No._____

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IN THE SUPREME COURT OF THE UNITED STATES

_____

VICTOR ROBLERO

Petitioner

v.

SCOTT KERNAN, Warden,

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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Petitioner, Victor Roblero, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit Court of Appeals affirmed the district court's denial of habeas relief in an unpublished memorandum decision. App. 1. [1] The order adopting the magistrate judge's findings and recommendations and the judgment of the district court denying Roblero's habeas corpus petition are unreported. App. 6, 7. The magistrate judge's opinion is also unreported. App. 8.

The California Court of Appeal affirmed the conviction and sentence in an unpublished decision. App. 82. The California Supreme Court denied review in an unpublished decision. App. 80. The decisions on Roblero's petitions for a writ of habeas corpus are also unreported. App. 44, 46-53, 69, 76.

JURISDICTION

The judgment of the Court of Appeals was entered on December 7, 2018. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

In pertinent part, the Sixth Amendment to the United States Constitution provides "In all criminal prosecutions, the accused shall enjoy the right . . ."to have "the assistance of counsel" for his defense.

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[1] "App." refers to the Appendix attached to this petition. "ER" refers to the Appellant's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit simultaneously with the Appellant's Opening Brief on Appeal. "CR" refers to the docket number of the Court of Appeals docket and "DCR" refers to the docket number of the federal district court docket.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "No state shall . . . deprive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

A. State Court Proceedings

On August 31, 2009, Roblero was charged by an amended information with six counts of committing a lewd act on a child under the age of 14, pursuant to California Penal Code § 288 (a)(Counts 1-6). The information also charged Roblero with one count of non-forcible oral copulation of a minor (a person under the age of 18), pursuant to California Penal Code § 288a (b)(1), and one count of non-forcible sexual penetration of a minor, pursuant to California Penal Code § 289 (h)(Counts 7-8).The information also alleged that the charged offenses were committed against more than one victim, pursuant to California Penal Code § 667.61 (e)(4).1 CT 97-98.

On September 3, 2009, a jury found Roblero guilty of all of the charged counts and found the special allegation to be true. 1 CT 282-290. On November 20, 2009, the trial court sentenced Roblero to 60 years to life in prison.

On September 7, 2010, the California Court of Appeal affirmed all of the convictions and remanded the case for resentencing on Counts 7 and 8. I ER 77. Roblero's petition for review filed in the California Supreme Court was denied on November 17, 2010. I ER 75.

On June 10, 2011, the trial court resentenced Roblero to 62 years to life in prison. Lodged Document 12. On February 8, 2013, the California Court of Appeal affirmed the sentence. I ER 58. The California Supreme Court denied Roblero's petition for review on May 1, 2013. I ER 52.

Roblero filed a petition for a writ of habeas corpus in the Riverside County Superior Court, which was denied on May 31, 2012. I ER 71. Roblero then filed a petition for a writ of habeas corpus in the California Court of Appeal, which was denied without comment or citation to authority on October 5, 2012. I ER 69. Roblero filed three more petitions in the Riverside County Superior Court, which were denied on March 27, 2013 (I ER 54), July 19, 2013, (I ER 48) and on November 7, 2013. I ER 44.

Roblero then filed a petition for a writ of habeas corpus in the California Court of Appeal, which was denied without comment or citation to authority on January 23, 2014. I ER 41. Roblero filed a final petition for a writ of habeas corpus in the California Supreme Court, which was denied without comment or citation to authority on April 16, 2014. I ER 40.

B. Federal Court Proceedings

On June 2, 2014, Roblero filed a petition for a writ of habeas corpus in the district court. CR 1. After a full round of briefing, including a supplemental answer and reply, the magistrate judge issued a report and recommendations recommending that the petition be denied. I ER 3. On December 17, 2016, the district court issued an order adopting the magistrate's report and recommendations and denying the petition on the merits. The district court also issued an order denying a certificate of appealability. I ER 1, 2. On August 3, 2017, the Ninth Circuit Court of Appeals issued an order granting a certificate of appealability and appointing counsel. Docket

No. 4-1. On December 7, 2018, the Ninth Circuit issued a memorandum decision affirming the judgment of the district court. App. 1.

STATEMENT OF FACTS

A. Background

Roblero was married to Jesalyne Roblero. 1 RT 708. At the time of Roblero's 2009 trial, they had been together for about eight and a half years. 1 RT 708. Jesalyne Roblero has a daughter from a previous relationship, who is referred to as Jane Doe No. 1.

Jane Doe No. 2 and her mother were close friends of the Roblero family. I RT 43. For several years, Jane Doe No. 2 and her mother had visited the Roblero home about every other weekend. When Jane Doe No. 2 was about seventeen years old, she and her mother moved into the Roblero family home. I RT 42-44.

B. Testimony of Jane Doe No. 1 Concerning Counts One to Three

Counts 1, 2 and 3 charged Roblero with committing a lewd act on Jane Doe No. 1 when she was under the age of 14, pursuant to Cal. Penal Code 288(a). 1 CT 95-96. Jane Doe No. 1 was 13 at the time of trial. 1 RT 716. Roblero, who was married to her mother, had begun molesting Jane Doe No. 1 "a little while" after they first met, when she was six years old. She did not recall the first time it happened, but it happened "a lot." 1 RT 717. He would touch and grab her breasts over her clothes.

At times, the touching seemed like an accident but other times it seemed intentional. 1 RT 718-721. Roblero also grabbed and "smacked" her "butt" over her clothes. 1 RT 722-723. Those incidents happened more than ten times. 1 RT 723. At times, when Roblero came up behind her

and grabbed her breasts or buttocks, she could feel his penis pressed against her. 1 RT 726-727. He told her not to tell her mother. 1 RT 728.

The incidents began when the family was living in San Bernardino, and continued through the period that they lived at a house on Elgin Street in Riverside. 1 RT 729; I CT 162-163. There were at least five incidents where Roblereo grabbed her breasts or buttocks at the house in Riverside. 1 RT 730. As her breasts began to get bigger, the touching got "worse." I RT 740.

On cross examination, Jane Doe No. 1 testified that when the touching occurred, it had sometimes happened when she and Roblero were wrestling or when he was hugging her. Also, some of the incidents where he smacked or grabbed her had occurred in front of other people. 1 RT 734-736.

C. Testimony Concerning Counts Four to Eight

Counts 4, 5 and 6 charged Roblero with committing a lewd act against Jane Doe No. 2 when she was less than fourteen years old. Counts 7 and 8 charged Roblero with oral copulation and digital penetration of Jane Doe No. 2 when she was under the age of 18, pursuant to Cal. Penal Code 288a(b)(1) and 289(h). I CT 96-98.

Jane Doe No. 2's mother was a close friend of Roblero's wife, Jesalyne Roblero. Jane Doe No. 2 had been friends with Jane Doe No. 1 since Jane Doe No. 2 was twelve or thirteen years old. Jane Doe No. 2's date of birth was August 16, 1991. I RT 61. At the time of Roblero's September, 2009, trial, Jane Doe No. 2 was 18 years old. 1 RT 27. (trial began on September 1, 2009).

For about four or five years, Jane Doe No. 2 and her mother had visited Roblero and his family about every other weekend. When Jane Doe No. 2 was seventeen, she and her mother moved into Roblero's home and lived there with him, his wife, and Jane Doe No. 1. 1 RT 43-44.

Jane Doe No. 2 testified that the first incident where Roblero had touched her inappropriately occurred when she was twelve or thirteen years old. She and Roblero had been building a shed for his house in Riverside. 1 RT 44, 57. He asked her to show him her breasts and she said "No." He kept asking and she again refused. He then took off her shirt and started touching her breasts. She "kind of punched him away" and said "no," but he "just kept going." 1 RT 44-45.

During the same time period, when she was twelve or thirteen, Roblero would call her up to his room and touch her breasts over her objections. He did that more than ten times. 1 RT 46. After a while, he started putting his hand down her pants. He also made her masturbate him until he ejaculated at least five times. 1 RT 47. As she got older, the behavior "got worse" and he tried to "have sex" with her multiple times. 1 RT 47, 49. When she was fourteen or fifteen, he began to put his fingers in her pants and touch her vagina. That happened about five times. 1 RT 48. When she was fifteen or sixteen, he began to put his mouth on her vagina. All of the incidents took place "upstairs" or in a bedroom. 1 RT 50.

On cross examination, Jane Doe No. 2 admitted that she had told a police detective that the first incident, the one by the shed, had happened when she was "either 13 or 14." She had later said she might have been 12 or 13. 1 RT 57. At another point in the police interview, she had said she was not sure when the shed incident had happened. She could not specify a date or a year. 1 RT 57.

When asked by the police detective how old she had been when Roblero had moved to the Riverside house (where the shed had been built) Jane Doe No. 2 had said "probably 13, 14, I'm not sure." I RT 57.

On redirect examination, Jane Doe No. 2 said that she was "certain" that Roblero had touched her breasts more than ten times and that he had made her masturbate him about five times when she was 12 or 13. 1 RT 64-65. She said she could remember that she was 13 when it started. 1 RT 68.

On recross examination, Jane Doe No. 2 admitted she was not sure when the incidents occurred. They could have happened when she was 12, 13, or 14. When she had said she believed they happened at 13, she was not "absolutely sure." 1 RT 67, 68.

Roblero's wife, Jesalyne Roblero, testified that the family moved into the house on Elgin Street in Riverside in June of 2003 or 2004. 1 RT 709. The family bought and constructed a shed in the garage within three to six months of moving into the house. 1 RT 710. Once they purchased the shed, they put it up "immediately." 1 RT 713.

On cross examination, Jesalyne admitted that she did not recall the exact year that they moved into the Elgin Street house or the date that the shed had been constructed. She admitted that money was "tight" and they may not have had the funds to purchase the shed until Roblero got a job at the "gas company." She said that was a "good possibility." 1 RT 712.

D. Uncharged Incidents

Jane Doe No. 3, who was nineteen at the time of trial, testified that when she was eighteen, she spent the night at the home of her friend, Jane Doe No. 2, who was then living with the Roblero family. Late at night, Roblero came into their room and approached Jane Doe No. 3's

bed. He put his hand on her chest over her shirt and began to move his hand down over her breasts. 1 RT 30, 32. Jane Doe No. 3 sat up in an effort to make him stop. When she lay back down on the bed, he started doing it again. 1 RT 30-31. Jane Doe No. 3 then sat up and curled into a ball to shield her breasts from him. After that, Roblero left the room. 1 RT 31.

The next day, Roblero called Jane Doe No. 3 to his room. He told her he was sorry, and that she had "nice boobs" and that if she ever wanted to show them, he was there to look at them for her. 1 RT 32.

Susan Holland testified that she and Roblero met when they were ten years old and they had been friends while they were in school. I RT 744-745. When they were both seventeen, Roblero had come to her house to talk about a family problem. While they were alone in her room, he had kissed her and she backed away and said "I can't do that, no." I RT 746, 748. He then began to touch her breasts and "butt" and ignored her demands that he stop. 1 RT 745-747.

E. Roblero's Recorded Statement

Roblero gave a recorded statement to a police detective, which was played for the jury. I RT 759-760. During the police interview, Roblero initially denied that he had molested his step daughter, Jane Doe No. 1. I CT 127, 130, 133, 139. He admitted molesting Jane Doe No. 2, but said "I thought she was older than she was." I RT 140.

Roblero admitted that his sexual contacts with Jane Doe No. 2 began about three years earlier when they were working on building a shed in the garage of his former home in Riverside. I CT 141, 144. The incident occurred about six months after he moved into the Riverside house. I CT 147. On that occasion, he admitted he had "started feeling under her shirt." I CT 145. After that, he had engaged in sexual contact with Jane Doe No. 2 about once a month, for the past three

and one half or four years. I CT 146, 147, 150. They would grab each other's "crotch" or chest as they passed in the house. I CT 151-152.

About a year before the police interview, Roblero had begun putting his finger in her vagina. I CT 153-154. At that time, she also began to masturbate him until he ejaculated. I CT 155. He had put his mouth on her vagina and engaged in "oral sex" about three or four times. I CT 156.

When Jane Doe No. 2 moved into his home, the sexual contacts began to occur more than a couple of times per week. I CT 157. They had engaged in oral sex about a week and a half before the interview. I CT 149.

As for Roblero's step daughter, Jane Doe No. 1, Roblero repeatedly denied that he had touched her with sexual intent. E.g., CT 138, 139, 142. However, he eventually admitted he "may have" touched her breasts over her clothes. I CT 165. He said he had never "intentionally" touched her breasts. I CT 177. Later, he said he would "catch her off guard" and "get a quick grab" of her chest or crotch. I CT 184, 187. He had started doing that about two years earlier. I CT 189, 194. The incidents had happened about once a month. I CT 194.

F. Defense Counsel's Closing Argument

During closing argument, defense counsel conceded that Roblero was guilty of non forcible oral copulation and non forcible sexual penetration of Jane Doe No. 2. He also argued that Roblero should be convicted of the lesser included offenses of simple assault as to each of the six counts of committing a lewd act on a child under age 14. Defense counsel stated:

> You see, ladies and gentlemen, we've learned a lot about Victor during this trial. We've learned the good, the bad, and the ugly. We've learned a little bit about who he is, what he's done, and yes, the crimes that he has committed.

II ER 90.

> Now [did] the prosecution prove this beyond a reasonable doubt that Victor Roblero committed an act of oral copulation on that young girl. You bet he did. Absolutely. Don't waste any time on it. In fact, I'm asking you to convict him of oral copulation with a person under the age of 18 because he committed that horrible offense with Jane Doe No. 2. That's true, so let's move on.

II ER 94-95.

As to the count of sexual penetration with a foreign object, counsel argued:

> Three elements: the defendant participated in an act of sexual penetration with another person; that penetration was accomplished by using a foreign object – the foreign object is also defined as a finger; the other person was under the age of 18 at the time of the act. Have the People proved beyond a reasonable doubt that Victor committed that offense against Jane Doe No. 2? You bet they did. Don't waste any time on it. I'm asking you to convict him of sexual penetration with a person under 18.

II ER 95.

Trial counsel also asked the jury to convict Roblero of the lesser included offenses of simple assault as to the six remaining counts. He argued that the prosecutor had failed to prove beyond a reasonable doubt that Jane Doe No. 2 was under the age of fourteen at the time of the incidents that supported the charges for three counts of committing a lewd act on a child under the age of fourteen. II ER 95-115. Trial counsel also argued that the trial testimony had failed to establish that the incidents that formed the basis for the same charges involving Jane Doe No. 1

were committed with sexual intent, which is an essential element of the crime of committing a lewd act on a child under the age of fourteen. II ER 95-115.

At the conclusion of defense counsel's argument, he asked the jury to find Roblero guilty of oral copulation of a person under the age of 18, and guilty of sexual penetration with a foreign object of a person under the age of 18, as to Jane Doe No. 2. He asked the jury to find Roblero not guilty of three counts of committing a lewd act on Jane Doe No. 2, on grounds that the prosecutor had failed to prove the essential element that she was under 14 at the time of the offenses. He asked the jury to convict Roblero of the lesser included offense of simple assault as to those counts. II ER 114-115.

As to Jane Doe No. 1, defense counsel argued that the prosecutor had failed to prove that he touched her with sexual intent. He asked the jury to find Roblero not guilty of committing a lewd act on a child under the age of 14 in counts I, II and III. He asked the jury to instead convict Roblero of the lesser included offense of simple assault as to those three counts. II ER 115.

STANDARD OF REVIEW

The California Supreme Court denied Roblero's petition for review on direct appeal without comment or citation to authority. ER 31.Under the AEDPA, relief may be granted under 28 U.S.C. 2254(d)(1) if the last reasoned decision, that of the Court of Appeal, unreasonably applied clearly established federal by either (1) correctly identifying the governing rule but then applying it to a new set of facts in a way that is objectively unreasonable, or (2) extending or failing to extend a clearly established legal principle to a new context in a way that is objectively unreasonable." *DeWeaver v. Runnels*, 556 F.3d 995, 997 (9th Cir. 2009).

To prevail under 28 U.S.C. 2254(d)(1), Roblero need not show a case directly on point. He must only demonstrate that the Court of Appeal unreasonably applied clearly established United States Supreme Court constitutional precedent to the facts of his case. *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000)(state court can be "unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled").

This Court may also grant relief under 28 U.S.C. 2254(d)(2) when the Court of Appeal opinion contains an objectively unreasonable determination of the facts. *Taylor v. Maddox*, 366 F.3d 992, 1001 (9th Cir. 2004) ("[a state court's] misapprehension [of the record] can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable"

REASONS FOR GRANTING THE PETITION

1. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE OPINIONS BELOW ARE IN CONFLICT WITH THE DECISIONS OF THIS COURT CONCERNING THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND A CRIMINAL DEFENDANT'S RIGHT TO DECIDE WHETHER TO CONCEDE GUILT AT TRIAL

This Court should grant certiorari because the decisions below are in conflict with this Court's precedents, including the recent decision in *McCoy v. Louisiana*, ___ U.S. ___, 135 S.Ct. 1500 (2018), concerning the right to effective assistance of counsel at trial. *McCoy* holds that the Sixth Amendment guarantees a criminal defendant's right to insist that defense counsel refrain from admitting guilt, even when counsel believes that conceding guilt would afford the best chance of avoiding the death penalty. This case presents an opportunity to explicitly extend the *McCoy* rule to non-capital cases. Because the reasoning in *McCoy* applies with equal force to non-capital defendants, this Court should accept certiorari and grant the writ.

In this case, trial counsel violated Roblero's right to counsel when he conceded Roblero's guilt as to two of the charged counts and six lesser included offenses. The Ninth Circuit held that defense counsel reasonably conceded Roblero's guilt in order to gain credibility with the jury and because of the overwhelming evidence as to the conceded counts. App. 3-5.

Under the Sixth Amendment, the fundamental decision to plead guilty or not guilty is within the exclusive control of the defendant. Here, Roblero had entered pleas of not guilty to all of the charges. His lawyer's failure to honor that decision and to instead argue that Roblero was guilty violated Roblero's right to counsel under *Strickland v. Washington* 466 U.S. 668 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984).

In *McCoy*, this Court held that the a criminal defendant has a fundamental right to make the decision whether to assert innocence as the objective of his defense at trial even in the face of overwhelming evidence. *McCoy*, at 1508-1510. Accordingly, this Court held that when a client expressly asserts that the objective of his trial defense is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt. *McCoy* at p. 1509 citing U.S. Const. Amdt. 6 (emphasis added); see ABA Model Rule of Professional Conduct 1.2(a) (2016) (a "lawyer shall abide by a client's decisions concerning the objectives of the representation").

The *McCoy* decision contrasts with that of this Court in *Florida v. Nixon*, 543 U.S. 175 (2004), where the defendant did not object to his lawyer's decision to concede his guilt as part of a strategy to avoid the death penalty. In this case, Roblero entered a plea of not guilty but he did not testify at trial and he did not object to his counsel's arguments on the record. However,

counsel did not obtain Roblero's consent to concede his guilt, which was the equivalent of a guilty plea.

The *McCoy* opinion describes the defendant's right to choose the objectives of his defense as a "fundamental" right that cannot be usurped by defense counsel. *McCoy*, at p. 1510. *McCoy* also emphasizes that it is not counsel's competence but the client's autonomy – his right to control the objectives of the defense, that is violated when counsel concedes guilt over his client's objection. Accordingly, there is no reason to limit the holding of *McCoy* to capital cases. This Court should accept certiorari to provide guidance to the lower courts as to the right of a non-capital defendant to control the objectives of his defense and, specifically, to decide whether counsel will concede his guilt at trial.

The *McCoy* opinion holds that counsel's decision to concede guilt in that case violated McCoy's Sixth Amendment right to counsel without a showing of prejudice, because counsel's decision to concede guilt over his client's objection was a structural error. *McCoy* at p. 1511. The deprivation of the right to control the objectives of the defense cannot be harmless, because it deprives the defendant of the fundamental right to control the objectives of the defense. Id. The same rule should apply in this case, because Roblero's counsel conceded his guilt without obtaining his permission, overriding Roblero's decision to plead not guilty to the charged offenses.

As set forth in more detail below, the AEDPA does not bar relief on Roblero's claim because the California Court of Appeal unreasonably determined the facts and unreasonably applied *Strickland* when it held that Roblero's right to counsel was not violated when his trial

lawyer conceded his guilt without his permission. For all of these reasons and as set forth in more detail below, this Court should grant certiorari and grant the writ.

ARGUMENT

I. Trial Counsel Violated Roblero's Right To Counsel When He Conceded Roblero's Guilt as to Two of the Charged Counts and Six Lesser Included Offenses Without Roblero's Consent

A. The Right to Effective Assistance of Trial Counsel

The Sixth Amendment recognizes the right to the assistance of counsel because counsel's role "is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

To prevail in a claim of ineffective assistance of counsel, a petitioner is required to show (1) deficient performance by counsel, and (2) prejudice to the defense, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id*. at 687.

In a narrow class of ineffective assistance of counsel cases, there is a presumption of prejudice. In *United States v. Cronic*, 466 U.S. 648 (1984), decided on the same date as *Strickland*, the Supreme Court created an exception to the *Strickland* prejudice standard and "acknowledged that certain circumstances undermine a defendant's important rights such that prejudice will be presumed." *Cronic*, 466 U.S. at 658. Under *Cronic* prejudice is presumed where defense counsel has ceased to act as an advocate, such that "there has been an actual breakdown in the adversarial process at trial." *Toomey v. Bunnell*, 898 F.2d 741, 744 n. 2 (9th Cir.1990).

The *Cronic*, Court stated:

> [T]he adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." *Anders v. California*, 386 U.S. 738, 743 [87 S.Ct. 1396, 1399, 18 L.Ed.2d 493] (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. . . . if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Cronic, 466 U.S. at 656-57 (footnotes omitted).

C. Defense Counsel is Ineffective If He Overrides His Client's Decision to Plead Not Guilty

It is the defendant, and not defense counsel, who controls the decision as to whether to plead guilty or to contest the charges at trial. *Brookhart v. Janis*, 384 U.S. 1, 7 (1966). Thus, the decision to concede guilt on a charged offense or a lesser included charge must be made by the accused, not his attorney, no matter how difficult it may be for the attorney to mount a defense. *Jones v. Barnes*, 463 U.S. 745, 751 (1983)(the accused has the ultimate authority to decide whether to plead guilty).

In *Faretta v. California*, 422 U.S. 806 (1975) the Supreme Court also recognized, in the context of examining a defendant's right to self-representation, that an accused's right to defend himself against the government is a personal right. Counsel must respect his client's liberty to decide whether to plead guilty or to contest the charges, for it is the client who must bear the consequences of those choices. *Faretta*, 422 U.S. at 834.

Accordingly, even where no theory of defense is available, if a defendant has decided to stand trial, counsel must hold the prosecution to its burden to prove every element of the charged offenses beyond a reasonable doubt. *Brookhart*, at p. 7; *Cronic*, 466 U.S. at p. 657, fn. 19; *see*

United States v. Swanson, 943 F.2d 1070, 1074 (9th Cir. 1991); *Anderson v. Calderon*, 232 F.3d 1053 (9th Cir. 2000) *overruled on other grounds* in *Osband v. Woodford*, 290 F.3d 1036, 1043 (9th Cir. 2002).

Moreover, if a defendant has chosen to enter a plea of guilty, the record must be clear that the defendant has given his informed consent to enter the plea and to waive his trial rights. *Brookhart*, at p. 7; *see United States v. Swanson*, 943 F.2d 1070-1073 (9th Cir. 1991).

The exception to the rule that defense counsel may not override a defendant's decision to plead not guilty applies only in capital cases. In *Anderson v. Calderon, supra*, this Court recognized that in a death penalty case, trial counsel may concede guilt as part of a legitimate strategy to avoid capital punishment. *Anderson* at p. 1087-1088. Likewise, in *Florida v. Nixon*, 543 U.S. 175, 192 (2004), the Supreme Court approved defense counsel's concession of guilt in the first phase of a capital trial when the defendant acquiesced to counsel's strategy.

Here, as set forth in more detail below, *Nixon* and *Anderson* do not apply because trial counsel conceded that Roblero was guilty of non-capital charges – two of the charged counts and of six lesser included offenses – without Roblero's consent.

C. The California Supreme Court Decision is Contrary to *Strickland* and *Cronic*

The district court reviewed the state court decisions denying Roblero's claims and held that it was "unclear whether any of the state decisions can be properly considered a reasoned decision and as to which claims." I ER 10. The district court therefore independently reviewed the record to determine whether the state court decision was objectively unreasonable. *Id*.

The state court's summary denials are contrary to *Strickland* and *Cronic* because no reasonable jurist under the circumstances could have held that trial counsel had not overrided

Roblero's plea of not guilty and abandoned his role as Roblero's advocate. Trial counsel conceded Roblero's guilt on the charges of oral copulation with a person under the age of 18 and penetration with a foreign object of a person under the age of 18. He also argued that, as to the six counts of molesting a child under the age of 14, Roblero was guilty of lesser included offenses of simple assault. II ER 94-95, 114-115.

Counsel explicitly asked the jury to convict Roblero of oral copulation of a minor. II ER 95. Counsel also argued that the jury should not "waste" time considering whether Roblero was guilty of penetration of a minor with a foreign object because, counsel said, the prosecutor had proved the elements of the offense beyond a reasonable doubt. II ER 94-95. Because counsel conceded Roblero's guilt without his consent, the convictions are the functional equivalent of forced guilty pleas.

For the same reasons, counsel was deficient when he conceded that Roblero was guilty of the lesser included offenses of simple assault as to the six charges of molesting a child under the age of 14. As to the counts involving Jane Doe No. 2, counsel argued that there was insufficient proof that she was under age 14 at the time of the offenses. As to Jane Doe No. 1, counsel contested the element of sexual intent. II ER 95-115.

However, counsel should have made those arguments without urging the jury to convict Roblero of the lesser included offense of simple assault. While Roblero admitted that he touched Jane Doe No. 1 and Jane Doe No. 2, counsel conceded that the touching was done in a harmful or offensive manner, which is an essential element of the crime of simple assault. CT 266; Cal. Penal Code § 240. II ER 114-115. Again, counsel's arguments amounted to forced guilty pleas because counsel conceded Roblero's guilt without his consent.

D. Prejudice Must Be Presumed, Because Counsel's Concession of Roblero's Guilt Was a Breakdown of the Adversarial Process

In *Cronic*, the Supreme Court recognized that "[t]here are... circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Cronic*, 466 U.S. at p. 658. If the trial "process [has lost] its character as a confrontation between adversaries"; then "the constitutional guarantee [of the right to counsel] is violated." *Id*., at pp. 656-657. Under those circumstances, the petitioner need not demonstrate actual prejudice. *Rickman v. Bell*, 131 F.3d 1150, 1155 (6th Cir. 1977)(defense counsel's repeated expressions of hostility toward his client and failure to advocate for him required presumption of prejudice); *United States v. Williamson*, 53 F.3d 1500, 1511 (10th Cir. 1995) ("admission by counsel of his client's guilt to the jury" is a "paradigmatic example of the sort of breakdown in the adversarial process that triggers a presumption of prejudice").

Accordingly, when, as in this case, defense counsel concedes his client's guilt without the client's express consent, there is a breakdown in the adversary process such that *Strickland* prejudice is presumed. This case is comparable to *Rickman* and *Swanson*, because defense counsel's concession that Roblero was guilty as to two of the charged counts and six lesser included offenses was professionally unreasonable. *Rickman*, 131 F.3d at 1155; *Swanson*, 943 F.2d at 1074. Because counsel had ceased to function as an adversary, prejudice is presumed and Roblero should receive a new trial.

E. In the Alternative, The Error Was Prejudicial Because Counsel's Conduct Aligning Himself With The Prosecution Must Have Influenced the Jury's Verdicts

As set forth in more detail above, Roblero maintains that his trial counsel's arguments conceding his guilt are presumed prejudicial. However, even if Roblero must show a reasonable

likelihood of a different result at trial, his claim should be granted. Defense counsel's concession that Roblero had unlawfully engaged in oral copulation and penetration with a foreign object with Jane Doe No. 2 when she was under the age of 18 was prejudicial because defense counsel could have raised a defense that Roblero believed she was 18 at the time of those offenses.

Both of those charges were based on Roblero's admission that he had engaged in sexual penetration and oral copulation with Jane Doe No. 2. To establish the elements of those offenses, the prosecutor was also required to show that Jane Doe No. 2 was under 18 at the time of the charged acts. Jane Doe No. 2 testified that the acts occurred when she was between the ages of 14 and 16. 1 RT 48-50.

However, under California law, a good faith belief that a minor (over the age of 14) was 18 or older at the time of the charged incident is a defense to the two charges that were conceded by defense counsel. *People v. Hernandez*, 61 Cal.2d 529, 536 (1964). In *Hernandez*, the defendant was charged with the statutory rape of a girl three months short of her 18th birthday. The California Supreme Court held that it was reversible error to refuse to allow the defendant to present evidence of a good faith, reasonable belief that the complaining witness was over 18, holding that if the defendant reasonably believed she was over 18, then the essential element of criminal intent is missing. *Id*., at pp. 534-536.

A subsequent case, relying on *Hernandez*, held that a reasonable mistake as to age is a valid defense to oral copulation with a person under 18 (sec. 288a, subd.(b)). *People v. Peterson*, 126 Cal.App.3d 396, 397 (1981).

During Roblero's police interview, he conceded that Jane Doe No. 2 was about sixteen years old when that conduct first occurred. II ER 153-154. However, he insisted that "for a long

time, I thought [Jane Doe No. 2] was older than she was" II ER 140. Although Jane Doe No. 1 and Jane Doe No. 2 were friends, Jane Doe No. 2 was about five years older than Jane Doe No. 1. RT 27, 61, 716. There was no testimony that anyone told Roblero how old Jane Doe No. 2 was at the time of the charged incidents.

Based on Roblero's statements to police, defense counsel could have argued that there was reasonable doubt as to whether Roblero thought that Jane Doe No. 2 was 18 or older at the time of the incidents that formed the basis for the charges of digital penetration and oral copulation of a person under the age of 18.

Accordingly, this was not a case where there was no basis to challenge the elements of those offenses.

Instead of arguing that there was a reasonable doubt as to whether Roblero was mistaken as to Jane Doe No. 2's age, defense counsel told the jury "Don't waste any time on it" and " I'm asking you to convict him of sexual penetration with a person under 18" and "I'm asking you to convict him of oral copulation with a person under the age of 18 because he committed that horrible offense with Jane Doe No. 2. That's true, so let's move on." II ER 94-95.

Counsel's decision to align himself with the prosecution during closing argument must have also tainted the jury's consideration of the defense theories that counsel himself chose to present. Counsel argued that the prosecutor had failed to prove that Jane Doe No. 2 was under the age of 14 when Roblero first touched her breasts during the "shed building" encounter in his garage. II ER 99-100.

Jane Doe No. 2's testimony as to her age at that time was equivocal. She admitted that she told the investigating police officer that the incident probably occurred when she was 13 or 14

but that she was not sure. I RT 56-58. Ultimately, counsel's argument that his client had committed a horrible offense against the same complaining witness and his statement that the jury should not waste any time before convicting him of it, must have tainted the jury's consideration of his argument that the prosecutor had failed to prove she was under the age of 14 when Roblero first molested her.

For the same reasons, counsel's concessions undermined his own argument that Roblero did not touch Jane Doe No. 1 with sexual intent. During Roblero's police interview, he repeatedly denied that he had touched Jane Doe No. 1 sexually, because she was his step daughter. I CT 138, 139, 142. While later in the interview, Roblero had admitted that he had done that, defense counsel argued that those admissions were unreliable and coerced. Defense counsel pointed out that Roblero had denied molesting Jane Doe No. 1 "nineteen times" during the interview and then falsely said he did because he was pressured to do so by the investigating officer. II ER 106-110.

Counsel argued there were other reasons to doubt that the touching of Jane Doe No. 1 was done with sexual intent. On cross examination, Jane Doe No. 1 testified that when the touching occurred, it had sometimes happened when she and Roblero were wrestling or when he was hugging her. Also, some of the incidents had occurred in front of other people. 1 RT 734-736.

In summary, there were arguable defense theories as to charged counts. Defense counsel's decision to concede Roblero's guilt as to oral copulation and digital penetration of a minor and to urge the jury to convict Roblero was prejudicial under any standard. The jury could not have given fair consideration to the defense theories when defense counsel himself urged the jurors

not to "waste time" considering the elements of two of the offenses. For all of these reasons, the errors were prejudicial and this Court should grant certiorari and grant the writ.

CONCLUSION

For the reasons stated above, this Court should grant certiorari and grant the writ.

Dated: March 5, 2018.

Respectfully submitted,

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