No.

IN THE SUPREME COURT OF THE UNITED STATES

ODECE DEMPSEAN HILL,
Petitioner,

vs.

ATTORNEY GENERAL FOR THE STATE OF ARIZONA;
DAVID SHINN, Director, Arizona Department of Corrections
And CHARLES L. RYAN
Respondents.

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

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause permits the prosecution to introduce the testimonial statements of a non-testifying sexual assault victim lay witness, as to her experiences and observations, through the in-court testimony of a forensic nurse examiner.

PARTIES TO THE PROCEEDING

All parties to this appeal are listed in the caption, and the Petitioner is not a corporation.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Odece Dempsean Hill, ("Mr. Hill"), respectfully requests that a Writ of Certiorari be issued to review the Memorandum Decision of the United States Court of Appeals for the Ninth Circuit entered on May 10, 2022. This decision held that Confrontation Clause is not offended by the admission of a non-testifying witness's statement to a forensic nurse examiner.

This decision conflicts with the decisions and analysis of this Court in *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); *Michigan v. Bryant*, 562 U.S. 344 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011). It also conflicts with a decision of the Eighth Circuit Court of Appeals, *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005), that held that the admission of a sexual assault victim's statement to a forensic nurse examiner violates the Confrontation Clause. As such, the exercise of this Court's discretion to grant certiorari is warranted, as fully explained below.

OPINION BELOW

On May 10, 2022, the United States Court of Appeals for the Ninth Circuit issued a Memorandum Decision in Ninth Circuit case number 20-17369, which affirmed, in a two to one decision, the district court's denial of Mr. Hill's habeas corpus petition. The relevant decisions and orders of the Ninth Circuit and the United States District Court for the District of Arizona are reproduced in the attached Appendix.

JURISDICTION

The United States District Court for the District of Arizona (Lanza, D.J.) had jurisdiction over the federal habeas corpus petition filed by Mr. Hill pursuant to 18 U.S.C. §§ 2241 and 2254. On November 6, 2020, the district court issued a written order denying Hill's petition for writ of habeas corpus in its entirety. 1-ER-2-10, Doc.#34. In that same order, the court denied Hill a certificate of appealability. *Id.* It issued judgment the same day. See 2-ER-75; Doc.#35.

Hill filed a written request for a certificate of appealability on December 1, 2020. 2-ER-66-70; Doc.#36. A written request for a COA is the functional equivalent of a notice of appeal. *See Ortberg v. Moody*, 961 F.2d 135, 137 (9th Cir. 1992) (holding that an application for a certificate of probable cause is the functional equivalent of a notice of appeal). Thus, Mr. Hill timely filed his notice of appeal.

The Ninth Circuit granted a certificate of appealability with respect to the following issue: "whether appellant's Sixth Amendment right to confrontation was violated by the trial court's admission of statements made by the victim to an examining forensic nurse." 9th Cir. Doc. #3-1.

The Ninth Circuit issued its two-to-one Memorandum Disposition on May 10, 2022, affirming the denial of Mr. Hill's petition for a writ of habeas corpus. C.A. Doc. 46. Mr. Hill filed a petition for panel rehearing and rehearing en banc on May 20, 2022. C.A. Doc. 47. That petition was denied on June 14, 2022. C.A. Doc. 48.

This Petition is thus being filed within 90 days of entry of judgment, pursuant to Supreme Court Rule 13.1. This Court has jurisdiction under 28 U.S.C. § 2254(1).

CONSTITUTIONAL AND OTHER PERTINENT PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted by the witnesses against him. . . ."

U.S. CONST. amend. VI.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> 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.

U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Relevant Facts

In May 2001, three armed men forced their way into an apartment in Mesa, Arizona. 1-ER-2; Doc.#34 at 1. The apartment was occupied by four people. *Id.* The intruders were apparently looking for drugs and money in the apartment. *See e.g.*, 4-ER-452. Upon entry, the intruders held two of the male occupants at gunpoint and beat them with firearms. 1-ER-2; Doc.#34 at 1. While this was occurring, the other two occupants—a pregnant young woman, Jaime Jorrick, and her boyfriend—attempted to hide in a closet. *Id.* When the intruders found the

couple, they threatened to shoot Ms. Jorrick in the stomach and sexually assaulted her. *Id.*

Shortly thereafter, Ms. Jorrick was taken to the emergency room. *Id.* There, she was treated by emergency personnel. *See e.g.*, 4-ER-453. Approximately three hours after the assault (7-ER-1056) and after Ms. Jorrick was treated by the emergency room staff, a forensic nurse examiner, who was at the hospital pursuant to a contract with the county, performed a forensic medical interview and examination of Ms. Jorrick.

Approximately four years later, in 2005, one of the assailants, Corey Russell, was identified as a suspect based on a match of his DNA to DNA found on the victim. 1-ER-3; Doc.#34 at 2. In 2008, Russell was questioned by a police detective concerning the crime during which he implicated "Odece" as a participant in this offense, stating his certainty that Odece's DNA would match DNA at the scene. 1-ER-3; Doc.#34 at 2; 11-ER-1751. During a later interview, Russell repeated this assertion. *Id.*

In 2011, Odece Hill, petitioner, "was identified as a suspect based on a match of his DNA to DNA found . . . on the mattress in the bedroom where one of the sexual assaults occurred." 1-ER-3.

In August 2011, Petitioner was charged with one count of burglary, four counts of kidnapping, four counts of aggravated assault, seven counts of sexual assault, and one count of attempted sexual assault. *Id.*

Before trial, the victim died from causes unrelated to the assault. *Id.* At trial, none of the other people who were at the apartment when this crime occurred identified Mr. Hill as the assailant. Instead, over Mr. Hill's objection, the trial court allowed the forensic nurse, Karyn Rasile, to testify about a statement made by the victim during the forensic interview and examination. *Id.* Ms. Rasile, who could not recall the interview or examination repeatedly needed to refresh her recollection by reading her Sex Crimes Evidence Kit report. *See e.g.*, 7-ER-987, 988, 990. In this report, "the victim provided a graphic account of several assaults." 1-ER-3; Doc.#34 at 2.

Ms. Rasile was a forensic nurse called to the hospital by law enforcement pursuant to a contract with Maricopa County. 7-ER-987-88. Ms. Rasile, the forensic examiner, essentially read her Sex Crimes Evidence kit interview report into the record because she could recall nothing of her interview or examination of Ms. Jorrick. Thus she was required to repeatedly reference the Sex Crimes Evidence Kit report. *See e.g.*, 7-ER-987, 988, 990. Rasile repeatedly made clear she was a 'forensic' nurse. See e.g., 7-ER-979.

Rasile utilized the procedures established and required by the "Sex Crimes Evidence Kit" report, to conduct this structured interview and exam. 7-ER-987-88. Rasile followed the form for documenting this interview and examination. *See e.g.*, 7-ER-984 and 987. Rasile testified that she was "collecting evidence" "throughout the entire process" of interviewing and examining Ms. Jorrick. 7-ER-985. Rasile confirmed that she even asked background medical history questions because they

can explain whether what she observed was related to "what has occurred." 7-ER-996.

The first page of Rasile's report includes chain of custody for the evidence collected during this examination and provides instructions on how to secure evidence obtained. 7-ER-993. Before Rasile conducted the forensic interview and examination, she spoke to law enforcement officers, not medical personnel, about the circumstances of the case. 7-ER-994-995.

At the time of the interview, Rasile obtained Ms. Jorrick's pulse and blood pressure and recorded them as within normal limits. 7-ER-1044. Ms. Rasile testified that though she could not remember Ms. Jorrick's circumstances, when someone is seen in the hospital, her usual practice was to obtain this information from the monitoring machines set by treating hospital staff. 7-ER-1062-63. She further explained that the frequency with which the monitoring machines report those numbers is dependent on whatever the hospital staff has decided, not her. 7-ER-1062-63.

When asked about what happened to Ms. Jorrick, Rasile read from her report attributing quotes to Ms. Jorrick. When asked how this information came to be provided, having already clearly testified that she did not remember this examination, Rasile testified as to her general practices, stating that she generally poses such questions as "completely open-ended." She explained "generally I say tell me why you're here. Did something happen or probably about 90 percent of the time I ask her to tell me why -- why are you here." 7-ER-1005. She explained that

she sometimes asks follow up questions, because it's "required" by the "state form." 7-ER-1005-06.

Rasile then testified to the specifics of the assault as recounted by Ms. Jorrick, including such specifics as where Ms. Jorrick had been "penetrated" and whether oral/genital contact occurred. 7-ER-1006. Rasile again confirmed her strict adherence to the state mandated structured sex evidence collection kit requirements, stating that though Ms. Jorrick was obviously pregnant at the time, she even asked whether Ms. Jorrick was menstruating at that time of the examination because "it's part of the state form, so every question is asked." 7-ER-1008.

Rasile then recounted further details of Ms. Jorrick's statement about the assault, based on information obtained through questioning of Ms. Jorrick, as required by, and documented on, the state mandated form. 7-ER-1008 and 2-ER-44. According to Rasile, Ms. Jorrick provided other identifying information as required by the form, including the gender and race of the assailants. 7-ER-1011 and 2-ER-44.

Then, again referring to the state sex crimes evidence report, Rasile recounted what Ms. Jorrick advised her about actions after the offense, such as bathing and washing. 7-ER-1012-13. Again, Rasile confirmed that she asked Ms. Jorrick everything that was on the required form. 7-ER-1013 and 2-ER-44. While discussing the physical injuries she observed, Rasile indicated that she documented them on the "injury log" another part of the Sex Crimes Evidence Kit, Exhibit 68. 7-

ER-1015 and 2-ER-45-47. This document was presented to the jury "for demonstrative purposes." 7-ER-1016.

Rasile then testified about the diagram of injuries that she prepared as part of the Sex Crimes Evidence Kit, based on what she observed on Ms. Jorrick's genitals. 7-ER-1018-1031. She also testified that she drew Ms. Jorrick's blood for evidentiary purposes, because it "identifies a person on DNA level." 7-ER-1034.

After Rasile completed this sex crimes evidence interview and examination, she "released [Ms. Jorrick] back to the care of the emergency room staff." 7-ER-1034-35. Rasile neither scheduled any future appointments nor performed any treatment on Ms. Jorrick. 7-ER-1035 and 2-ER-46; 7-ER-1035 and 2-ER-46.

Rasile repeatedly affirmed that she did not remember how she worded the questions asked of Ms. Jorrick that morning, but rather explained her "general" practice. 7-ER-1046. Ultimately, Rasile testified that her "diagnosis" based on Ms. Jorrick's answers to her questions on the Sex Crimes Evidence Report was: "sexual assault by history." 7-ER-1050-1051. Based on her examination, Rasile's 'diagnoses' included that there was "moderate genital injury and no anal injury," and "penetration of the vulva by exam and by lab finding" and concluded: "crime lab results pending." 7-ER-1050 and 2-ER-46.

Rasile testified that her "goal" in such an exam is not to "get personally involved" or to have "recall" of those she sees as a forensic nurse, so what she knows is "not from independent recollection" but is from her review of the Sex Crimes Evidence Kit report she had prepared. 7-ER-1064.

Rasile testified that she subjectively believed part of her charge was treatment. *See e.g.*, 7-ER-985. However, she provided no treatment whatsoever to Ms. Jorrick, as confirmed in the report itself where Rasile marked "no" to all the options identified for "Treatment Given." 3-ER-46. Rasile confirmed three times on the form that she provided no treatment to Ms. Jorrick. Rasile collected evidence the entire time she interacted with Ms. Jorrick, 7-ER-985, and then released her back to treating hospital staff.

Rasile repeatedly testified that she could not remember the specifics of this examination other than what she documented on the required form. *See e.g.*, 7-ER-987. Instead, she testified about her 'general' practices, which her testimony suggested she deviated from approximately 10% of the time. *See* 7-ER-1005.

B. Procedural History

In his direct appeal after his conviction on one count of burglary, four counts of kidnapping, four counts of aggravated assault, seven counts of sexual assault, and one count of attempted sexual assault, Mr. Hill's counsel filed an *Anders* brief. Mr. Hill, pro se, argued that his Sixth Amendment and Fourteenth confrontation rights had been violated by the admission of the nurse's testimony concerning the victim's statements. The Arizona Court of Appeals rejected this argument and affirmed. 1-ER-34-40; *State v. Hill*, 336 P.3d 1283, 1290 (Ariz. Ct. App. 2014) ("Because the victim's statement to the forensic nurse was not testimonial, [Petitioner's] rights under the Confrontation Clause were not violated when the

superior court allowed the nurse to recount the statement."). The Arizona Supreme Court denied Petitioner's petition for review. 1-ER-34-40.

Mr. Hill then "sought a state writ of habeas corpus pursuant to Rule 32 of the Arizona Rules of Criminal Procedure." 1-ER-4. The trial court summarily concluded that Mr. Hill had failed to raise any colorable claim for relief. *Id.* In January 2018, the Arizona Court of Appeals granted review and summarily denied relief. *Id.*

In his pro se habeas corpus petition, Mr. Hill raised four grounds for relief including that he was denied his right to confront witnesses. The Magistrate Report and Recommendation (hereinafter "R&R") concluded that statements admitted through Rasile "were made to a nurse for the purpose of treatment." 1-ER-24. As such, it recommended that the petitions should be denied. As to the certified issue regarding the Confrontation Clause, the R&R concluded that "[t]he state court's denial of relief on this claim was not contrary to nor an unreasonable application" of federal law because the Supreme Court has recognized that the Confrontation Clause does not bar the admission of non-testimonial hearsay statements and the statements at issue here were non-testimonial. 1-ER-23.

The R&R further recommended that all other claims raised by Mr. Hill be denied on either substantive or procedural grounds. 1-ER-24-32.

Over Mr. Hill's objection, (*See* 1-ER-10), the district court adopted the findings and recommendations of the R&R on all bases. 1-ER-2-10. On the Confrontation Clause issue, the district court cited to an unpublished Sixth Circuit

per curium opinion, *Dorsey v. Cook*, 677 Fed. App'x 265 (6th Cir. 2017), for the proposition that because the Supreme Court has not discussed this specific fact scenario, the admission of testimony of a sexual assault nurse examiner did not violate the Confrontation clause as it was "not contrary to, or an unreasonable application, of clearly established Supreme Court precedent." 1-ER-7-8. The district court found that per curium opinion sufficiently persuasive to control on this issue, overruled Mr. Hill's objections, adopted the R&R, and denied Mr. Hill's habeas petition. 1-ER-10.

Mr. Hill timely appealed and the Ninth Circuit granted the certificate of appealability with respect to the following issue: "whether appellant's Sixth Amendment right to confrontation was violated by the trial court's admission of statements made by the victim to an examining forensic nurse." 9th Cir. Doc. #3-1. The Ninth Circuit denied Mr. Hill's appeal in a 2-1 memorandum decision. *Hill v. Attorney General, et. al*, No. 20-17369 (9th Cir. May 10, 2022).

In that 2-1 decision, the Ninth Circuit held that the state court's rejection of Mr. Hill's Confrontation Clause challenge to the admission of this statement made by Ms. Jorrick to Rasile describing the sexual assault, was neither contrary to, nor an unreasonable application of clearly established law as determined by the Supreme Court because the "state court applied the correct legal standard and conducted a fact-intensive analysis of the objective circumstances" of the examination. *Id.* at *2.

The decision also concluded that this Court's decisions *Melendez-Diaz*, and *Bullcoming* (cases neither identified nor discussed by the state courts), are inapposite because the actual Sex Crimes Evidence Kit form was not admitted; Rasile only read from it. *See, Hill* at *2-3. Judge Paez dissented from the panel decision. *Hill* at *4.

Judge Paez correctly concluded that Ms. Jorrick's statement was testimonial, and the state court's rejection of Mr. Hill's Confrontation Clause challenge was an unreasonable application of clearly established federal law. As Judge Paez explained, the state court decision overlooked "the surrounding 'relevant circumstances' of the examination" in determining the "primary purpose" of the interrogation. *Id.* An examination of those relevant circumstances led Judge Paez to conclude that the state court decision was an unreasonable application of clearly established federal law.

Because the panel decision conflicts not only with Supreme Court precedent including *Melendez-Diaz* and *Bullcoming*, as there is no rational distinction between reading a document into the record and admitting the paper document itself into the record, and because, as Judge Paez notes, it conflicts with *Bryant*, 562 U.S. at 369, in its failure to consider the required relevant circumstances of the examination to determine the primary purposes of an interrogation for purposes of the Confrontation Clause, and because the decision conflicts with Eighth Circuit precedent in *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005), review by this Court is warranted.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision conflicts with clearly established precedent of this Court and that of the Eighth Circuit, therefore, this Court should grant certiorari and reverse this erroneous holding.

A. The Decision of the Ninth Circuit Conflicts with the Decisions and Analysis of this Court in *Crawford v. Washington*, 541 U.S. 36 (2004); *Davis v. Washington*, 547 U.S. 813 (2006); *Michigan v. Bryant*, 562 U.S. 344 (2011); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009) and *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

In *Bullcoming*, citing *Melendez-Diaz*, this Court concluded that the admission of a document created solely for an 'evidentiary purpose,' . . . made in aid of a police investigation" violated the Sixth Amendment Confrontation Clause. *Id.* While in those cases, the Court considered the admission of laboratory reports by people other than those who drafted them, the Court is clear that the Sixth and Fourteenth Amendments Confrontation Clause is offended whenever a document created solely for an evidentiary purpose, made in aid of a police investigation, is admitted. That is what happened here. The decision of the Ninth Circuit held that *Melendez-Diaz* and *Bullcoming* are inapposite because "the examination report created by the nurse was not itself admitted into evidence." *Hill*, at *2-*3. This is unsupportable as a basis to distinguish those cases.

In those cases, this Court was assessing whether the Confrontation Clause was offended by the admission of examiners' reports, which contained the statements made by someone who was not present and available for cross-examination. Nothing in those cases suggests in any way that the analysis would have been

different if the person testifying (who was not the declarant of the information in the reports) had simply read the reports into the record or had they been permitted to enter the out-of-court statements through question and answer format, as was done in this case.

There is a no legally relevant evidentiary distinction between reading the contents of a document containing the inadmissible hearsay statements of another into the record and the admission of the document containing those statements. *See e.g.*, *United States v. Sine*, 483 F.3d 990 (9th Cir. 2007). That there is no way to distinguish these cases is highlighted by precedent that explains that "a line of questioning that repeatedly incorporates inadmissible evidence can be just as improper as the direct admission of such evidence." *Id.* at 1000. In *Sine*, the Ninth Circuit considered whether it was error for a prosecutor to incorporate inadmissible hearsay documentary evidence, a court order from a different jurisdiction, into its form of cross-examination question. It found such practice to be error because the order itself was excludable hearsay.[1] Because the prosecutor could not get the order properly admitted, it was error to put it before the jury in its questioning of a witness.

This is consistent with the holding of the Fourth Circuit in *United States v. Hall*, 989 F.2d 711 (4th Cir. 1993). In *Hall*, the court assessed whether "artful" questioning that puts before the jury information contained in a document that was

[1] Because Sine did not object, and the evidence in the case was overwhelming, the Ninth Circuit did not reverse, despite recognizing the error.

excludable under the Confrontation Clause because the declarant was unavailable for cross-examination, was error. It found it is. Simply because the document itself was not admitted did not change the nature of the issue or the error.

In sum, it is not the paper that matters, but rather the information contained on that paper. So too here. That the state only had Ms. Rasile read the information that she recorded from Ms. Jorrick during the forensic interview is immaterial. It is that Ms. Jorrick's statements were admitted without affording Mr. Hill the opportunity to cross examine her that is the error. *Melendez-Diaz* and *Bullcoming* are not distinguishable.

Her testimony read to the jury what was on the document which had been created in aid of a police investigation, the admission of which conflicts with clear Supreme Court precedent in *Bullcoming*, 131 S.Ct. at 2717. Without any independent recollection of events, Ms. Rasile's testimony amounts to the introduction of a form created by the prosecution that has no independent basis for admission into evidence.

The state elected to admit Ms. Jorrick's statements contained in the Sex Crimes Evidence interview form through Ms. Rasile's reading of what was in her report. In so doing, Ms. Jorrick became a witness that Mr. Hill had a right to confront. Supreme Court precedent "cannot sensibly be read any other way." *Bullcoming*, 131 S.Ct. at 2717. The Ninth Circuit's conclusion to the contrary cannot stand and Mr. Hill asks this Court to grant Mr. Hill's request for a petition for certiorari.

B. The Decision of the Ninth Circuit Conflicts with a Decision of the Eighth Circuit Court of Appeals, *United States v. Bordeaux*, 400 F.3d 548 (8th Cir. 2005), that held that the admission of a sexual assault victim's statement to a forensic nurse examiner violates the Confrontation Clause.

The decision of the Ninth Circuit similarly conflicts with Eighth Circuit precedent, which held that the admission of a forensic interview of a sexual assault victim in the absence of the opportunity for confrontation of that victim violated the Sixth Amendment. *See Bordeaux*, 400 F.3d 548. In *Bordeaux*, the sexual assault victim testified at trial via closed circuit TV. The Eighth Circuit concluded that this was not sufficient for confrontation purposes, and thus that court was faced with the need to assess whether the testimony concerning statements made during the forensic medical interview were testimonial under *Crawford*, 541 U.S. 36. The Eighth Circuit concluded that they were. It highlighted that the forensic interview was "as a matter of course" provided to law enforcement. The same is true in this case where the form itself directs that the primary copy be provided to the crime lab. Second, the Eighth Circuit considered that the interview itself is designated a 'forensic' interview, the meaning of which clearly denotes its relation to a criminal proceeding. To conclude in this case that such forensic interviews are not primarily for testimonial purposes conflicts with *Bordeaux*, and provides another reason for this Court to review this case.

Because the Ninth Circuit's holding is inconsistent with this Court's binding precedent, and it conflicts with Eighth Circuit precedent, this Court should exercise its discretion to grant the requested writ. Supreme Court Rule 10. Therefore, Mr.

Hill respectfully requests this Court to grant the writ, and reverse the Ninth Circuit, and remand this matter for further proceedings.

CONCLUSION

For the reasons stated above, this Court should grant the Writ.

Respectfully submitted: June 21, 2022.

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