SUPREME COURT CASE NO._____

SUPREME COURT OF THE UNITED STATES

PHILONG NGHIA HUYNH,

Petitioner,

v.

J. LIZARRAGA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, COURT OF APPEAL CASE NO. 20-55343

PETITION FOR A WRIT OF *CERTIORARI*

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Appointed Under the Criminal Justice Act, 18 U.S.C. § 3006A(b)

QUESTION PRESENTED

Whether the Confrontation Clause of the Sixth Amendment permits the prosecution in a criminal trial to present testimony by a surrogate nurse conveying the testimonial statements of a nontestifying forensic nurse.

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PETITION FOR A WRIT OF CERTIORARI

Philong Huynh respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS AND JUDGMENTS BELOW

The Ninth Circuit's order denying petition for rehearing is unreported. (Appendix ("App.") A.) The Ninth Circuit's decision affirming the district court's judgment is unreported and can be found at *Huynh v. Lizarraga*, No. 20-55343, 2023 WL 8449201 (9th Cir. 2023); (*see also* App. B).

The district court's decision is unreported and can be found at *Huynh v. Lizarraga*, 2020 WL 1324826 (S.D. Cal. 2020); (*see also* App. C).

The California Supreme Court's denial of petition for review is unreported. (App. D.) The California Court of Appeal's published opinion is reported at *People v. Huynh*, 212 Cal. App. 4th 285 (2012); (*see also* App. E).

JURISDICTION

The Ninth Circuit denied a petition for rehearing on March 18, 2024, (App. A), and affirmed the district court's order denying Petitioner's habeas corpus petition on December 6, 2023, (App. B).

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The district court had jurisdiction under 28 U.S.C. § 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

2. The Fourteenth Amendment to the United States Constitution provides: "No State shall . . . deprive any person of life, liberty, or property without due process of law . . . ."

3. Section 2254 of Title 28 of the United States Code 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

The facts are undisputed. Jeremiah, a Navy corpsman, and Huynh hung out one evening during which Jeremiah drank an entire pint of cognac. (4-ER[1]-

[1] Citations are the Excerpts of Record filed in the Ninth Circuit preceded by the volume number. (*See* Ninth Circuit Case No. 20-55343, Docket Entry No. 43.)

576-77, 645.) The next morning, Jeremiah suspected he had been sexually assaulted, (4-ER-605), and tried to track Huynh down, (4-ER-606-608). Jeremiah felt ill and disoriented so his supervisors took him to the hospital. (9-ER-1640-1641.) Because Jeremiah's urine was positive for benzodiazepine, the doctor suspected he "might have been drugged," and called police. (9-ER-1641-1643, 1704.)

The police took Jeremiah to a facility for a sexual assault examination. (9-ER-1759-1760, 1778.) At the examination, the nurse flossed Jeremiah's teeth and took swabs from his mouth, anus, rectum, penis and scrotum; these were then provided to the police, along with Jeremiah's blood and urine samples, which the nurse also collected at the examination. (9-ER-1751-52.) Using the swabs and samples the nurse had collected, a police forensic analyst generated DNA profiles. (9-ER-1803, 1824.) Huynh's DNA was found in the sperm fraction of the DNA from Jeremiah's penis, scrotum and anus; the DNA also matched the DNA of the semen found on the alleged murder victim Dane Williams's shirt. (10-ER-1942-1945, 1950.)

Danella Kawachi, the nurse who had collected the DNA and blood samples from Jeremiah, did not testify. Instead, her employer, Claire Nelli, testified based on Kawachi's reports and photographs. (6-ER-1041-1044; 9-ER-1743.) Nelli testified that a protocol developed by the state of California governs how

sexual assault examinations must be conducted and how the evidence must be collected and stored. (9-ER-1723-1724.) A state provided form must be completed, which, with the evidence collected, are provided to the police. (9-ER-1724, 1748.)

Nelli was not present when Kawachi examined Jeremiah. (9-ER-1761.) Based only on Kawachi's reports, Nelli testified that Kawachi had collected oral, buccal, penal, scrotal, and anal-rectal swabs from Jeremiah. (9-ER-1750-1752.) Each swab was dried for an hour in a special box. (9-ER-1725-1726.) According to Nelli, Kawachi had also collected Jeremiah's blood and urine. (9-ER-1752.) Then, according to Nelli, Kawachi had sealed and labeled the evidence and the swabs she collected, which were provided to the police and the crime lab. (9-ER-1752-1753.) Nelli also testified the photos that Kawachi had taken during the examination showed trauma and injury to Jeremiah's rectum and anal canal. (9-ER-1750, 1755-1760.)

On appeal, in deciding "whether Huynh's Sixth Amendment right was violated because he was not able to confront and cross-examine Kawachi," *People v. Huynh*, 212 Cal. App. 4th 285, 320 (2012), the state court only evaluated "the two photographs that Kawachi took during her SART examination," *id.* The court did not address Kawachi's hearsay testimonial labeling and reports, stating that the swabs and blood/urine samples were derived from Jeremiah.

Based on this limited adjudication, the court then concluded that "[t]he primary purpose of the photographs that Nelli relied on was to show the condition of the body. In taking the photographs, there was no likelihood of falsification and no motivation to produce anything other than a reliable depiction of Jeremiah's injuries, if any. The photographs were not taken for the primary purpose of accusing a targeted individual. Therefore, Nelli's use of the photographs was not testimonial and did not violate Huynh's right to confront and cross-examine the photographer (Kawachi). Huynh's Sixth Amendment right was not violated by Nelli's testimony." *Id.* at 321.

Huynh filed a petition seeking discretionary review by the California Supreme Court, which was denied. (1-ER-84.)

Huynh then filed a habeas petition in the district court, which was also denied, (1-ER-3-82,) and the Ninth Circuit affirmed, *Huynh*, 2023 WL 8449201.

REASONS FOR GRANTING THE WRIT

I. An Accused's Sixth Amendment Confrontation Clause Rights Are Violated When a Surrogate Nurse Is Allowed to Testify About the Forensic Examination By Another Nurse.

A. The Violation

"The Confrontation Clause of the Sixth Amendment . . . guarantees the right of a criminal defendant to be confronted with the witnesses against him." *Richardson v. Marsh*, 481 U.S. 200, 206 (1987). "The central concern of the

Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Lilly v. Virginia*, 527 U.S. 116, 123-24 (1999). "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

"A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009).

"[T]he 'primary purpose' test" establishes "the boundaries of testimonial evidence." *Lucero v. Holland*, 902 F.3d 979, 989 (9th Cir. 2018) (quoting *Ohio v. Clark*, 576 U.S. 237, 244 (2015)). "Under that test, statements are testimonial when they result from questioning, 'the primary purpose of which was to establish or prove past events potentially relevant to later criminal prosecution[.]'" *Id.* (quoting *Davis v. Washington*, 547 U.S. 813, 822 (2006)).

"And considering all the relevant circumstances here," there is no doubt that Kawachi's examination, and the collection and labeling of the evidence and swabs, were conducted "with the primary purpose of creating evidence" for "prosecution. Thus, their introduction at trial . . . violate[d] the Confrontation

Clause." *Clark*, 576 U.S. at 246. The police took Jeremiah to the SART facility not for diagnosis or treatment, but because of a criminal investigation. Indeed, the core characteristic of SART examinations is the "collection and preservation of evidence." *See People v. Vargas*, 178 Cal. App. 4th 647, 654 (2009) ("Sexual assault examinations are performed pursuant to a statutorily mandated protocol for the examination and treatment of victims of sexual assault and attempted sexual assault and the collection and preservation of evidence therefrom.").

Moreover, before the examination, Jeremiah had suspected he had been sexually assaulted, (4-ER-605), and had tried to track Huynh down, (4-ER-606-608). Kawachi, who was responsible for obtaining and preserving evidence and providing them to law enforcement, took swabs and urine and blood samples from Jeremiah, and made observations and findings, which were documented, not for diagnostic or treatment purposes, but at the behest of the police to document a forensic sexual assault examination in a potential prosecution. Kawachi was thus "principally charged with uncovering . . . criminal behavior" rather than medical care, *Clark*, 576 U.S. at 249, with "a 'primary purpose' of establishing or proving past events potentially relevant to later criminal prosecution." *Bullcoming v. New Mexico*, 564 U.S. 647, 659 n. 6 (2011). Kawachi would have understood that the sole purpose of her statements on the labels affixed to the sexual assault kit to be for use in investigating and prosecuting

criminal charges. The records were created on a special state-mandated form, in the midst of a sexual assault investigation, a circumstance of which "we can safely assume that" Kawachi was aware when she prepared the records. *Melendez-Diaz*, 557 U.S. at 311.

Thus, Kawachi's examination, including her collection and labeling of the swabs and the urine and blood samples, were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*; *see also Vargas*, 178 Cal. App. 4th at 660 ("[I]n examining and questioning Maria for the purpose of collecting evidence to be used by the police in investigating the sexual assault and in possibly prosecuting the offender, [nurse] Stephenson acted as an agent of law enforcement."); *People v. Uribe*, 162 Cal. App. 4th 1457, 1481 (2008) (physicians who performed sexual assault examination deemed "part of the 'prosecution team'"); *Medina v. State*, 143 P.3d 471, 476 (2006) (nurse conducted sexual assault examination and "gather[ed] evidence for the prosecution for possible use in later prosecutions," thus leading "an objective witness to reasonably believe that the statements would be available for use at a later trial"); *United States v. Norwood*, 982 F.3d 1032, 1046 (7th Cir. 2020) ("Sexual assault examinations conducted by a [nurse] . . . can serve both a medical and investigative function."); *Michigan v. Bryant*, 562 U.S. 344, 367-68 (2011) (a witness can act with multiple

purposes); *United States v. Latu*, 46 F.4th 1175, 1182 (9th Cir. 2022) ("*Crawford* requires that we consider 'all of the relevant circumstances,' and circumstances may arise in which statements for medical purposes will be testimonial." (quoting *Bryant*, 562 U.S. at 369)).

In *Melendez-Diaz*, the Court held reports that a substance was cocaine were "incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact," and "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination"– *i.e.*, offering proof that the substance was cocaine. 557 U.S. at 310-11. Therefore, and because scientific evidence is no more neutral or reliable than other evidence, confrontation serves to ensure its accuracy by "weed[ing] out not only the fraudulent analyst, but the incompetent one as well." *Id.* at 320.

Similarly, in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Court made clear that the Sixth Amendment requires the prosecution to present testimony by the witness who was actually involved in preparing the evidence. *Id.* at 651-652, 657. The Confrontation Clause was not satisfied when the prosecution introduced a laboratory report "through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." *Id.* at 652. The Court rejected the use of "surrogate testimony" from a colleague. *Id.* at 655-656. Though the colleague was

knowledgeable, and was subject to cross-examination, about the efficacy and reliability of the equipment and also that established protocol and procedures were followed, *id.* at 655-57, the Sixth Amendment is not satisfied by a "surrogate" witness who is knowledgeable, but had "no involvement whatsoever in the relevant test and report[,]" *id.* at 673; *see also United States v. Williams*, 720 F.3d 674, 698 (8th Cir. 2013) ("[I]n *Bullcoming* . . ., the Court extended *Melendez-Diaz*'s holding and determined that the person who conducts a laboratory test – not merely a colleague knowledgeable about the testing procedures and equipment used – must be available for cross-examination to satisfy the Sixth Amendment's confrontation requirement."). The Court explained that "surrogate testimony of the kind [the colleague] was equipped to give could not convey what [the actual analyst] knew or observed about the events . . ., *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part." *Id.* at 661-62. The Court also explained that it is "implausible" to read the Clause to "render inadmissible only sworn *ex parte* affidavits, while leaving admission of formal, but unsworn affidavits 'perfectly OK." *Id.* at 664.

Bullcoming and *Melendez-Diaz* make clear that Kawachi's reports, including the swabs and samples she purportedly collected and labeled, were testimonial and could not be admitted absent cross-examination. Nelli was not

present, and played no part whatsoever, in Jeremiah's examination. Nelli had no personal knowledge about the process by which Kawachi took and labeled the swabs, or about Kawachi's representations about the origins of the swabs, *i.e.*, that a given swab was, in fact, collected from a particular part of Jeremiah's body. Thus, as in *Bullcoming*, Nelli's "surrogate testimony . . . could not convey what [Kawachi] knew or observed about the events . . ., *i.e.*, the particular test and testing process [s]he employed[,]" or "expose any lapses or lies on the [Kawachi's] part." 564 U.S. at 661-62. Huynh could not ask about Kawachi's "proficiency, the care [s]he took in performing h[er] work, and h[er] veracity." *Id.* at 662 n. 7. In responding to such questions, Kawachi would have made "representations . . . relating to past events and human actions" that are "not revealed in raw, machine-produced data." *Id.* at 660. Indeed, such questioning has prompted witnesses to realize that they had made labeling or handling errors, thereby preventing convictions based on incorrect or misleading results. *See Williams v. Illinois*, 567 U.S. 50, 118-19 (2012) (Kagan, J., dissenting).

Moreover, "[a]t least some of th[e] methodology" Kawachi used "require[d] the exercise of judgment and present[ed] a risk of error that might [have] be[en] explored on cross-examination." *Melendez-Diaz*, 557 U.S. at 320. Because human judgment and skill were involved, we cannot assume Kawachi's findings and methodology were reliable even if she possessed the "scientific acumen of

Mme. Curie and the veracity of Mother Teresa." *Id.* at 319 n. 6; *see also id.* at 321 ("[T]here is little reason to believe that confrontation will be useless in testing analysts' honesty, proficiency, and methodology – the features that are commonly the focus in the cross-examination of experts."); *Bullcoming*, 564 U.S. at 661 ("[O]bvious reliability of a testimonial statement does not dispense with the Confrontation Clause.").

Consequently, Huynh was deprived of any opportunity to question Kawachi to ensure that the swabs and blood/urine samples were properly collected and labeled. Instead, Nelli took it as given that the swabs and samples were collected as Kawachi said they were, and then relayed these statements to the jury. By introducing how the swabs were collected through the testimony of a witness who played no role in the collection process whatsoever, the prosecution sidestepped the one aspect of the forensic evidence that was most "meet for cross-examination." *Bullcoming*, 564 U.S. at 60.

B. The Prejudice

"Having determined that [Huynh] was denied his Sixth Amendment right to cross-examination, [this Court] must now decide whether that error was harmless 'assuming that the damaging potential of the precluded cross-examination would otherwise have been fully realized.'" *Fowler v. Sacramento Cty. Sheriff's Dep't*, 421 F.3d 1027, 1041 (9th Cir. 2005) (quoting

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986)); *see also Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988) ("An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation[.]"). This Court "has emphasized that . . .'the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial.'" *Slovik v. Yates*, 556 F.3d 747, 754 (9th Cir. 2009) (quoting *Van Arsdall*, 475 U.S. at 680); *see also United States v. Holloway*, 826 F.3d 1237, 1249 (10th Cir. 2016) ("Unlike many constitutional violations, a defendant does not have to show prejudice with respect to the trial as a whole to state a violation of the Confrontation Clause.").

"The state, rather than [Hunyh], bears the 'risk of doubt' in [the] harmless-error analysis." *Crawford v. Valerio*, 306 F.3d 742, 762 (9th Cir. 2002) (en banc). Thus, "[o]nly if the State has persuaded us that there was no substantial and injurious effect on the verdict do we find the error harmless." *Payton v. Woodford*, 299 F.3d 815, 828 (9th Cir. 2002) (en banc).

The prejudice here is obvious. The prosecution's case that Huynh's DNA was found in the sperm fraction of the DNA found in the swabs collected from Jeremiah, and that Jeremiah's blood and urine tested positive for clonazepam, and that Huynh's DNA that was found on Williams's shirt, was entirely reliant

on Kawachi's testimonial hearsay reports and labeling that identified Jeremiah, and the locations of his body, as the source of evidence collected upon the swabs and samples tested. (9-ER-1783, 1788; 10-ER-1941, 1949-1950; 12-ER-2365-2366, 2370-2373, 2381.) Thus, the prosecution's case was based on Kawachi's labeling of the sexual assault kit that stated that the swabs and toxicology samples were, in fact, derived from Jeremiah, rather than from some other source. Thus, the very relevancy of the DNA and toxicology evidence was dependent upon the jury accepting Kawachi's hearsay testimony about how and from where the various swabs and blood/urine samples had been collected. Without those statements linking the swabs and samples to the examination performed on Jeremiah, the prosecution merely would have presented various tests on swabs – origin unknown – and identified them containing DNA that matched Huynh's DNA. That is, had the prosecution's analysts testified they had found Huynh's DNA on the swabs (and did not disclose that the swabs were taken from Jeremiah), their testimony would be irrelevant because it would not make it any more or less probable that Huynh had in fact drugged and sexually assaulted Jeremiah. It is the analysts' reliance on the statements identifying Jeremiah as the source of the swabs and samples that supplied relevance to their expert testimony. Without linking the swabs that were tested to Jeremiah's examination (and the portions of his body on which the swabs were

used), the analysts' testimony would be that Huynh's DNA was found on various swabs of unknown origin.

C. The State Court's Decision Is Flawed.

In deciding "whether Huynh's Sixth Amendment right was violated because he was not able to confront and cross-examine Kawachi," *Huynh*, 212 Cal. App. 4th at 320, the last state court decision evaluated only "the two photographs that Kawachi took during her SART examination," *id.* The court completely failed to address Kawachi's hearsay testimonial labeling and reports that stated the swabs and blood/urine samples were derived from Jeremiah. And, it was based on this limited adjudication of the claim, that the state court concluded "Huynh's Sixth Amendment right was not violated by Nelli's testimony," *id.*, and never reached the issue of prejudice, *see id.*

"Section 2254 (d)['s] standard . . . . does not apply when a state court does not reach the merits of a federal claim." *James v. Ryan*, 733 F.3d 911, 914 (9th Cir. 2013); *see also Johnson*, 568 U.S. at 302 ("§ 2254 (d) . . . applies only when a federal claim was 'adjudicated *on the merits*[.]'" (emphasis in original)). Where, as here, "the claim was not 'adjudicated on the merits' by the state court, the review is to be *de novo*." *Amado*, 758 F.3d at 1130; *see also Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("Because the state courts . . . never reached the issue of prejudice, . . . we examine this element of the . . . claim *de novo*[.]").

To the extent that it can be said that the state court adjudicated the claim, its decision involved an unreasonable application of clearly established law, and based on the unreasonable determination of the facts, 28 U.S. C. § 2254 (d)(1)-(2). First, the court made an unreasonable determination of the facts by failing to consider that Kawachi's testimonial statements were not limited to her photos, but her collection and labeling of the swabs and blood/samples. Further, the court based its decision on the fatally false premise that "[w]hen Jeremiah's SART examination took place . . . there was no criminal investigation of Huynh," *Huynh*, 212 Cal. App. 4th at 321, when the record shows that, before the examination, Jeremiah himself suspected he had been sexually assaulted and was trying track Huynh down, (4-ER 605-608, 716), Jeremiah had been diagnosed with "benzodiazepine intoxication," (9-ER-1642), and brought to the examination at the direction of the police, (9-ER-1704). Though the court need not consider "every jot and tittle" of evidence, it "must acknowledge significant portions of the record, particularly where they are inconsistent with [its] findings." *Taylor v. Maddox*, 366 F.3d 992, 1001, 1007 (9th Cir. 2004); *see also Zapata v. Vasquez*, 788 F.3d 1106, 1120 (9th Cir. 2015) (holding the state court's finding was unreasonable, in part, because "[i]n assessing the strength of [witness] testimony . . . the court entirely overlooked a serious inconsistency in [that] testimony and . . . resulting questionable credibility.").

The state court's "failure to take into account and reconcile key parts of the record casts doubt on the process by which the finding was reached, and hence on the correctness of the finding." *Taylor*, 366 F.3d at 1008. "[A]s [this] Court [has] noted . . ., the state-court fact-finding process is undermined where the state court has before it, yet apparently ignores, evidence that supports petitioner's claim." *Id.* at 1001; *see also Miller-El v. Cockrell*, 537 U.S. 322, 346 (2003) ("Our concerns are amplified by the fact that the state court also had before it, and apparently ignored, testimony" supporting petitioner's claim). "When [as here] the state court fails 'to consider key aspects of the record,' it makes an 'unreasonable determination of the facts.'" *Milke*, 711 F.3d at 1010.

The court's reasoning was also "unreasonable" under § 2254 (d)(1) "insofar as it failed to evaluate the totality of the available . . . evidence." *Williams*, 529 U.S. at 397; *see also Dixon v. Williams*, 750 F.3d 1027, 1036 (9th Cir. 2014) (finding the state court's harmless analysis unreasonable because "it recited only the testimony that supported the verdict[.]"); *Bailey v. Rae*, 339 F.3d 1107, 1119 (9th Cir. 2003) ("The state court's denial of the . . . claim was . . . objectively 'unreasonable' [because] the court did not undertake a careful, balanced evaluation of the nature and strength of both the evidence the defense was prevented from presenting and the evidence each side presented at trial.").

Further, "the text of the Confrontation Clause does not constrain the time at which one becomes a 'witness.' Indeed, a declarant may become a 'witness' before the accused's prosecution." *Lambert v. Warden Greene SCI*, 861 F.3d 459, 470 (3d Cir. 2017) (quoting *Williams*, 567 U.S. at 115) (cleaned up)). "While the individual making the statement may do so without the intent to accuse the defendant, she may become a witness against the accused in the context of trial." *Id.* (citing *Melendez-Diaz*, 557 U.S. at 314 (the Confrontation Clause jurisprudence recognizes the right to confront a witness even where the "adverse witness's testimony, taken alone, will not suffice to convict.")). "[This] Court has squarely rejected the argument that forensic reports that 'do not directly accuse the defendant of wrongdoing,' or that are only 'observations of an independent scientist made according to a non-adversarial public duty,' are not testimonial." *Garlick v. Lee*, 1 F.4th 122, 136 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 1189 (2022) (quoting *Melendez-Diaz*, 557 U.S. at 313-14 and *Bullcoming*, 564 U.S. at 665)). "Even if a forensic report contains only a contemporaneous, objective account of observable facts that does not accuse a defendant, it is testimonial and the Confrontation Clause requires that the defendant be afforded the opportunity to cross-examine the declarant." *Id.* (citing *Melendez-Diaz*, 557 U.S. at 318-21; *Bullcoming*, 564 U.S. at 661-62; *Crawford*, 541 U.S. at 68-69). "The Constitution prescribes a procedure for determining the reliability of testimony

in criminal trials" – cross-examination – "and we, no less than the state courts, lack authority to replace it with one of our own devising." *Crawford*, 541 U.S. at 67.

In sum, the rationales applied here by the California Court of Appeal and similarly applied by other courts do not comport with the Confrontation Clause. Unless this Court intervenes, these rationales will persist and ensure that defendants in jurisdictions across the country are deprived of a meaningful opportunity to confront some of the most important witnesses against them.

D. The Question Presented Is an Important and Recurring One, and This Case Presents the Ideal Vehicle for Addressing It.

The question presented implicates recurring issues of national significance to the proper administration of criminal trials in which forensic analyses play an increasingly central evidentiary role. Prosecutors in many jurisdictions across the country rely on substitute experts to present the forensic analyses of nontestifying analysts. And it is in these cases that the Confrontation Clause's safeguards are perhaps most needed. Indeed, forensic evidence often can be superficially impressive to juries, carrying with it an air of infallibility propagated by popular media. *See, e.g., State v. Bowman*, 337 S.W.3d 679, 694 n.3 (Mo. 2011) (taking judicial notice of the socalled "CSI Effect"). Concerns about forensic evidence also have been repeatedly validated and reinforced by incidents of negligence, incompetence, bias, and even fraud on the part of

forensic analysts, including "drylabbing" incidents where analysts have reported results of testing that they never even conducted. *See generally Brief of Amicus Curiae The Innocence Network*, *Bullcoming v. New Mexico*, 564 U.S. 647 (2011) (No. 09-10876), 2010 WL 5043100. Now, more than ever, lower courts, prosecutors, and defense lawyers need this Court's guidance on whether, and the extent to which, the Confrontation Clause permits substitute expert testimony.

This case presents the ideal vehicle for this Court to address the question presented and resolve the confusion and divide among lower courts. As an initial matter, this case comes to this Court free of any procedural constraints. Huynh timely objected and argued that Nelli's testimony violated the Confrontation Clause, and preserved the issue on appeal.

Finally, Huynh's inability to cross-examine the forensic nurse presents a compelling case of prejudice. Significantly, the forensic analysis that was performed here "require[d] specialized knowledge and training" in which "human error can occur at each step." *Bullcoming*, 564 U.S. at 654. In Kawachi's absence, Huynh could not interrogate her about "lapses or lies" in her materials and could not "ask[] questions designed to reveal whether incompetence, evasiveness, or dishonesty [might have] accounted for" her employment at the crime lab ending. *Id.* at 661-662.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: June 10, 2024

Respectfully submitted,

s/ Tony Faryar Farmani
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Philong Nghia Huynh