No._____

IN THE SUPREME COURT OF THE UNITED STATES

JUAN PETITIONER
Petitioner,

v.

SCOTT FRAUENHEIM, Warden
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

Petitioner, Juan Petitioner, 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The Ninth Circuit Court of Appeals affirmed the district court's denial of habeas corpus relief in an unpublished decision. App. 1. [1] The order and judgment of the district court denying petitioner's habeas petition are unreported. App. 7.

The California Court of Appeal affirmed Petitioner's conviction and sentence in an unpublished decision. App. 19. The California Supreme Court denied review

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[1] "App" refers to the Appendix attached to this petition. "ER" refers to the Petitioner's Excerpts of Record filed in the Court of Appeals for the Ninth Circuit. "RT" refers to the reporter's transcript of the state Court of Appeal proceedings and

in an unpublished order. App. 18.

JURISDICTION

The final judgment of the Ninth Circuit Court of Appeals was entered on March 15, 2022. App. 1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

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."

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "in all criminal prosecutions" the defendant shall have the right to the assistance of counsel."

STATEMENT OF THE CASE

A. State Court Proceedings

On November 5, 2015, Petitioner was charged by information with one count of intercourse with a child age ten years or younger, pursuant to California Penal Code § 288.7(a), and three counts of oral copulation of a child age ten years or younger pursuant to California Penal Code § 288.7(b). CT 73-76.

On March 9, 2016, a jury found Petitioner guilty of the charged counts. CT 147-149. On April 1, 2016, the trial court sentenced Petitioner to 70 years to life in prison. ER-27; CT 181.

"CT" refers to the Clerk's Transcript.

On August 31, 2017, the California Court of Appeal affirmed the judgment. ER-17. The California Supreme Court denied Petitioner's petition for review on November 15, 2017. ER-16.

B. Federal Court Proceedings

On May 22, 2018, Petitioner filed a petition for a writ of habeas corpus in the federal district court. CR 1. The district court denied the petition on December 18, 2019. ER-5. On the same date, the district court declined to grant a certificate of appealability. ER-5.

On April 20, 2021, the Ninth Circuit Court of Appeals issued an order granting a certificate of appealability and appointing counsel. ER-3. On March 15, 2022, the Ninth Circuit affirmed the judgment of the district court. App. 1.

STATEMENT OF FACTS

A. Background

The petitioner, Juan Gomez, was in a cohabiting relationship and had a child in common with Marycruz Doe. 1 RT 51-52. Petitioner was about thirty-one years old at the time of the charged events. 2 RT 53.

L.D., the complaining witness, was Marycruz Doe's daughter from a previous relationship. Petitioner moved into a house in San Jose with Marycruz Doe and L.D. when L.D. was 6 or 7 years old. 2 RT 51, 53. At the time of the charged events, L.D. was about eight years old and she was in the third grade. 2 RT 61-63.

B. L.D.'s trial testimony

L.D. testified that the first time petitioner molested her, she had been sitting in their living room in their apartment on Loma Verde Avenue, watching television and waiting for petitioner to take her to a ballet practice. 2 RT 61-63, 71.

When petitioner came into the room, L.D. looked at him and he looked at her. Without saying anything, L.D. got down on the floor and pulled her pants down. According to L.D., petitioner did not tell her to take off her clothes. 2 RT 63.

Petitioner licked her vagina for about five minutes. He was interrupted when one of L.D.'s friends knocked on the front door. L.D. put her clothes back on, opened the door and spoke to her friend, who did not come inside the apartment. Her friend had wanted to play but L.D. said that she was going to ballet class. Petitioner then took L.D. to the class. 2 RT 64-65

The second incident occurred on a day that L.D. and petitioner had been swimming at a local pool. When asked if petitioner had molested her that day, L.D. initially said she could not remember. 2 RT 67. When prompted by the prosecutor, she then testified that, without saying anything, petitioner had again licked her vagina. She was not wearing any underwear. Petitioner licked her vagina for about three minutes. 2 RT 67-68.

The third incident, which occurred when L.D. was still about eight years old, happened at their home. L.D. had been lying on the floor wearing leggings and a shirt. petitioner took off his pants and underwear. L.D. removed her leggings about

half way. She could not remember if he said anything, but he put his penis on her vagina. 2 RT 69-70.

When asked if petitioner had put his penis inside her vagina, she replied "Well, not all the way inside. Like, just from the outside." 2 RT 70. She told petitioner not to put it in all the way because it hurt. Id. Then, he stopped and just rubbed his penis on the outside of her vagina for about five minutes. White stuff came out and his penis was sticky. When asked if the white stuff was on her vagina, L.D. replied "I don't think so." 2 RT 70. When prompted by the prosecutor, L.D. replied "probably" "a little." *Id*.

L.D. also said that petitioner had showed her pornographic videos while they were living on Loma Verde Avenue. In one of the videos, there was a naked girl walking through a jail and then all of sudden all of the men got on top of her. 2 RT 72 .

The following year, when L.D. was in the fourth grade, the family moved to a one bedroom apartment on Cadillac Street. One day in June of that year, L.D. had stayed at home because she was sick. L.D.'s mother went to get some soup and Petitioner stayed at home with L.D., who was in bed wearing a pair of leggings and a shirt. 2 RT 55-57.

After L.D.'s mother had been gone for a few minutes, Petitioner put a wet towel on L.D.'s forehead. He then asked if he could put a towel on her vagina and whether he could lick her vagina. L.D. said "yes." Then, petitioner pulled down her

leggings and underwear and licked her vagina for about seven minutes. He was kneeling on the floor when he did that. 2 RT 56-59.

When they heard L.D.'s mother come back into the house, petitioner got up quickly. He told L.D. "Don't tell your Mom." L.D. did not tell her mother what happened because she was worried that petitioner and her mother might fight. 2 RT 60.

About a week later, petitioner did the same thing. L.D. could not recall the details of that incident. However, she testified that he licked her vagina but not in the same way that he had when she was home sick. 2 RT 50.

There was another incident that occurred when the family was still living in the apartment on Cadillac Street. On that date, L.D. had been sleeping next to her mother when she felt petitioner touch her. 2 RT 80.

When L.D. was in the fifth grade, she was sent to a school counselor because she was in trouble. According to L.D., petitioner had "told on" her and she was angry at him. 2 RT 81. Also, L.D. had decided that she did not want petitioner to touch her anymore. She told the counselor what petitioner had been doing to her. The counselor told the police. 2 RT 80-82.

On cross examination, L.D. admitted that she had not been honest with the police when she told them about an incident where she claimed she saw a pornographic image on her grandmother's phone. When asked if she had lied to the police about that, L.D. replied "Well, probably I did." 2 RT 82.

L.D. also agreed that it was "fair to say" that some of the things she said petitioner had done to her had not happened. 2 RT 83. However, some "bad things" did happen. Id.

L.D. recalled a conversation she had with the prosecutor during a break in her testimony at the preliminary hearing in this case. On that date, L.D. had testified that petitioner had touched her vagina with his hand and mouth but did not touch it with his penis. During the break, the prosecutor had asked L.D. why she was not telling the truth. The prosecutor had also said it was important for her to tell the truth. L.D. had replied that she did not want petitioner to go to jail for a long time. 2 RT 83-84.

After that conversation during the break in the preliminary hearing, L.D. had told the truth. She had then testified that petitioner had licked her vagina before the ballet practice and when she had been home sick. He also did that once when they came back from swimming. She also described the incident where petitioner had put his penis in her vagina and ejaculated. 2 RT 84-85.

C. Testimony about petitioner's police interview

Petitioner was interviewed by two police detectives on February 28, 2015. One of the detectives acted as a translator as the interview took place in Spanish. Initially, petitioner denied that he had even been alone with L.D. He insisted that she had fabricated her allegations against him because she had been disciplined for twisting her younger sister's arm. ER-38-39

The officers decided to lie to Petitioner as part of their interrogation strategy. They told him that there had been a DNA examination that showed that his DNA had been found in L.D.'s vagina. After that, etitioner said that he may have tickled L.D.'s vagina with his finger. He said that L.D. had asked him to do that because he did it to her mother. ER-40-41.

Petitioner admitted that he had orally copulated L.D., which he described as tickling her vagina with his tongue. He also admitted touching her vagina when she had been home sick. He also admitted that he had ejaculated near L.D.'s vagina but denied that he had ever penetrated her vagina with his penis. ER-40-44.

Petitioner also said that he had caught L.D. watching pornography on television and had either scolded her or told his wife about that. 2 RT 96.

In total, petitioner admitted to touching L.D.'s vagina one or two times and orally copulating her once. He also admitted he had ejaculated near her vagina but denied that he had placed his penis in or near her vagina. ER 44-46-47. He said that he had been using alcohol and drugs when the incidents occurred. He also wrote a letter of apology to L.D.'s mother. ER-47.

D. Defense counsel's closing argument

During closing argument, defense counsel conceded that petitioner was guilty of three counts of oral copulation of L.D. Counsel began her argument by stating "I'm sure you are asking yourself why are we here?" If there were admissions, why? Why are we here? Why? ER-32. She then said that she could answer that question for the jury. ER-32.

Counsel then said that she knew that the jurors "great dislike[d] – and that's probably putting it mildly – Mr. Gomez And that's OK because of the admissions that you heard that came from him and the conduct that he did." ER-32.

Defense counsel continued: "So the question is why are we here. Well, he is charged with four counts. And he admitted to three. He admitted three counts. He did not admit count 1. And that was the sexual penetration." ER-33.

Counsel continued with her argument, emphasizing petitioner's guilt. She argued, again, "why does it matter?" and also emphasized that the jurors may have been finding it "difficult to believe" he was not guilty of the charge of intercourse with a minor "in light of what he has said." Counsel said "bad things happened to [L.D.] and that "Mr. Gomez admitted what he did." ER-34.

Counsel emphasized that petitioner must not have wanted to admit what he did, but that "he did" admit it. ER 33. She argued that "we can be moved by our anger towards him, our revulsion because he did this." ER 33.

Counsel later emphasized, again, that finding that petitioner did not commit the charge of intercourse with a minor was going to be "a very difficult task to be asked in light of the fact that there are admissions." ER-33.

After further discussing L.D.'s testimony, counsel argued that petitioner "touched [L.D.] twice" and that he "orally copulated her." She said "he's guilty of that." Counsel then asked the jury to find petitioner guilty of counts 2, 3 and 4, which were the oral copulation counts. She asked that the jury acquit him of count 1, which was the charge of intercourse with a minor under age 10. ER-34.

E. The California Court of Appeal decision

The California Court of Appeal held that trial counsel's decision as to how to argue a case to the jury is "inherently tactical." ER-20. The Court of Appeal acknowledged that a defense attorney may not argue against her client's interests. The Court of Appeal also recognized that conceding a client's guilt without a reasonable tactical basis "can constitute ineffective assistance of counsel." ER-20. However the Court held that it is "not necessarily incompetent" for an attorney to concede a client's guilt as to a particular offense. ER-20.

The Court of Appeal held that it need not decide whether defense counsel's performance in this case was professionally unreasonable because, it held, Petitioner could not show prejudice. ER-21. The Court of Appeal held that the only viable defense strategy was to challenge the victim's credibility. It held that the jury had credited the victim's testimony as to Count 1, the charge of intercourse with a minor, and so it must have found the victim credible. Accordingly, the Court of Appeal held that petitioner had failed to establish that he was prejudiced by trial counsel's concessions. ER-21.

F. The Ninth Circuit Court of Appeals Decision

In the Ninth Circuit Court of Appeals, petitioner argued that he was deprived of his right to counsel pursuant to this Court's decision in *United States v. Cronic*, 466 U.S. 648 (1984). The Ninth Circuit held that petitioner had failed to properly raise his *Cronic* claim prior to his appellate briefing. App. 2. The memorandum decision acknowledges that petitioner cited to *Cronic* in his state and district court

brief, but concluded that the reference to *Cronic* was a "throwaway" citation to support a general point. App. 2-3.

As for Petitioner's claim that his trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984) when she conceded his guilt at trial, the Ninth Circuit held that counsel's conduct was not objectively unreasonable. The decision reasoned that a trial lawyer may properly concede a client's guilt as to lesser offenses to avoid a guilty verdict as to a more serious offense. App. pp. 3-4. The Court of Appeals also concluded that there was a reasonable argument that trial counsel's concessions were not prejudicial. App. 4. Accordingly, the Court of Appeals affirmed the judgment of the district court.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant Certiorari Because the Ninth Circuit's Decision That Petitioner's *Cronic* Claim Was Unexhausted is Contrary to This Court's Decisions Holding That Petitioner Must Give the State Courts a "Fair Opportunity" to Rule on a Federal Claim

A federal court may grant habeas relief to a state prisoner if "it appears that the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A).

This Court should grant certiorari to clarify the standard for exhaustion of a federal claim in state court. In this case, the Ninth Circuit Court of Appeals found that a petitioner was required to do more than state facts and cite the controlling United States Supreme Court case (*United States v. Cronic* 466 U.S. 648 (1984) to fully exhaust his *Cronic* claim. The Ninth Circuit's novel holding that it may

disregard the petitioner's citation to authority by labeling it a "throwaway" is contrary to this Court's decisions setting forth the standard for exhaustion of federal constitutional claims in state courts.

Exhaustion under § 2254 requires only that state prisoners give state courts a "fair opportunity" to act on their claims. *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999). Therefore, a federal court must consider only whether a habeas petitioner adequately exhausted state remedies by fairly presenting the factual and legal premises for his federal claim to the state courts. 28 U.S.C. § 2254(b)(1); *Baldwin v. Reese*, 541 U.S. 27, 30-34 (2004).

In this case, the Ninth Circuit panel acknowledged that petitioner's briefing in the state courts and the federal district court "did cite *Cronic* once," but held that was "a throwaway citation to support a general point about the Sixth Amendment and not *Cronic's* presumption of prejudice." App. 2-3.

This Court should grant certiorari to clarify that citation to the controlling federal authority is sufficient to exhaust a constitutional claim. The Ninth Circuit's decision should be reversed as it is contrary to this Court's decisions concerning a petitioner's duty to exhaust his federal claims in state court.

To exhaust, a petitioner must present, in State court, only the "substantial equivalent" of the federal claim, *Picard v. Connor*, 404 U.S. 270, 278 (1971), so as to give the State "a 'fair opportunity' to apply controlling legal principles to the facts bearing upon" the claim, *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam) (quoting and citing *Picard*, 404 U.S. at 276-77). The State petition "must include

reference to a specific federal constitutional guarantee, as well as a statement of the facts that entitle the petitioner to relief" - or, in other words, "the facts necessary to state a claim." *Gray v. Netherland*, 518 U.S. 152, 162-63 (1996).

The Ninth Circuit decision in this case is contrary to this Court's precedents because a defendant may "fairly present" the substance of a federal constitutional claim to the state court without citing "book and verse on the federal constitution." *Picard*, 404 U.S. at 278. A claim is "fairly presented" even when it is supported by varying legal arguments in the state courts. *Sanders v United States*, 373 U.S. 1, 16 (1963) What is important is that the state courts are given arguments that place them on notice of the elements of the subject claim. *Wells v Maass*, 28 F.3d 1005, 1008-1009 (1st Cir. 1994).

Contrary to the Ninth Circuit's decision in this case, the requirement that the state court be given a reasonable opportunity to pass on the federal habeas claim is therefore satisfied if the legal basis of the claim made in state court was the "substantial equivalent" of that of the habeas claim. *Picard*, 404 U.S. at 278; *see also Ulster County Court v. Allen*, 442 U.S. 140, 147-48 n. 5 (1979).

The Ninth Circuit decision in this case fails to recognize that petitioner's statement of facts and his legal arguments that his counsel was ineffective, along with his citation to *Cronic*, were sufficient to exhaust his *Cronic* claim under this Court's precedents. Because petitioner cited to the *Cronic* decision, he was not required to use the phrase "presumption of prejudice" to exhaust his *Cronic* claim. Under this Court's precedents, petitioner exhausted his Cronic claim because he

presented the substance of his claim to the state courts. *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986).

This case presents an exceptional opportunity to clarify the standard for state court exhaustion. Because of the recurring nature and importance of this question, certiorari should be granted.

II. This Court Should Grant Certiorari Because the Ninth Circuit Decision That the State Court Reasonably Concluded That Defense Counsel's False Concession of Guilt Was Not Prejudicial Is Contrary to This Court's Precedents Concerning the Sixth Amendment Right to Effective Assistance of Counsel

The Ninth Circuit affirmed the district court's denial of petitioner's claim that his trial counsel was ineffective when she falsely conceded his guilt at trial, on grounds that there was a reasonable argument that that counsel's false concession was not prejudicial. App. 3-4.

This Court should accept certiorari because the decisions below go too far in extending latitude to the strategic decisions of a trial lawyer. A lawyer's discretion to concede a client's guilt for tactical reasons should not constitutionally include the option to falsely concede a client's guilt as counsel did in this case.

This Court has held that there are certain fundamental decisions that only a criminal defendant can make, including the decision to plead guilty or to go to trial. *Jones v. Barnes*, 463 U.S. 745, 751 (1983). When a defendant chooses to go to trial and to maintain his innocence as to the charged counts, his defense counsel should not be permitted to override that decision by falsely conceding his guilt at trial. Allowing such conduct undermines the crucial role of defense counsel as the client's

advocate and agent as required by *Strickland* and its progeny.

Trial counsel violated petitioner's right to effective assistance of counsel when she conceded his guilt as to all three charged counts of oral copulation of a child. Petitioner had entered pleas of not guilty to all of the charges. His lawyer's failure to honor that decision and to instead argue that petitioner was guilty violated his right to counsel under the Supreme Court decisions in *Strickland v. Washington* 466 U.S. 668 (1984) and *United States v. Cronic*, 466 U.S. 648 (1984).

The Ninth Circuit reasoned that a defense attorney "may find it advantageous" to concede a client's guilt under some circumstances. However, there are no circumstances where a defense attorney should be permitted to falsely concede a client's guilt. There are no cases that so hold because such conduct is fundamentally contrary to an attorney's duty to advocate for her client.

The circumstances under which an attorney may tactically concede a client's guilt must be confined to circumstances where there is an honest factual basis for defense counsel's concession. To hold otherwise, as in this case, excuses defense counsel not only from her constitutional duty to advocate for her client but also from her ethical duty of candor to the court. Because this case concerns fundamental and important questions concerning the right to counsel and the scope of a defense attorney's authority to concede a client's guilt at trial, certiorari should be granted.

Argument

I. Trial counsel violated Petitioner's right to effective assistance of counsel when she conceded his guilt of three counts of oral copulation of a minor

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, such as this, 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 a defendant's counsel has ceased to act as an advocate for the defense, 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." *[Citation]*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).

In short, where defense counsel's conduct creates an actual breakdown in the adversarial process at trial, prejudice is presumed. *Toomey,* 898 F.2d at 743 n.2.

For example, in *United States v. Swanson*, 943 F. 2d 1070, 1074 (9th Cir. 1991), a defense attorney had argued at trial that the evidence against his client was "overwhelming" and that counsel would not "insult [the jury's] intelligence" by advocating for an acquittal. This Court held that counsel's conduct was an "abandonment" of the defense of his client at a critical stage of the criminal proceedings."*Swanson*, 943 F.2d at 1074.

Cases where there is strong evidence are not exempt from the rule that defense counsel must advocate for his or her client. *Cronic* held that "even when no theory of defense is available . . . counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt." *Cronic*, 466 U.S. at p. 657, fn. 19.

Accordingly, when, as in this case, a defendant has entered a plea of not guilty and elected to go to trial, defense counsel must make a bona fide effort to make any available arguments that advance the defendant's case and undermine that of the prosecution. Counsel may not simply concede the defendant's guilt or

side with the prosecution. *Id*.

B. Petitioner's lawyer was ineffective when she told the jury that he was guilty of three counts of oral copulation of a minor because she violated his right to control the objectives of his defense

It is the defendant, and not defense counsel, who controls the decision 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 her client's right 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).

There is a limited exception to this rule, which 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. [1]

Here, *Nixon* and *Anderson* do not apply because trial counsel conceded that petitioner was guilty of non-capital charges –three counts of oral copulation of a minor– without petitioner's express consent. Accordingly, counsel was prejudicially ineffective when she admitted petitioner's guilt because she violated his right to control the objectives of his defense. *Brookhart* at 7.

Petitioner's trial counsel abandoned him at a critical stage of the trial, the closing arguments, when she told the jury that petitioner had admitted to three counts of oral copulation of a child and that he was guilty of those offenses. Because petitioner had entered pleas of not guilty and elected to go to trial, counsel had a constitutional duty to make any bona fide arguments that could have advanced his case and undermined the testimony of L.D. and the police officer witness. *Cronic*,

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[1] After Petitioner's direct appeal was complete, the Supreme Court decided another capital case, *McCoy v. Louisiana*, No. 16-8255, cert granted 138 S.Ct. 53 (Sept. 28, 2017) where it held that defendants have a Sixth Amendment right to choose the objectives of their defense. *McCoy v. Louisiana,* 584 U.S. ___, 138 S. Ct. 1500 (2018).

466 U.S. at 656-57.

Instead council inexplicably chose to concede petitioner's guilt and side with the prosecution. Counsel repeatedly argued "why are we here?" suggesting that there was no question as to petitioner's guilt and that the entire trial was a waste of time. ER-32. She also suggested that the lawyers, the jury and everyone present in the courtroom would be so moved by their anger, revulsion and dislike for petitioner, that it would be difficult to objectively weigh the evidence as to the most serious count. ER-33.

Defense counsel not only emotionally aligned herself with the prosecutor, she also argued forcefully that petitioner was guilty of three of the four contested counts. Those comments were comparable to the ones by defense counsel in *Swanson*, where he argued that the evidence was overwhelming and that he would not insult the jury's intelligence by an arguing for an acquittal. *Swanson*, 943 F. 2d at 1074. In both cases, counsel's arguments amounted to an abandonment of the defendant by his lawyer during a critical stage of the trial.

Defense counsel is not entirely precluded from making selective tactical concessions during argument. However, courts have distinguished between a bona fide tactical concession and conduct that amounts to a 'surrender of the sword.'" *Messer v. Kemp*, 760 F.2d 1080, 1090 n. 6 (11th Cir. 1985). The *Messer* court emphasized that "[I]t is a 'complete concession of the defendant's guilt' which constitutes ineffective assistance of counsel." *Messer*, 760 F.2d at 1090 n. 6 *citing*

Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983), cert. denied, 470 U.S. 1059 (1985)). In this case, because defense counsel conceded petitioner's guilt as to three of the four contested charges, her conduct was not tactical.

In summary, when petitioner's counsel conceded his guilt of three counts of oral copulation, the trial process lost its character as a confrontation between adversaries. Because trial counsel abandoned petitioner at a critical stage of the trial, her conduct was both ineffective and prejudicial per se under *Strickland* and *Cronic*.

This case is even more egregious than other cases where a defense lawyer concedes guilt, because counsel's concession was objectively inaccurate. As set forth in more detail below, counsel repeatedly told the jury that the reason she was conceding petitioner's guilt as to three counts of oral copulation of a minor is because he had confessed to those three counts. However, viewed objectively and assuming the police testimony was accurate, petitioner had admitted to only one count. ER-45.

C. Trial counsel was ineffective when she conceded petitioner's guilt as to three counts of oral copulation because she falsely told the jury that he had confessed to all of those charges

"Deficient performance" under *Strickland* is representation falling below professional norms prevailing at the time of trial. *See Strickland*, 466 U.S. at 688–89, 104 S.Ct. 2052. To show "deficient performance," petitioner must overcome a "strong presumption" that his lawyer "rendered adequate assistance and made all

significant decisions in the exercise of reasonable professional judgment." *Id*. at 690. Further, petitioner "must identify the acts or omissions of counsel" that are alleged to have been deficient. *Id*.

Here, petitioner was charged with three counts of oral copulation of a child under ten years old. [2] The elements of oral copulation of a child 10 years of age or younger (§ 288.7, subd. (b)) are: (1) The defendant engaged in an act of oral copulation with the victim; (2) when the defendant did so, the victim was 10 years of age or younger; and (3) at the time of the act, the defendant was at least 18 years old. *People v. Mendoza*, 240 Cal.App.4th 72, 79-80 (2015).

Oral copulation is defined as any contact, no matter how slight, between the mouth of one person and the sexual organ of another. Penetration is not required. *Mendoza*, 240 Cal.App.4th at p. 79-80. The penalty for that offense is 15 years to life. Cal. Penal Code § 288.7(b).

California Penal Code § 288 defines the alternate lesser offense of lewd or lascivious acts on a child. That section has two elements: (a) the touching of the body of a child under age 14; (b) with a sexual intent. *United States v. Baron–Medina*, 187 F.3d 1144, 1147 (9th Cir. 1999) *citing People v. Martinez*, 11 Cal.4th 434, 442 (1995). The penalty for that offense is either 3, 6 or 8 years in prison. Cal. Penal Code § 288 (a).

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[2] The statute, California Penal Code § 288.7(b) prohibits oral copulation or sexual penetration of a child under ten. However, the jury was instructed only as to oral copulation as to counts 2, 3 and 4. ER-28.

Here, a police officer witness testified that petitioner had admitted to orally copulating L.D. once and touching her with sexual intent two times. ER-45. Under those circumstances, no reasonable defense attorney would have chosen to argue, as defense counsel did, that petitioner had admitted to committing three counts of oral copulation of a child.

Oral copulation of a child is a more serious offense than lewd or lascivious acts under California Penal Code § 288. The penalty for oral copulation is 15 year to life and the penalty for lewd or lascivious acts is only 3, 6 or 8 years. No reasonable defense attorney would have argued that petitioner had confessed to all three counts of the more serious crime when his statements, viewed objectively, were admissions to one count of oral copulation and two counts of lewd or lascivious acts.

Moreover, there could not have been any reasonable tactical basis for defense counsel's argument that petitioner had admitted three counts of oral copulation, even independent of his alleged statements to the police officers. L.D. admitted that she had exaggerated her account of the charged incidents at times, that she had lied to the police about alleged pornography on her grandmother's phone, and that not everything she had reported about the charged incidents was true. 2 RT 81-83.

Moreover, L.D. had reported petitioner's conduct to a school counselor during a meeting where she was in trouble for acting out and she was angry at petitioner. 2 RT 80-83. Defense counsel could have pointed to all of these facts to support an argument that there was a reasonable doubt as to all of the charged counts.

Finally, it is unclear how petitioner's alleged statements to the police were recorded. The clerk's transcript includes only a summary written by a police detective. ER 50. The officer who testified at trial said he had a transcript of petitioner's statements but there was no recording played for the jury at trial. ER-46. If it was recorded, the prosecutor should have played the recording for the jury.

Under these circumstances, where there were flaws in the prosecution's case and where there was no evidence that petitioner had confessed to all three oral copulation charges, no reasonable defense attorney could have made a tactical decision to argue, incorrectly, that petitioner had confessed to three counts of oral copulation of a minor. At minimum, defense counsel should have argued that if the police testimony about his statements was accurate, he was guilty of one count of oral copulation and two counts of the lesser related offense of lewd or lascivious acts on a child under age 14, under California Penal Code § 288.

For all of these reasons, defense counsel's decision to argue to the jury that petitioner had confessed to three counts of oral copulation of a minor under age 10 was professionally unreasonable. Because counsel's statements were extraordinarily damaging to petitioner's defense and because they were not true, this was not a reasonable tactical concession.

D. Prejudice must be presumed, because defense counsel's argument that Petitioner was guilty 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 her client's guilt without the client's express consent, there is a breakdown in the adversary process such that *Strickland* prejudice is presumed. Accordingly, Petitioner should receive a new trial.

E. This Court should not defer to the Court of Appeal decision because it unreasonably applied *Strickland* and unreasonably determined the facts

The last reasoned decision is that of the California Court of Appeal, which denied Petitioner's claim on grounds that he could not show prejudice due to counsel's errors. ER-21.

The state court's decision is contrary to *Strickland* and unreasonably determines the facts under 28 U.S.C. §§ 2254 (d)(1) and (2) because no reasonable jurist under the circumstances could have found that petitioner was not prejudiced by trial counsel's concessions. First, as set forth in more detail above, a showing of prejudice was not required under *Cronic* because counsel had both abandoned her role as petitioner's advocate and overrode his decision to plead not guilty. Moreover, even if a showing of prejudice was required, petitioner was prejudiced because counsel falsely argued that he had confessed to three counts of oral copulation of a minor. If the police testimony was accurate, petitioner had confessed to one count of oral copulation and two counts of the lesser related offense of sexual touching of a minor.

Counsel argued that petitioner was not guilty of Count 1, sexual intercourse with a minor under age 10. However, counsel should have made that argument without urging the jury to convict petitioner of three charges of oral copulation of minor. Counsel's argument that petitioner had committed those three offenses weighed against a finding of not guilty as to the most serious charge. Counsel

herself acknowledged that point when she said that the jury would find it difficult to acquit on Count 1 given her argument that he was guilty of the three oral copulation counts. ER-33-34.

In summary, this Court should not defer to the Court of Appeal decision finding that petitioner did not prove prejudice, because the decision unreasonably applied *Strickland* and unreasonably determined the facts. Defense counsel's decision to argue that her client had confessed to three serious offenses when he did not was prejudicial under any standard.

F. The AEDPA standard of review does not apply, because the Court of Appeal decision failed to apply the *Cronic* presumption of prejudice

When a state court applies a standard that is contrary to the Supreme Court's constitutional decisions, the federal court must then resolve the [constitutional] claim without the deference AEDPA otherwise requires." 28 U.S.C. § 2254 (d)(1);*Panetti v. Quarterman*, 551 U.S. 930, 948 (2007); *Deck v. Jenkins,* 768 F.3d 1015, 1024 (9th Cir. 2014).

Here, citing *Strickland* and state law, the Court of Appeal held that Petitioner was required to prove that there was a "reasonable probability" of a different result absent counsel's errors. ER-19-20 . The Court of Appeal failed to acknowledge *Cronic* and its progeny, which hold that a defendant who has been constructively abandoned by his attorney need not show prejudice. *Cronic*, 466 U.S. at 658

Because the Court of Appeal decision fails to acknowledge or apply the *Cronic* rule, this Court need not defer to its decision holding that petitioner failed to establish that counsel's error was prejudicial. *Panetti* at 948.

G. In the alternative, the error was prejudicial because defense counsel's conduct aligning herself with the prosecution must have influenced the jury's verdicts

As set forth in more detail above, petitioner maintains that his trial counsel's arguments conceding his guilt are presumed prejudicial. However, even if petitioner must show a reasonable likelihood of a different result at trial, his claim should be granted. First, defense counsel's false concession that petitioner had admitted to three counts of oral copulation of a minor was prejudicial because the jury must have credited defense counsel's statements and believed they were true. Because a defense lawyer is the client's agent, defense counsel spoke for petitioner and there is a reasonable likelihood that the jury believed that he had in fact confessed to all three counts when he did not.

In *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) the Supreme Court emphasized that "A confession is like no other evidence. Indeed, the defendant's own confession is probably the most ... damaging evidence that can be admitted against him." Here, defense counsel's false statements that Petitioner had admitted to three counts of oral copulation were the most damaging statements made during the closing arguments. ER 32-34.

Counsel's concessions were also prejudicial because they essentially precluded her from making an effective argument challenging L.D.'s credibility as to all of the counts, even though there was ample basis in the record to do that. L.D. admitted that she had sometimes exaggerated her account of the charged incidents and that sometimes she had not told the truth. 2 RT 82-83. She had lied to the police about alleged pornography on her grandmother's phone and gave inconsistent testimony at the preliminary hearing. 2 RT 82-84. Because defense counsel chose to argue, falsely, that petitioner had confessed to three counts of oral copulation, she bypassed a critical opportunity to point out flaws in the prosecution's case.

Instead of arguing that there was a reasonable doubt as to whether petitioner had committed any of the charged offenses or that he was guilty of, at most, the lesser related offense of lewd and lascivious acts on a child, defense counsel repeatedly stated "why are we here?" and suggested that the entire trial process seemed like a waste of time. ER-32-33.

There were additional reasons that at least one juror could have found a reasonable doubt as the count of sexual intercourse with a minor. During the preliminary hearing, L.D. had initially, under oath, denied that petitioner penetrated her. 2 RT 83-84. At trial, when the prosecutor tried to elicit from her that petitioner had raped her, it was not entirely clear that there was penetration. 2 RT 70. Accordingly, there is a reasonable probability that, absent counsel's false concessions at to the oral copulation counts, at least one juror would have held a

reasonable doubt as to the most serious count.

Counsel's decision to align herself with the prosecution during closing argument undermined the jury's consideration of any defense theories that counsel could have presented. While counsel argued that petitioner had not committed the offense of sexual penetration of a child, her argument was so laced with gratuitous disparaging comments about petitioner that it could not have carried any weight.

In summary, there were arguable defense theories as to all of the charged counts. Defense counsel's decision to concede petitioner's guilt as to three counts of oral copulation of a minor and to urge the jury to convict petitioner of those counts was prejudicial under any standard. For all of these reasons, counsels errors were prejudicial and this Court should grant a conditional writ.

CONCLUSION

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

Dated:

Respectfully submitted,

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