, are common” in individuals suffering from gender dysphoria. *Id.* at 458. “[A]dults with gender dysphoria may have coexisting mental health problems, most commonly anxiety and depressive disorders.” *Id.* at 459.

Transgender individuals have “disproportionately high rates of depression, anxiety, somatization, and overall psychological distress.” Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 5 Am. J. of Pub. Health 943, 948 (May 2013). “[R]egular contact with peers is necessary to ameliorate [the negative impact of stigma on mental health.]” *Id.* at 949. Unaddressed internalized transphobia “increases the likelihood that a transgender individual will experience depression, anxiety, suicidal ideation/attempts, or substance abuse problems.” SAGE Encyclopedia of Psychology and Gender 953 (Nadal ed. 2017). These risks were realized in petitioner’s case, as she was placed in segregated housing

while experiencing significant mental health problems. Excerpts 49–50.

Here, due to her mental health problems—so severe she was placed in segregation—petitioner’s jailhouse letters were not the product of “a free and unconstrained will” *Elstad*, 470 U.S. at 305; *Haynes*, 373 U.S. at 514. Instead, they were the product of a highly distressed mind. Accordingly, the statements should have been suppressed. *Id.*

Because the court of appeals failed to address whether the jailhouse letters were voluntary within the meaning of the Due Process Clause, this Court should grant review to settle whether the jailhouse letters were voluntarily written. Sup. Ct. R. 10(c).

B. This Court Should Grant Review Because the Court of Appeals Decided an Important Federal Question in a Way That Conflicts with this Court’s Decisions in Finding That JD1’s Statements to Detective Elia Were Cumulative of Other Evidence.

The court of appeals found that “the state court’s determination that the undisclosed evidence was cumulative of other evidence introduced at trial that impugned JD1’s credibility and did not undermine confidence in the outcome was not contrary to or an unreasonable application of clearly established federal law.” Appendix A at 7.

“Evidence is cumulative if it does not present facts additional to those presented at trial.” *United States v. Howard*, 26 F.3d 134 (9th Cir. 1994). Here, the recording provided numerous facts additional to those presented at trial.

The JD1 recording would have provided numerous additional and stronger grounds for impeachment than those he was able to pursue. Further, it would have significantly strengthened many of the grounds counsel already relied on.

With the recording, counsel could have shown: (1) that, contrary to her testimony, JD1 told Detective Elia she did not say anything when petitioner took off her clothes, *compare* Excerpt 58 at 6:55, 7:45, *with* Excerpt 75 at 1212, 1213, 1273; (2) that, contrary to her testimony, JD1 told Detective Elia that she asked petitioner to give her alcohol, *compare* Excerpt 58 at 3:55, *with* Excerpt 75 at 1201; (3) that, contrary to her testimony, she kissed petitioner on the lips, *compare* Excerpt 58 at 4:40, *with* Excerpt 75 at 1206; (4) that she admitted to a “history of lying” to her grandparents, Excerpt 58 at 25:20; (5) that she admitted she was on probation, Excerpt 58 at 25:20; (6) that she admitted she had been cutting school, Excerpt 58 at 26:00; (7) that she admitted she had been using drugs, Excerpt 58 at 26:10; (8) that, contrary to her testimony, she admitted drinking regularly on the weekend, *compare* Excerpt 58 at 26:30, *with* Excerpt 75 at 1248; (9) that she told Detective Elia she hated her grandparents, they were abusive, and she wanted to live elsewhere, Excerpt 58 at 27:50, 28:30; Excerpt 58 Video 2 at 1:00, 2:20, 3:40, 4:30, 6:45, 7:40, 8:10, 10:00, 13:00, 13:40, 14:45, 17:00; and (10) that she said nothing to Detective Elia about telling petitioner she was a virgin as she testified. *Compare generally* Excerpt 58; *with* Excerpt 75 at 1212, 1213, 1273.

With the recording, counsel could have strongly improved the impeachment of JD1’s testimony about walking/driving to the apartment. JD1 said she misstated how she got to the apartment in her preliminary hearing testimony because she was nervous and was filling in gaps she did not remember at the time of her testimony. Excerpt 75 at 1241–1242, 1270, 1277. With the recording, counsel could have shown that JD1 was not simply nervous and mistaken. In fact, she was repeating a lie she told Detective Elia on

the night of the crime—a lie she told without hesitation when asked how she got to petitioner’s apartment on the night of the crime. Excerpt 58 at 2:20, 2:50.

Counsel could have bolstered the impeachment of JD1’s testimony about her past drinking by showing that neither her preliminary hearing testimony nor trial testimony was honest. Excerpt 58 at 26:30.

Counsel could have used the recording to support his argument that JD1 “had a motive for accusing petitioner of rape. She did not want to live with her grandparents. Her grandparents had rules that she did not want to follow. She did not want to go back to her grandparents’ house.” Excerpt 75 at 1077–1078. The recording included numerous statements from JD1 supporting this theory—that she hated her grandparents, that they hated her, and that they physically and emotionally abused her. Excerpt 58 at 27:50, 28:30; Excerpt 58 Video 2 at 1:00, 2:20, 3:40, 4:30, 6:45, 7:40, 8:10, 10:00, 13:00, 13:40, 14:45, 17:00. Counsel could have noted that JD1 was more emotional in the recording when discussing her grandparents than when discussing the crime—a fact consistent with the theory that she fabricated the rape to escape her grandparents. *Id.*

Not only could counsel have impeached JD1, he could have impeached Detective Elia. Detective Elia’s report omitted: (1) JD1’s statements that she did not say anything to petitioner when he took her clothes off; (2) JD1’s statement that she asked petitioner for alcohol;³ (3) the full extent of JD1’s description of her initiating the kissing with

³ The report said: “She wanted to drink some alcohol and she knew he would give her some. The victim went over to the Bristol Townhomes and went into GORDON’s room. They started to drink some Wild Turkey whiskey. The victim and GORDON had

petitioner;⁴ (4) JD1's admission that she had a history of lying; (5) JD1's admission she was on probation; (6) JD1's admission she used drugs; (7) JD1's admission she drank regularly on weekends; (8) JD1's admission she cut school; or (9) JD1's statements that she hated her grandparents because they were abusive and that she wanted to live elsewhere.⁵ These material omissions would have discredited Detective Elia's investigation and undermined her testimony.

The recording would have been more than cumulative because it would have allowed counsel show that JD1 was not merely a poor narrator of facts. Rather, she had changed her testimony to be more detrimental to the defense. While she told Detective Elia that she asked petitioner for the alcohol; she testified that petitioner gave it to her. While she told Detective Elia she kissed petitioner on the lips; JD1 testified that she kissed petitioner on the cheek. While she told Detective Elia she said nothing when petitioner took off her clothes; she testified that she told petitioner she was a virgin and

two shots of whiskey each." Excerpt 61 at 552.

⁴ The report said: "The victim wanted to kiss him on the cheek like she had always done In the past. She then kissed him on the lips. GORDON kissed her back and they started to 'French kiss.'" Excerpt 61 at 552–553.

In the video, JD1 told Detective Elia: "He was just sitting in the chair and I gave him, I kissed him." Excerpt 58 at 4:40. She said she did not "say anything prior to kissing him." She agreed that she "just started kissing him." Excerpt 58 at 5:00–5:05. Detective Elia asked JD1 why she "just started kissing" petitioner. She answered: "Well 'cause I always kiss him on the cheek when I see him and I hadn't seen him in like a year. And then I guess he kissed me back." Excerpt 58 at 5:10. These statements provided far stronger impeachment value than the statement in the report.

⁵ The report said: "The victim did not want to go home with her grandparents because she felt that they didn't believe that she had been raped." Excerpt 61 at 553.

did not want to have sex. While she told Detective Elia she drank regularly on the weekends; she testified that she'd only been intoxicated two or three times. These were not simple memory lapses. They were material changes that made the facts of the case far more damaging to the defense.

True enough, “when defense counsel sufficiently impeaches a government witness in cross-examination and closing argument, the defendant cannot later claim a *Brady/Giglio* violation on account of additional undisclosed evidence supporting the impeachment. In such circumstances, the evidence is cumulative because the grounds for impeachment are ‘no secret’ to the jury.” *United States v. Kohring*, 637 F.3d 895, 908 (9th Cir. 2011) (citation omitted). Here, counsel did not “sufficiently impeach” JD1 because the court was still willing to find her testimony credible beyond a reasonable doubt on the issue of consent. And the numerous facts contained in the recording but omitted from the report were, in fact, a “secret” to the factfinder. Indeed, the court in *Kohring* found that factual discrepancies between the prosecution witnesses’s testimony and his prior statements were material and non-cumulative under this standard. *Id.* at 908–909.

The greatest import of the JD1 recording is not in showing that her recorded statements were all true. Instead, the recording shows that none of JD1’s statements—either in the recording or at trial—could be trusted. Even without the recording, the court had “doubt[s]” about JD1’s testimony. Excerpt 72 at 1084. Had the recording not remained a “secret,” the court would have fully discredited her testimony.

The court of appeals erred in finding the evidence in the video cumulative. Truly,

the evidence was material to the case. As such, the state's failure to turn over the recording to the defense prior to trial requires reversal under *Brady v. Maryland*, 373 U.S. 83 (1963). The materiality of the evidence further shows that trial counsel's failure to obtain and utilize the recording requires reversal under *Strickland v. Washington*, 466 U.S. 668 (1984). By finding the JD1-recording evidence cumulative and therefore immaterial, the court of appeals "decided an important federal question in a way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c).

CONCLUSION

Petitioner respectfully requests that the Petition for Writ of Certiorari be granted.
Sup. Ct. R. 10.

DATED: December 30, 2021

Respectfully submitted,



JAMES S. THOMSON
Attorney for Petitioner
CHARLES DAVID GORDON
Counsel of Record

CERTIFICATE OF COMPLIANCE

PURSUANT TO Sup. Ct. R. 33.2(b)

Case No. 21 - _____

I certify that the foregoing petition for writ of certiorari is proportionally spaced, has a typeface of 12 points, is in Century font, is double-spaced, and is 15 pages long.

A handwritten signature in dark ink, appearing to read "James Thomson", written in a cursive style.

JAMES S. THOMSON