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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUAN GOMEZ, Petitioner-Appellant, v. SCOTT FRAUENHEIM, Warden, Respondent-Appellee.	No. 20-15088 D.C. No. 3:18-cv-03021-EMC MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Edward M. Chen, District Judge, Presiding

Argued and Submitted March 9, 2022
San Francisco, California

Before: S.R. THOMAS, McKEOWN, and GOULD, Circuit Judges.

Juan Gomez seeks review of a district court judgment denying his petition for a writ of habeas corpus. We certified for appeal the question of whether Gomez's "trial counsel provided ineffective assistance by conceding guilt on all three counts of oral copulation with a child." We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. We review de novo a district court's denial of a habeas petition, *see Lopez v.*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Thompson, 202 F.3d 1110, 1116 (9th Cir. 2000) (en banc), including claims of ineffective assistance of counsel, *see Womack v. Del Papa*, 497 F.3d 998, 1002 (9th Cir. 2007). Where, as here, the district court was reviewing a state court ruling on the merits of a federal claim, we review the state court's ruling to determine whether it was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

In his appellate briefing, Gomez argues that the California Court of Appeal erred because it failed to apply the rule from *United States v. Cronic*, which holds that a "presumption of prejudice is appropriate without inquiry into the actual conduct of the trial" where there has been an effectively complete denial of counsel, such as when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." 466 U.S. 648, 659–60 (1984).

Yet Gomez failed to properly raise his *Cronic* claim prior to his appellate briefing. His federal habeas petition raised only a claim under *United States v. Strickland*, 466 U.S. 668 (1984). "It is a well-established principle that in most instances an appellant may not present arguments in the Court of Appeals that it did not properly raise in the court below." *Rothman v. Hosp. Serv. of S. Cal.*, 510 F.2d 956, 960 (9th Cir. 1975). And while Gomez's state court briefing (which was included with his federal habeas petition) did cite *Cronic* once, this was a throwaway

citation to support a general point about the Sixth Amendment and not *Cronic*'s presumption of prejudice. *Cf. Castillo v. McFadden*, 399 F.3d 993, 1003 (9th Cir. 2005) ("Exhaustion demands more than drive-by citation, detached from any articulation of an underlying federal legal theory."). The Supreme Court has made clear that the "difference" between "the rule of *Strickland* and that of *Cronic* … is not of degree but of kind," *Bell v. Cone*, 535 U.S. 685, 697 (2002), so raising *Strickland* is insufficient to properly raise *Cronic*.

Turning to Gomez's *Strickland* claim, we conclude that he cannot overcome the highly deferential standard of review. To prevail under *Strickland*, a petitioner must show that (1) "counsel's representation fell below an objective standard of reasonableness" (i.e., deficiency), 466 U.S. at 688, and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (i.e., prejudice), *id.* at 694. Yet when we review a lower court holding that there was no ineffective assistance of counsel, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking when defense counsel's performance fell below *Strickland*'s standard." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). "[T]he question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id*. at 105.

The answer to this question is yes. The California Court of Appeal concluded that Gomez's appeal fails on the prejudice prong. It relied on a line of state cases suggesting that a defense attorney may concede her client's guilt on a lesser charge as a tactical strategy to avoid a guilty verdict for the greater charge. The district court held that such a conclusion was "not unreasonable." We agree. Federal precedent echoes the state cases cited by the Court of Appeal. *See United States v. Thomas*, 417 F.3d 1053, 1058–59 (9th Cir. 2005); *United States v. Bradford*, 528 F.2d 899, 900 (9th Cir. 1975). Even in *United States v. Swanson*, on which Gomez relies heavily, we "recognize[d] that in some cases a trial attorney may find it advantageous to his client's interests to concede certain elements of an offense or his guilt of one of several charges." 943 F.2d 1070, 1075–76 (9th Cir. 1991).

In light of our precedent, there is *a* "reasonable argument" that defense counsel's concessions were non-prejudicial and that counsel thus "satisfied *Strickland*'s deferential standard" on appeal. *Harrington*, 562 U.S. at 105. Therefore, Gomez's ineffective assistance of counsel argument fails.

AFFIRMED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUAN GOMEZ, Petitioner-Appellant, v. SCOTT FRAUENHEIM, Warden, Respondent-Appellee.	No. 20-15088 D.C. No. 3:18-cv-03021-EMC Northern District of California, San Francisco ORDER

Before: GRABER and TALLMAN, Circuit Judges.

The request for a certificate of appealability (Docket Entry No. 7) is granted with respect to the following issue: whether trial counsel provided ineffective assistance by conceding guilt on all three counts of oral copulation with a child. *See* 28 U.S.C. § 2253(c)(3); *see also* 9th Cir. R. 22-1(e).

Appellant's motion for appointment of counsel (Docket Entry No. 8) is granted. *See* 18 U.S.C. § 3006A(a)(2)(B); *Weygandt v. Look*, 718 F.2d 952, 954 (9th Cir. 1983). Counsel will be appointed by separate order.

The Clerk will electronically serve this order on the appointing authority for the Northern District of California, who will locate appointed counsel. The appointing authority must send notification of the name, address, and telephone number of appointed counsel to the Clerk of this court at counselappointments@ca9.uscourts.gov within 14 days of locating counsel.

The opening brief is due July 27, 2021, the answering brief is due August 26, 2021; the optional reply brief is due within 21 days after service of the answering brief.

The Clerk will serve on appellant a copy of the "After Opening a Case – Counseled Cases" document.

If Scott Frauenheim is no longer the appropriate appellee in this case, counsel for appellee must notify this court by letter of the appropriate substitute party within 21 days of the filing date of this order. *See* Fed. R. App. P. 43(c).

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUAN GOMEZ,

Petitioner,

v.

SCOTT FRAUENHEIM,

Respondent.

Case No. 18-cv-03021-EMC

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTION

Juan Gomez filed this action for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 to challenge his conviction and sentence from Santa Clara County Superior Court. Respondent has filed an answer to the petition, and Mr. Gomez has filed a traverse. For the reasons discussed below, the petition is denied.

II. BACKGROUND

A. The Crime

The California Court of Appeal described the evidence presented at trial:

> During a one-day trial, the victim, then 11 years old, testified that defendant is her younger half-sister's father. He moved in with her and her mother when the victim was six or seven years old. She testified that once, when she was sick and her mother was out buying soup, defendant asked if he could lick her vagina. She said yes and he did so, but he quickly stopped when her mother returned. Defendant told the victim not to tell her mother about the incident. On another occasion, when the victim was about eight years old, she laid down on the living room floor, pulled down her pants, and the defendant licked her vagina. He stopped when a friend of the victim's knocked on the door. Afterwards, he took the victim to ballet class. The victim recalled a third occasion when the defendant licked her vagina after she had gone swimming. The victim also testified that defendant once put his penis in her vagina; she told him "not all the way in 'cause it hurts." He then rubbed his

> penis on the outside of her vagina and white stuff came out of it. Defendant also showed the victim pornography on the television.
>
> On cross-examination, the victim said that she was angry with defendant when she first disclosed the abuse to a counselor. She also admitted to sometimes exaggerating and agreed with defense counsel's statement that "maybe not everything that you're saying happened [actually] happened."
>
> Alejandro Ortiz, a sexual assaults detective with the San Jose Police Department, testified that he interviewed defendant following his arrest. Detective Ortiz testified that defendant admitted to touching the victim's vagina with his finger and said that "he would tickle her [vagina] with his tongue." Defendant specifically admitted to touching the victim's vagina on a day when she was home sick, although he did not say what part of his body he used to touch her on that occasion. Defendant also admitted to exposing his penis to the victim and ejaculating "in front of her or near her." Defendant denied putting his penis inside the victim. On cross-examination, defense counsel asked: "[defendant] admitted that he orally copulated [the victim] one time; correct?" Detective Ortiz responded: "I believe so, yes."

People v. Gomez, No. H043446, 2017 WL 3769628, at *1 (Cal. Ct. App. Aug. 31, 2017) (alterations in original).

B. Procedural History

Following a jury trial in Santa Clara County Superior Court, Mr. Gomez was convicted of one count of intercourse or sodomy with a child 10 years of age or younger (*see* Cal. Penal Code § 288.7(a)), and three counts of oral copulation or sexual penetration with a child 10 years of age or younger (*see* Cal. Penal Code § 288.7(b)). On April 1, 2016, Mr. Gomez was sentenced to 70 years to life in prison. *See* Docket No. 15-3 at 167-68. The sentence was comprised of a term of 25 years to life for the intercourse or sodomy with a child 10 years of age or younger (Count 1), plus three consecutive terms of 15 years to life for the three counts of oral copulation or sexual penetration with a child 10 years of age or younger (Counts 2, 3, and 4). *See id.* at 168.

Mr. Gomez appealed. The California Court of Appeal affirmed his conviction in a reasoned decision. *See Gomez*, 2017 WL 3769628, at *5. The California Supreme Court summarily denied Mr. Gomez's petition for review. Docket No. 15-15 at 2. He apparently did not file any petitions for writ of habeas corpus in the state courts.

Mr. Gomez then filed this action to obtain a federal writ of habeas corpus. His federal petition raises the lone claim that his trial attorney provided ineffective assistance of counsel by

incorrectly conceding Gomez's guilt on Counts 2, 3, and 4 during closing argument.

III. JURISDICTION AND VENUE

This Court has subject matter jurisdiction over this action for a writ of habeas corpus under 28 U.S.C. § 2254. 28 U.S.C. § 1331. This action is in the proper venue because the petition concerns the conviction and sentence of a person convicted in Santa Clara County, California, which is within this judicial district. 28 U.S.C. §§ 84, 2241(d).

IV. STANDARD OF REVIEW

This Court may entertain a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

The Antiterrorism And Effective Death Penalty Act of 1996 ("AEDPA") amended § 2254 to impose new restrictions on federal habeas review. A petition may not be granted with respect to any claim that was adjudicated on the merits in state court unless the state court's 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." 28 U.S.C. § 2254(d).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams (Terry) v. Taylor*, 529 U.S. 362, 412-13 (2000).

"Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. "A federal habeas court making the 'unreasonable application' inquiry should ask whether the state

court's application of clearly established federal law was 'objectively unreasonable.'" *Id.* at 409.

The state-court decision to which § 2254(d) applies is the "last reasoned decision" of the state court. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803-04 (1991). When confronted with an unexplained decision from the last state court to have been presented with the issue, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale. It should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). The presumption that a later summary denial rests on the same reasoning as the earlier reasoned decision is a rebuttable presumption and can be overcome by strong evidence. *Kernan v. Hinojosa*, 136 S. Ct. 1603, 1605-06 (2016).

V. DISCUSSION

A. Ineffective-Assistance-Of-Counsel Claim

Mr. Gomez contends that trial counsel provided ineffective assistance because, during her closing argument, she conceded that he was guilty of three counts of oral copulation. He contends that counsel misstated the evidence to his detriment because Detective Ortiz's testimony showed that Mr. Gomez admitted only one count of oral copulation.

1. Background

During closing argument, defense counsel argued:

> First of all, I want to say I know that you greatly dislike – and that's probably putting it mildly – Mr. Gomez. And that's okay because of the admissions that you heard that came from him and the conduct that he did. [¶] 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. [¶] And why does it matter? It matters because he did not do Count 1.

RT 121-22 (emphasis added).

Later in the closing argument, defense counsel focused on the victim's confused testimony that suggested that Mr. Gomez placed his penis on the victim's vagina in three of the four incidents. Defense counsel argued:

> That did not happen. What happened was he touched her twice.

> Wrong. And he orally copulated her. Wrong. And he's guilty of that. [¶] So I – we are asking you to find him guilty of the counts for which he is, which are Counts 2, 3, and 4 and not Count 1. [¶] And we know that Leslie, at times, can exaggerate. But is the core of her testimony that something bad happened to her true? Yes. And we know that. The question is what happened? [¶] And so we are asking you – and you heard the admissions – to find him guilty of Counts 2, 3 and 4, but not of Count 1.

RT 123.

Mr. Gomez argued on appeal that counsel's erroneous statement that Mr. Gomez admitted the three acts charged in Counts 2, 3, and 4 was constitutionally ineffective assistance of counsel.

The California Court of Appeal first described the two-prong test (deficient performance and prejudice) for ineffective-assistance-of-counsel claims set out in *Strickland v. Washington*, 466 U.S. 668 (1984), and then applied that standard to reject Mr. Gomez's claim on the ground that there was no prejudice:

> We need not decide whether trial counsel's performance was deficient because defendant has not shown a reasonable probability of a more favorable verdict had trial counsel not conceded guilt on the oral copulation counts.
>
> The defense did not call any witnesses or offer any evidence. Thus, the only viable defense strategy was to challenge the victim's credibility. The guilty verdict on count 4, charging sexual intercourse, demonstrates the jury credited the victim's testimony despite defendant's denial of that charge, as testified to by Detective Ortiz. Logic dictates that the jury likewise would have credited the victim's testimony as to the oral copulations had defense counsel not stated that defendant admitted those charges. We do not find persuasive defendant's theory that jurors voted to convict him, not because they were persuaded by the victim's testimony, but because they believed defense counsel had attempted to mislead them into believing defendant admitted to more counts than he did.
>
> For the foregoing reasons, defendant's ineffective assistance of counsel claim fails.

Gomez, 2017 WL 3769628, at *3.

As the last reasoned decision from a state court, the California Court of Appeal's decision is the decision to which § 2254(d) is applied. *See Wilson*, 138 S. Ct. at 1192. Mr. Gomez is entitled to habeas relief only if the California Court of Appeal's decision was contrary to, or an unreasonable application of, clearly established federal law from the U.S. Supreme Court, or was based on an unreasonable determination of the facts in light of the evidence presented.

2. Analysis of Federal Constitutional Claim

The Sixth Amendment's right to counsel guarantees not only assistance, but effective assistance, of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id.* In order to prevail on a Sixth Amendment ineffective-assistance-of-counsel claim, a petitioner must establish two things. First, he must demonstrate that counsel's performance was deficient and fell below an "objective standard of reasonableness" under prevailing professional norms. *Id* at 687-88. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Id.* at 690-91. Second, he must establish that he was prejudiced by counsel's deficient performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

A "doubly" deferential judicial review is appropriate in analyzing ineffective-assistance-of-counsel claims under § 2254. *See Cullen v. Pinholster*, 563 U.S. 170, 202 (2011). The "question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

The California Court of Appeal's rejection of Mr. Gomez's claim was not contrary to, or an unreasonable application of, clearly established federal law. The state appellate court correctly identified the *Strickland* test as the test applicable to the ineffective-assistance claim and reasonably applied it to determine that no prejudice was shown from counsel's erroneous concession of guilt on three counts.

Perhaps the biggest hurdle for the prosecution in a child-molestation case is to convince the jury that the events happened at all, i.e., to convince the jury that the child did not fabricate the

accusations and that the defendant is the sort of person who would sexually abuse a child. That hurdle was overcome in this case because Mr. Gomez's statement to the police detective confirmed many of the victim's statements and showed that he was the sort of person who would sexually abuse a child. Mr. Gomez admitted to the detective that he had licked the victim's vagina once (RT 97, 100), that he had touched the victim's vagina with his finger for sexual gratification (RT 96), that he had exposed himself to the victim (RT 98), and that he had ejaculated close to the victim's vagina (RT 98). (The interview had been transcribed and the detective had that transcript available at trial, RT 88, thus reducing any ability to argue the detective's memory was faulty.)

Even though Mr. Gomez had admitted to the police only one incident of oral copulation (RT 97, 100), it was not unreasonable for the California Court of Appeal to conclude that defense counsel's mistaken statement that Mr. Gomez had admitted all three incidents of oral copulation did not result in any prejudice to Mr. Gomez. The evidence against Mr. Gomez was strong, with the victim identifying three separate incidents of oral copulation: Mr. Gomez had licked her vagina on one occasion when she was home sick (RT 57-60, 84), on another occasion before her friend came to the door (RT 61-62, 85), and on a third occasion after she and Mr. Gomez had been at a swimming pool (RT 66-68, 85). It was not necessary for the jury to have corroboration in the form of an admission from Mr. Gomez for each of the events to find him guilty of all three acts. Contrary to Mr. Gomez's argument, the victim's credibility was not greatly undermined. Although the victim said on cross-examination that she sometimes did not tell the truth, she was rehabilitated on redirect examination when she confirmed that these three specific incidents had, in fact, occurred (RT 84-85). The 11-year-old victim's credibility was enhanced by the unusual fact that she tried to take responsibility for the events by stating that she had asked Mr. Gomez to perform the sex acts on her (RT 63-64, 73). Overall, the victim's credibility was not eviscerated and instead was only slightly tarnished by her acknowledgement that she sometimes exaggerated things. The trial had only two witnesses (i.e., the victim and the detective); the victim's testimony about Mr. Gomez's sexual activity was at least partially corroborated by Mr. Gomez's statements to the detective; and the jury found Mr. Gomez guilty of Count 1 (intercourse with a child 10 years or age or under), even though Mr. Gomez had denied engaging in intercourse with the victim.

Given these facts, it was not unreasonable for the California Court of Appeal to conclude that there was not a "reasonable probability that," but for counsel's erroneous statement that Mr. Gomez admitted guilt on Counts 2, 3, and 4 (i.e., the three counts of oral copulation), "the result of the proceeding would have been different," *Strickland*, 466 U.S. at 694.

The court may look to the jury's conduct along with counsel's deficient performance in determining whether there was a reasonable probability of a different outcome. *Cf. Jennings v. Woodford*, 290 F.3d 1006, 1019 (9th Cir. 2002) (*Strickland* prejudice prong satisfied because, given the "overwhelming evidence" that defendant was the killer, the fact that jury deliberated for two days before finding defendant guilty of first-degree murder supported conclusion that jury would have found reasonable doubt on mental state if defense counsel had investigated and presented evidence about defendant's mental health problems and drug abuse). Here, the length of the jury deliberations does not carry much weight in favor of, or against, a finding of prejudice because both the trial and deliberations were short. From start to finish, the trial took less than a day and the deliberations took less than two hours. *See* CT 147-49 (opening statements started at 9:22 a.m.; deliberations began at about 2:55 p.m.; verdict reached at 4:23 p.m.). The short deliberations show at least that the jury did not struggle with the case.

Mr. Gomez argues that the Supreme Court's recent decision in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), supports his claim. In *McCoy*, the Supreme Court held that a defendant has a Sixth Amendment right to insist that counsel refrain from admitting the defendant's guilt "even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty. . . . [I]t is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt." 138 S. Ct. at 1505. When, contrary to the defendant's express wish to maintain his innocence, counsel has admitted the defendant's guilt, the *Strickland* two-prong test does not apply; the error is structural and reversal is required without any need to show actual prejudice. *Id.* at 1510-11.

Even assuming that Mr. Gomez directed trial counsel not to concede guilt, *McCoy* does not help Mr. Gomez because *McCoy* had not yet been decided when the California Court of Appeal

considered Mr. Gomez's claim.[1] "[Section] 2254(d)(1) requires federal courts to 'focu[s] on what a state court knew and did,' and to measure state-court decisions 'against this Court's precedents *as of 'the time the state court renders its decision.*'" *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (second alteration in original). It cannot be said that the California Court of Appeal's decision was contrary to, or involved an unreasonable application of, the *McCoy* holding that did not yet exist. *Id.*; *see Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (when Supreme Court "cases give no clear answer to the question presented, let alone one in [the petitioner's] favor, 'it cannot be said that the state court unreasonabl[y] appli[ed] clearly established Federal law.' Under the explicit terms of § 2254(d)(1), therefore, relief is unauthorized.") (last two alteration sin original) (citation omitted). *Cf. Barbee v. Davis*, 728 F. App'x 259, 267 n.6 (5th Cir. 2018) (pre-*McCoy* case declining to wait for Supreme Court decision in *McCoy* because the Supreme Court's anticipated decision in *McCoy* "is not likely to shed light" as to whether the state habeas court's resolution of the ineffective-assistance claim was unreasonable in light of clearly established law at the time the state habeas court decided the case). At the time Mr. Gomez's case was decided by the California Court of Appeal, the law was that the *Strickland* two-prong test applied to a claim that counsel had conceded guilt without the assent of the client. *See Florida v. Nixon*, 543 U.S. 175, 178 (2004) (defense counsel's failure to obtain defendant's express consent to a strategy of conceding guilt at the guilt phase of a capital trial did not automatically render counsel's performance deficient); *id.* at 179 (state court erred in applying a presumption of deficient performance and a presumption of prejudice to counsel's concession of guilt). Thus, it was consistent with Supreme Court precedent then in place for the California Court of Appeal to consider whether *Strickland*'s prejudice prong was satisfied rather than to treat counsel's concession of guilt as a structural error requiring automatic reversal.

The California Court of Appeal's rejection of Mr. Gomez's ineffective-assistance-of-counsel claim was not contrary to, or an unreasonable application of, clearly established federal

[1] The opinion in *McCoy* was issued on May 14, 2018. The California Court of Appeal rejected Mr. Gomez's appeal on August 31, 2017, and the California Supreme Court denied review on November 15, 2017.

law as set forth by the U.S. Supreme Court. He therefore is not entitled to the writ.

B. No Certificate of Appealability

A certificate of appealability will not issue. *See* 28 U.S.C. § 2253(c). This is not a case in which "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Accordingly, a certificate of appealability is **DENIED**.

VI. CONCLUSION

For the foregoing reasons, the petition for writ of habeas corpus is **DENIED** on the merits.

Petitioner's motion for appointment of counsel, filed five months after his traverse was filed, is **DENIED**. Docket No. 21. There is no reason to appoint counsel in this case that is being closed today.

The Clerk shall close the file.

IT IS SO ORDERED.

Dated: December 18, 2019

EDWARD M. CHEN
United States District Judge

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JUAN GOMEZ,

Plaintiffs,

v.

SCOTT FRAUENHEIM,

Defendants.

Case No.: 18-cv-03021-EMC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that:

(1) I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California; and

(2) On 12/18/2019, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an interoffice delivery receptacle located in the Clerk's office.

Juan Gomez ID: AZ-6788
Pleasant Valley State Prison A-3
P.O. Box 8500
Coalinga, CA 93210

Dated: 12/18/2019

Susan Y. Soong
Clerk, United States District Court

By:_____/s/_____
Leni Doyle-Hickman, Deputy Clerk to
the Honorable Edward M. Chen

Court of Appeal, Sixth Appellate District - No. H043446

S244663

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

JUAN ARTEAGA GOMEZ, Defendant and Appellant.

The petition for review is denied.

Corrigan, J., was absent and did not participate.

CANTIL-SAKAUYE
Chief Justice

Filed 8/31/17

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JUAN ARTEAGA GOMEZ, Defendant and Appellant.	H043446 (Santa Clara County Super. Ct. No. C1505099)

A jury convicted defendant Juan Arteaga Gomez of one count of intercourse or sodomy with a child 10 years of age or younger (Pen. Code, § 288.7, subd. (a))[1] and three counts of oral copulation or sexual penetration with a child 10 years of age or younger (*id*., subd. (b)). The trial court sentenced defendant to 70 years to life in prison and ordered him to pay $1,600 in restitution to the Victim Compensation and Government Claims Board (Board). On appeal, defendant seeks to have his convictions for violating section 288.7, subdivision (b) reversed on ineffective assistance of counsel grounds. He also challenges the restitution order as unauthorized. We shall affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Santa Clara County District Attorney charged defendant with one count of intercourse or sodomy with a child 10 years of age or younger (§ 288.7, subd. (a)) and three counts of oral copulation or sexual penetration with a child 10 years of age or younger (*id*., subd. (b)).

[1] All further statutory references are to the Penal Code unless otherwise indicated.

During a one-day trial, the victim, then 11 years old, testified that defendant is her younger half-sister's father. He moved in with her and her mother when the victim was six or seven years old. She testified that once, when she was sick and her mother was out buying soup, defendant asked if he could lick her vagina. She said yes and he did so, but he quickly stopped when her mother returned. Defendant told the victim not to tell her mother about the incident. On another occasion, when the victim was about eight years old, she laid down on the living room floor, pulled down her pants, and the defendant licked her vagina. He stopped when a friend of the victim's knocked on the door. Afterwards, he took the victim to ballet class. The victim recalled a third occasion when the defendant licked her vagina after she had gone swimming. The victim also testified that defendant once put his penis in her vagina; she told him "not all the way in 'cause it hurts." He then rubbed his penis on the outside of her vagina and white stuff came out of it. Defendant also showed the victim pornography on the television.

On cross-examination, the victim said that she was angry with defendant when she first disclosed the abuse to a counselor. She also admitted to sometimes exaggerating and agreed with defense counsel's statement that "maybe not everything that you're saying happened [actually] happened."

Alejandro Ortiz, a sexual assaults detective with the San Jose Police Department, testified that he interviewed defendant following his arrest. Detective Ortiz testified that defendant admitted to touching the victim's vagina with his finger and said that "he would tickle her [vagina] with his tongue." Defendant specifically admitted to touching the victim's vagina on a day when she was home sick, although he did not say what part of his body he used to touch her on that occasion. Defendant also admitted to exposing his penis to the victim and ejaculating "in front of her or near her." Defendant denied putting his penis inside the victim. On cross-examination, defense counsel asked: "[defendant] admitted that he orally copulated [the victim] one time; correct?" Detective Ortiz responded: "I believe so, yes."

During closing arguments, defense counsel urged jurors to convict on all three oral copulation counts, which she said defendant "admitted," but to acquit on the sexual intercourse count.

The jury convicted defendant on all four counts.

On April 1, 2016, the trial court sentenced defendant to a prison term of 70 years to life: 25 years to life on count 1 and 15 years to life on counts 2, 3, and 4, with all terms running consecutively. The court ordered defendant to pay $1,600 in restitution to the Board.

Defendant timely appealed.

II. DISCUSSION

A. Ineffective Assistance of Counsel

Defendant argues trial counsel rendered constitutionally ineffective assistance by conceding, in her closing argument, that he was guilty of three counts of oral copulation. He maintains that trial counsel's argument misstated the evidence to his detriment because Detective Ortiz's testimony showed defendant admitted only one count of oral copulation.

1. Legal Principles

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) To prevail on a claim of ineffective assistance of counsel, a criminal defendant must establish both that his counsel's performance was deficient and that he suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*).) The deficient performance component of an ineffective assistance of counsel claim requires a showing that "counsel's representation fell below an objective standard of reasonableness" "under prevailing professional norms." (*Id*. at p. 688.) With respect to prejudice, a defendant must show "there is a reasonable probability"—meaning "a probability sufficient to

undermine confidence in the outcome"—"that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Id.* at p. 694.) We "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Id.* at p. 697.)

"The decision of how to argue to the jury after the presentation of evidence is inherently tactical . . . ." (*People v. Freeman* (1994) 8 Cal.4th 450, 498.) "Defense counsel must not argue against his or her client [citation], but it is settled that it is not necessarily incompetent for an attorney to concede his or her client's guilt of a particular offense." (*People v. Lucas* (1995) 12 Cal.4th 415, 446.) Indeed, where there is "overwhelming evidence against [a defendant], . . . good trial tactics [may demand] complete candor." (*People v. Powell* (1974) 40 Cal.App.3d 107, 167; *People v. Jones* (1991) 53 Cal.3d 1115, 1150 ["It is within the permissible range of tactics for defense counsel to candidly recognize the weaknesses in the defense in closing argument"].) Accordingly, our Supreme Court has rejected ineffective assistance of counsel claims in "cases involving concessions made by defense counsel in closing argument, where the incriminating evidence was strong and counsel offered some other choice in the defendant's favor." (*People v. Hart* (1999) 20 Cal.4th 546, 631.) That said, "a defense attorney's concession of his client's guilt, lacking any reasonable tactical reason to do so, can constitute ineffectiveness of counsel." (*People v. Gurule* (2002) 28 Cal.4th 557, 611.)

2. Analysis

We need not decide whether trial counsel's performance was deficient because defendant has not shown a reasonable probability of a more favorable verdict had trial counsel not conceded guilt on the oral copulation counts.

The defense did not call any witnesses or offer any evidence. Thus, the only viable defense strategy was to challenge the victim's credibility. The guilty verdict on count 4, charging sexual intercourse, demonstrates the jury credited the victim's testimony despite defendant's denial of that charge, as testified to by Detective Ortiz. Logic dictates that the jury likewise would have credited the victim's testimony as to the oral copulations had defense counsel not stated that defendant admitted those charges. We do not find persuasive defendant's theory that jurors voted to convict him, not because they were persuaded by the victim's testimony, but because they believed defense counsel had attempted to mislead them into believing defendant admitted to more counts than he did.

For the foregoing reasons, defendant's ineffective assistance of counsel claim fails.

B. Restitution

The court ordered defendant to pay $1,600 in restitution to the Board as recommended by the probation report. The probation report states "Victim Witness officials reported paying the victim $1600.00 in relocation costs." The probation report also indicates that the victim's mother explained that she could not afford to pay her rent after defendant was incarcerated; she moved to a more affordable home with the help of $1,600 in relocation costs from the Victim Witness Center. Defendant contends the restitution order was unauthorized because the relocation expenses were not verified to be necessary by law enforcement or by a mental health professional as he maintains is required by section 1202.4, subdivision (f)(3)(I).

1. Forfeiture

The People contend that defendant forfeited any challenge to the restitution order by failing to object below. Defendant argues the unauthorized sentence exception to the forfeiture rule applies.

Generally, a defendant "cannot obtain appellate relief concerning [a] restitution order [where] he failed to object to it in the trial court." (*People v. Le* (1995) 39 Cal.App.4th 1518, 1523.) "[T]he 'unauthorized sentence' concept constitutes a narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case. Appellate courts are willing to intervene in the first instance because such error is 'clear and correctable' independent of any factual issues presented by the record at sentencing. [Citation.]" (*Ibid.*) "In essence, claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Ibid.*)

Defendant's argument is that the restitution order was improperly imposed because the relocation of victim and her mother was not "verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim." (§ 1202.4, subd. (f)(3)(I).) Thus, his complaint is that the order was imposed in a procedurally flawed manner (because of the absence of the necessary verification) or a factually flawed manner (because relocation may not have been necessary for the personal safety or emotional well-being of the victim). Accordingly, the unauthorized sentence exception does not apply. Defendant forfeited his challenge to the restitution order by failing to object at the sentencing hearing.

2. Ineffective Assistance of Counsel

We turn, then, to defendant's alternative argument: that his trial counsel was ineffective for failing to object to the restitution order.

a. Legal Principles Governing Victim Restitution

"Convicted criminals may be required to pay one or more . . . types of restitution," including "a 'restitution fine' . . . paid into the Restitution Fund in the State Treasury"

and "restitution directly to the victim or victims of the crime." (*People v. Giordano* (2007) 42 Cal.4th 644, 651 (*Giordano*).) Similarly, crime victims may obtain restitution indirectly from the Board out of the Restitution Fund or directly from the defendant pursuant to a court restitution order. (Gov. Code, § 13950, subd. (b); § 1202.4; *Giordano*, *supra*, at pp. 651-653.)

Section 1202.4 requires a sentencing court to order a defendant to pay direct victim restitution in "a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of the defendant's criminal conduct, including . . . . [¶] (I) Expenses incurred by an adult victim in relocating away from the defendant . . . ." (§ 1202.4, subd. (f)(3)(I).) "Expenses incurred pursuant to . . . section [1202.4, subdivision (f)(3)(I)] shall be verified by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim." (*Ibid*.)

Government Code section 13957 authorizes the Board to compensate victims for specific enumerated losses, including "expenses incurred in relocating, if the expenses are determined by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim." (Gov. Code, § 13957, subd. (a)(7)(A).) Where indirect restitution has been paid out of the Restitution Fund, "the amount of assistance provided shall be presumed to be a direct result of the defendant's criminal conduct and shall be included in the amount of the restitution ordered." (§ 1202.4, subd. (f)(4)(A).) "If the defendant offers evidence to rebut the presumption established by this paragraph, the court may release additional information contained in the records of the board to the defendant only after reviewing that information in camera and finding that the information is necessary for the defendant to dispute the amount of the restitution order." (§ 1202.4, subd. (f)(4)(C).) "[W]e review the trial court's restitution order for abuse of discretion." (*Giordano*, *supra*, 42 Cal.4th at p. 663.)

b. Analysis

Direct victim reimbursement is not at issue in this case. Rather, the victim's mother was reimbursed $1,600 for relocation costs out of the Restitution Fund and defendant was ordered to pay $1,600 in restitution to the Board. Under these circumstances, 1202.4, subdivision (f)(3)(I) has no application and trial counsel was not ineffective in failing to raise an objection pursuant to that provision, as defendant claims. (*People v. Ochoa* (1998) 19 Cal.4th 353, 463 ["Representation does not become deficient for failing to make meritless objections"].)

As the People note, section 1202.4, subdivision (f)(4)(C) governs here. On reply, defendant contends that a verification nevertheless was required pursuant to Government Code section 13957, subdivision (a)(7)(A) and that trial counsel was ineffective for failing to object on that ground. Even reading defendant's ineffective assistance of counsel claim broadly, so as to include that revised argument, we reject it.

The victim's mother was required to file an application for compensation with the Board. (Gov. Code, § 13952, subd. (a).) And the Board was required to verify all the information it deemed pertinent to her claim. (Gov. Code, § 13954, subd. (a).) Given the statutory requirements, it is reasonably likely that, in the course of the application and verification process, documentation was submitted to the Board showing that the relocation expenses were "determined by law enforcement to be necessary for the personal safety of the victim or by a mental health treatment provider to be necessary for the emotional well-being of the victim." (Gov. Code, § 13957, subd. (a)(7)(A).) If such documentation was submitted, then trial counsel was not deficient for failing to object.

But neither party cites to the application for compensation or the verification information on which the Board relied; nor have we found any such documents in the record. Defendant has the burden of demonstrating error. (*Gamache*, *supra*, 48 Cal.4th at p. 378; see *In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1452 ["it is the appellant's burden to provide an adequate record on appeal"]; *People v. Clifton* (1969) 270

Cal.App.2d 860, 862 [“ ‘error is never presumed, but must be affirmatively shown, and the burden is upon the appellant to present a record showing it, any uncertainty in the record in that respect being resolved against him’ ”].) By not affirmatively showing that the proper documentation was not submitted to the Board, defendant has failed to carry that burden. On the current record, we cannot say that counsel rendered deficient performance.

III. DISPOSITION

The judgment is affirmed.

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ELIA, ACTING P.J.

WE CONCUR:

_____

BAMATTRE-MANOUKIAN, J.

_____

MIHARA, J.

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