ORIGINAL

No. 21-8023



IN THE SUPREME COURT OF THE UNITED STATES

XINGFEI LUO,

Petitioner

v.

STATE OF CALIFORNIA,

Respondent.

On Petition For a Writ of Certiorari to the Appellate Division,
Superior Court of California for the County of Orange

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**PETITION FOR A WRIT OF CERTIORARI**

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XINGFEI LUO
PO BOX 4886,
El Monte, CA 91734
Petitioner, in Pro Se

## QUESTIONS PRESENTED FOR REVIEW

1. Where an individual does not have a reasonable expectation of privacy in an image, the State's interest in protecting the individual's privacy interest in that image is minimal. Where the State has only a minimal interest at stake—such as where the individual depicted did not have a reasonable expectation of privacy—a prosecution of dissemination of private photographs would not be a justifiable incursion upon First Amendment-protected speech. *State v. Vanburen*, 214 A.3d 791, 813, 820-21 (Vt. 2019).

The questions presented are:

a. Where provided evidence establishes that two people exchanging photos did not engage in a relationship of a sufficiently intimate or confidential nature, where a nudist is not supposed to expect privacy in his nude photos due to his belief that becoming nude increases confidence, does California's prosecution of dissemination of a nudist's nude photographs violate First and Fourteenth Amendments?

b. Where no dating relationship between the Accuser and Petitioner was a relied upon theory that (1) the two family court orders were unlawful due to the lack of dating relationship, (2) the parties did not engage in a relationship engendered any reasonable expectation of privacy, and (3) the Accuser did not have a reasonable expectation of privacy in his nude photos as a nudist sent to Petitioner when they were not in a dating relationship, does a defense attorney render reasonably effective assistance when the attorney fails to (1) request jury instruction related to dating relationship; (2) present to the jury that the Accuser was a nudist; (3) cross examine the sole witness concerning the Accuser's upbringing and background as a nudist after the Accuser testified he exposed himself in public; (4) cross examine the sole witness as to why he expected privacy in his nude photos when he distributed to Petitioner who he called her "nobody" to him?

2. Content-based prohibitions have the constant potential to be a repressive force in the lives and thoughts of a free people. To guard against that threat the Constitution demands that content-

based restrictions on speech be presumed invalid, *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992) , and that the Government bear the burden of showing their constitutionality, *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 817 (2000).

The questions presented are:

a. Where two family court orders impose unconstitutionally overbroad content and speaker based restrictions, before the government prosecutes the violation of these two orders, do First and Fourteenth Amendment require the government to meet its burden of showing the constitutionality of those two orders?

b. Where Petitioner and the Accuser did not engaged in any dating relationship and the Government should have been required to bear the burden of showing the constitutionality of two family court orders which impose content and speaking bases restrictions, does a defense attorney render reasonably effective assistance when the attorney signs off a stipulation with the prosecution, without Petitioner's consent, agreeing that the two family court orders are lawful and valid?

3. A witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar v. United States*, 406 U.S. 441 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution. *Bram v. United States*, 168 U.S. 532 (1897); *Boyd v. United States*, 116 U.S. 616 (1886).

The questions presented are:

a. Where a criminal defendant was previously compelled to testify in a family court hearing without being represented by counsel, are Fifth Amendment and due process rights violated by the introduction at a criminal trial of her prior compelled testimony?

b. Where Petitioner's prior compelled testimony should have been suppressed, does a defense attorney render reasonably effective assistance when the attorney makes no attempt to exclude her prior testimony involuntarily given at a family court proceeding?

4. Delay that is "uncommonly long" triggers a presumption of prejudice *Doggett v. United States* (1992) 505 U.S. 647, 651, 652, 656, 657, a defendant can establish a speedy trial claim under the Sixth Amendment without making an affirmative demonstration that the government's want of diligence prejudiced the defendant's ability to defend against the charge. Under the federal Constitution, the defendant need not identify any specific prejudice from an unreasonable delay in bringing the defendant to trial after the speedy trial right has attached. *Moore v. Arizona* (1973) 414 U.S. 25, 26.

The questions presented are:

a. 720 days after the original complaint was filed, can courts permit amendment to the complaint without finding of good cause?

b. Does the standard for assessing ineffective assistance of counsel claims, announced in *Strickland v. Washington*, fail to protect the Sixth Amendment right to a fair trial and the Fourteenth Amendment right to due process when, in misdemeanor cases involving flagrantly deficient performance where the defendant did

not request any continuance due to any personal reasons, public defender lied to the defendant they would need time to investigate and prepare the case but in fact they did not, courts can deny relief following a truncated "no prejudice" analysis that does not account for the evidence?

5. Whether Petitioner received ineffective assistance of counsel both at trial and on appeal?

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A. Opinion of the Appellate Division of the Superior Court of California, County of Orange issued on April 27, 2022 in *People v. Luo*, No. 30-2021-01216615, Cal. Super. Ct.

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## PETITION FOR A WRIT OF CERTIORARI

The petitioner, Xingfei Luo, respectfully petitions this Court for a Writ of Certiorari to review the judgment and opinion of the Appellate Division of the Superior Court of California, County of Orange filed on April 27, 2022 in case No. 30-2021-01216615.

## OPINION AND ORDER BELOW

The unpublished opinion affirming Petitioner's convictions of the Appellate Division of the Superior Court of California, County of Orange was filed on April 27, 2022 in Case No. 30-2021-01216615, and is attached hereto as Appendix A. Pet. App. 1a. The opinion completely ignored the First Amendment issue raised by Petitioner.

## JURISDICTION

The Appellate Division denied Application for Certification for Transfer to the Court of Appeal on Feb 25, 2022 and affirmed Petitioner's convictions on April 27, 2022. The Court of Appeal denied Petitioner's motion to transfer appeal on March 3, 2022. Having no right to petition for review from the order denying transfer, Cal. Rules of Court, rule 8.500(a)(1), this petition is filed

within 90 days of the judgment entered by a state court of last resort pursuant to the Rules of the United States Supreme Court, Rule 13.1. This Court has jurisdiction to review under 28 U.S.C. section 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### A. Federal Constitutional Provisions

The First Amendment of the United States Constitution provides in relevant part: "Congress shall make no law ... abridging the freedom of speech."

The Fifth Amendment provides in relevant part: "No person 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."

The Sixth Amendment of the United States Constitution provides, in pertinent part: "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 crime shall have been

committed ....; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law ...."

**B. Federal Statutes**

Under The Violence Against Women Reauthorization Act of 2013 ("VAWA"), Dating Violence means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim; and where the existence of such a relationship shall be determined based on a consideration of the following factors:

° The length of the relationship;

° The type of relationship;

° The frequency of interaction between the persons involved in the relationship.

**C. State Statutory Provisions**

The purpose of The Domestic Violence Prevention Act ("DVPA") is to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence. Cal. Fam. Code §6220.

The moving party for a DVRO must be in a specified domestic relationship with the person to be restrained. Cal. Fam. Code, §§ 6211, 6301, subd. (a).

"Dating relationship" means frequent, intimate associations primarily characterized by the expectation of affection or sexual involvement independent of financial considerations. Cal. Fam. Code §6210.

## INTRODUCTION

Not only State of California has decided an important federal question, free expression, in a way that conflicts with the decision of State of Vermont, the entire prosecution of Petitioner is plagued by shoddy police work, prosecutorial misconduct, and bad lawyering.

The Court should grant certiorari.

## STATEMENT OF THE CASE AND FACTS

While many of us prefer to spend our days fully clothed, some prefer to live their lives au naturel, in their birthday suits. Nude. Unclothed. They are naturists. Naturism is a lifestyle of social nudity, and the cultural movement which advocates for and defends that lifestyle. It may also be referred to as nudism. Nudists believe that becoming nude increases confidence and going naked brings them out of their shell. Without the barrier of clothing, nudists become more open, comfortable, and secure.

Tomas Czodor ("Czodor" or "Accuser"), who is a nudist and two faced liar raised in central Europe, sent his nudes to Petitioner right after they just met in person for the very first time without any frequent or intimate associations. Nor did he ever request to keep his photos confidential. From their first text message till their final in person gathering, they had only two lunches together.

Czodor testified that he called the police the following week after Sep 7, 2018 due to being threatened by dissemination of his nude photos. But in fact Czodor called police alleging unfounded

terrorism on Sep 10, 2018.

On Sep 18, 2018, Petitioner arrived uninvited at the Czodor's house. Once hearing knocking on his front door where was brightly lit, Czodor immediately pulled out cell phone constantly taking photos and videos. Despite Czodor testified he heard scratching for 20 minutes not a word he mentioned that during the 911 call he made while the alleged scratching was continuing. Not a single clip of video shows the scratching sound.

During a conversation secretly recorded by the Accuser and later played in front of the jury, he stated "Who are you to me? Nobody. You are to me nobody. What you think, what we was? It was my wife, girlfriend, boyfriend, what have you been to me. Jesus Christ. I met you one or two times."

On Sep 28, 2018 the Accuser faked his damages and injuries and requested a DVRO from Orange County Superior Court. An ex parte hearing was held without a court reporter while Petitioner was not present. Despite the Accuser failed to meet his burden of proving by a preponderance of the evidence that the parties were

engaged in a "dating relationship" within the meaning of Cal. Fam. Code §6210, a TRO was issued in violation of Petitioner's due process rights, in relevant part, ordering Petitioner to remove content from pages on internet what she or her accomplices created to destroy Czodor's online reputation and to stop posting about Czodor online, a blanket prohibition of speech on all content, viewpoint, and images related to Czodor. Pet. App. 13a.

On Oct 19, 2018 a formal hearing was held while Petitioner was not represented by counsel due to her insufficient financial resources. Despite the Accuser failed again to meet his burden of proving by a preponderance of the evidence that the parties were engaged in a "dating relationship" within the meaning of Cal. Fam. Code §6210, a DVRO was issued in violation of Petitioner's due process rights, in relevant part, ordering Petitioner to cease posting the picture or likeness of Czodor or refer to him by name on any social media website or blog and to remove any pictures or references of Czodor from any social media website or blog she may have posted, a blanket prohibition of speech on all content,

viewpoint, and images related to Czodor. Pet. App. 24a.

On August 6, 2019 Petitioner was charged by misdemeanor complaint with vandalism (Pen. Code, § 594(a)/(b)(2)(A)), violation of a protective order (Pen. Code, § 273.6(a)) (by COMING WITHIN 100 YARDS OF THE PROTECTED PERSON), and disorderly conduct (unlawful dissemination of private photographs and recordings) (Pen. Code, § 647(j)(4)(A)). During the two years prior to jury selection, despite Petitioner did not request reassignment of counsel, six public defenders cycled through her case. One trial date was set on Mar 24, 2020, but later vacated due to building closure. Despite the building closure lasted for only about two months, despite the Trial Court resumed jury trial since late May 2020, https://www.occourts.org/media-relations/covid/Soft_Reopening_5_21_2020.pdf, more than ten continuances were granted without a single objection raised by the prosecution, and the trial court repeatedly allowed the matter to be continued without finding good cause on the record despite Petitioner did not request any continuance due to her own inability to appear at trial.

During Petitioner's arraignment while in custody on August 12, 2019, Petitioner's court appointed counsel failed to properly and fully advise her about her right to a speedy trial, a general time waiver was entered without Petitioner's willful and intelligent consent and knowledge. Petitioner submitted sworn declaration stating that none of her public defenders ever fully advised her of her right to a speedy trial and she was unaware of any general time waiver until July 2021.

Despite in late May 2020 the Orange County Superior Court already initiated the process of reopening and a large number of prospective jurors heeded the call of duty and came to the Court to serve our community, on July 14, 2020, both prosecution and public defender jointly requested a pretrial date on December 4, 2020 without Petitioner's willful and intelligent consent. Petitioner was not informed of the July 14, 2020 hearing and was not present at the hearing. Outrageous enough, public defender failed to inform Petitioner of her court date, Petitioner did not appear at the pretrial on December 4, 2020 and a bench warrant was issued for her arrest.

After the warrant was recalled, on December 22, 2020, counsel appeared for Petitioner pursuant to Penal Code section 977 and a pretrial was set on March 5, 2021 with the general time waiver remaining without Petitioner's willful and intelligent consent, and with no good cause stated on the record.

On or about July 11, 2021 Petitioner instructed her counsel to file a motion to dismiss based on the violation of her right to a speedy trial. Public defender refused to do so. Petitioner did not discover she could file a *Marsden* motion until Jul 12, 2021.

Waiver requires "an intentional relinquishment or abandonment of a known right or privilege." *Barker v. Wingo* (1972) 407 U.S. 514, 525 92 S.Ct. 2182, 33 L.Ed.2d 101. None of the general time waivers was entered or maintained with Petitioner's intentional relinquishment or abandonment of her right to a speedy trial. Petitioner was unable to withdraw any of the general time waivers because she did not even know they existed.

On July 19, 2021, public defender answered ready, but the People answered not ready despite the charges were filed almost

two years ago. Later on the same day Petitioner filed a *Marsden* motion and a motion to dismiss. Despite a pretrial hearing on a motion to dismiss for denial of a speedy trial may exclude prosecution, *Shleffar v. Superior Court* (1986) 178 Cal.App.3d 937, the court informed Petitioner that the motion to dismiss was not being accepted or considered because it was untimely and the People were not present.

720 days after the complaint was filed, despite no finding of good cause to justify any belated amendment, the trial court permitted the people to amend the complaint from allegation of coming within 100 yards of the protected person to failure to deactivate website and created new websites.

After the Accuser testified he did not start a dating relationship with Petitioner, through the Accuser's testimony the prosecution not only introduced Petitioner's prior compelled testimony involuntarily given in a civil proceeding while she could not afford counsel, but also misrepresented her prior testimony. No screenshot or photo presented at trial was ever forensically

examined.

At trial public defender had nothing to offer, made no effort to suppress the introduction of Petitioner's prior involuntary testimony in a family court, called no witness to the stand, presented no evidence from his own investigation, engaged in a lackadaisical and ineffective cross-examination of the prosecution's sole/star witness, stipulated with prosecution over two unlawful family court orders without Petitioner's consent or authorization, and allowed prosecution to introduce and misrepresent Petitioner's prior compelled testimony in a family court in violation of her First, Fifth, Sixth, and Fourteenth Amendment rights etc.

Where there is no forensic evidence, where there is no independent evidence, where the only witness is the Accuser, and where the credibility of the witness is a crucial issue in a criminal case, defense attorney failed to discover the facts that (1) Czodor made inconsistent statements to police regarding the events; (2) the Accuser was previously subject to deportation; (3) the Accuser was arrested for impersonation; and (4) the Accuser had prior criminal

convictions rested upon facts establishing dishonesty and/or false statements. Defense counsel also failed to impeach the Accuser as to why he lied about being dark in his front door area, why he didn't report the weird noises he heard while making the 911 call, why the damages to the door is inconsistent with 20 minutes scratching, how did he not know his door was damaged after hearing 20 minutes of scratching on Sep 18, 2018 but discovered the damages on Sep 19, 2018, and why he delayed reporting until he received a quote of $1,500 to remove an online post concerning his credibility.

On July 28, 2021, after the jury was not instructed related to dating relationship, the Accuser put on a one man show, and Petitioner's counsel made a motion pursuant to Penal Code section 1118.1, which was denied.

Due to the prosecution, public defender, and the trial court's violation of Petitioner's right to a speedy trial, Petitioner is subject to over $20,000 interest stemming from restitution. After being asked for an explanation for the tactical reasons for the acts or omissions public defender failed to provide any. In *People v. Pope*, 23 Cal.3d 412

(Cal. 1979), the court suggests that if counsel was asked for an explanation and failed to provide one, this could prove he or she had no tactical reason for the action taken.

Public defender declared conflict and requested to be relieved as Petitioner's counsel on appeal. Robert L. Bullock was appointed to represent Petitioner on appeal and later filed *Wende* brief stating that he has found no arguable issues. Petitioner filed her supplemental opening brief arguing violations of First, Fifth, Sixth, and Fourteenth Amendments.

On April 27, 2022 appellate division affirmed Petitioner's convictions and denied her request for new counsel. Pet. App. 1a. Both appellate division and court of appeal denied Petitioner's requests to transfer the case to court of appeal. Pet. App. 8a-9a.

## REASONS FOR GRANTING THE WRIT

### A. State of California Has Decided An Important Federal Question, Free Expression, In A Way That Conflicts With The Decision of State of Vermont

Vermont's statute banns disclosure of nonconsensual pornography. 13 V.S.A. § 2606. However, where an individual does

not have a reasonable expectation of privacy in an image, the State's interest in protecting the individual's privacy interest in that image is minimal. *State v. Vanburen*, 214 A.3d 791, 813 (Vt. 2019).

Where the State has only a minimal interest at stake—such as where the individual depicted did not have a reasonable expectation of privacy—a prosecution under § 2606 would not be a justifiable incursion upon First Amendment-protected speech. *Id.* at 820 - 821.

§ 2606 is narrowly tailored insofar as it penalizes only the disclosure of images in which the depicted person had a reasonable expectation of privacy rested in part on our construction that the statute would apply only where the person depicted had not distributed the images in a way that would undermine their reasonable expectation of privacy, such as sending the images to a person not in any kind of relationship engendering a reasonable expectation of privacy. *Id.* at 821.

"It is difficult to see how a complainant would have a reasonable expectation of privacy in pictures sent to a stranger." But the State has not presented evidence to demonstrate that, in contrast

to a stranger, Mr. Coon had a relationship with complainant of a sufficiently intimate or confidential nature that she could reasonably assume that he would not share the photos she sent with others. Nor has it offered evidence of any promise by Mr. Coon, or even express request by complainant, to keep the photos confidential. *Id.* at 823.

Here, the Accuser had no reasonable expectation of privacy in the images he sent to Petitioner for three reasons: (1) He did not engage with Petitioner in a relationship engendering a reasonable expectation of privacy; (2) He did not request Petitioner to keep his photos confidential before sending out his photos; and (3) He is a nudist. A person with a lifestyle of social nudity does not have a reasonable expectation of privacy in his nude images. Nudists believe that becoming nude increases confidence and going naked brings them out of their shell. Without the barrier of clothing, nudists become more open, comfortable, and secure. Nevertheless, unlike Vermont, California went ahead and prosecuted Petitioner.

Only this Court can decide which of these two conflicting views of California and Vermont is correct.

### B. The Entire Prosecution Is Wrong And Deeply Troubling

California's failure to enumerate the factors, as VAWA, to be considered in determining the existence of a "dating relationship" encourages arbitrary prosecution in violation of Fourteenth Amendment.

The government's ability to restrict speech in public forums is "very limited." *United States v. Grace*, 461 U.S. 171, 177 (1983). See also *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (holding that even when expression "inflict[s] great pain ... we cannot react to that pain by punishing the speaker.") The enforcement of unlawful court orders is deeply troubling.

Throughout the process, Petition was not protected by First, Fifth, Sixth, or Fourteenth Amendments.

### C. The Questions Presented Are Important And Recur Frequently

The importance of the issues is self-evident. It is rare today that modern people don't have one or two casual dates and use social media. The issues here greatly affect fundamental personal

rights and liberties, and have enormous legal and practical consequences for every American. The recurring nature of the issues calls out for this Court's intervention.

At a criminal proceeding, the requirements of due process cannot be satisfied by partial or niggardly procedural protections. A defendant is entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings. He must be afforded all those safeguards which are fundamental rights and essential to a fair trial. *Specht v. Patterson*, 386 U.S. 605, 609-10 (1967). The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. *Malloy v. Hogan*, 378 U.S. 1 (1964). Permitting the government to take advantage of involuntarily given prior testimony in a civil proceeding while a criminal defendant cannot afford an attorney in that civil proceeding not only deprives every criminal defendant of their right to counsel but also their privilege against self-incrimination. This affects every American nationwide.

The fundamental requirement of due process is the

opportunity to be heard 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). In reality, whoever is represented by public defender never has a right to a speedy trial.

Further, a core goal of our criminal justice system is to avoid "wrongful conviction[s]." *Berger v. United States*, 295 U.S. 78, 88 (1935).

**D. The First Amendment Prohibits Censorship or Punishment, Unless Shown Likely To Produce A Clear And Present Danger Of A Serious Substantive Evil That Rises Far Above Public Inconvenience, Annoyance, or Unrest**

The First Amendment protects a significant amount of criticism and challenges. "Speech is often provocative and challenging. . . . [But it] is nevertheless protected against censorship or punishment , unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

## CONCLUSION

For all of the above reasons, Petitioner respectfully requests the writ be granted. Alternatively, this Could should appoint counsel to Petitioner and allow her to resubmit her petition with assistance of court appointed counsel.

Dated: April 29, 2022

Respectfully submitted,

/s/ XINGFEI LUO
Petitioner, in Pro Se