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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO ARANA CORTES,

Defendant and Appellant.

In re

ERNESTO ARANA CORTES,

On Habeas Corpus.

A129974

(Napa County
Super. Ct. No. CR 150946)

A132791

I. INTRODUCTION

Ernesto Arana Cortes pleaded no contest to one count of continuous sexual abuse of a child under the age of 14 (Pen. Code, § 288.5¹; count 11) on the condition that the other 10 counts, all of which alleged sexual abuse of the same victim, would be dismissed. The court sentenced him to the upper 16-year term. On appeal, he challenges his sentence, arguing that his attorney provided ineffective assistance and that the court committed errors in denying probation and imposing the upper term. We will affirm the judgment.

Cortes has also filed a petition for a writ of habeas corpus, which we have ordered considered together with the appeal. In that petition, he asserts that his trial counsel

¹ All further unspecified statutory references are to the Penal Code.

rendered ineffective assistance because he did not advise Cortes that he would be deported for conviction of violating section 288.5. The Attorney General has filed an informal response to the petition, and Cortes has filed a reply to that response. We conclude that the petition states a prima facie case for relief and issue an order to show cause, returnable in the superior court, why the petition should not be granted.

II. FACTUAL AND PROCEDURAL BACKGROUND

On June 22, 2010, the Napa County District Attorney filed an amended complaint in the Napa County Superior Court charging appellant with three counts of lewd conduct on a child under the age of 14 (Pen. Code, § 288, subd. (a); counts 1-3), four counts of lewd acts on a child under the age of 14 and at least 10 years younger than the perpetrator (§ 288, subd. (c)(1); counts 4-7), two counts of unlawful sexual intercourse with a minor more than three years younger than the perpetrator (§ 261.5, subd. (c); counts 8-9), one count of using a minor to perform a sex act (§ 311.4, subd. (c); count 10), and one count of continuous sexual abuse of a child (§ 288.5; count 11). The complaint also alleged that appellant engaged in “substantial sexual conduct” in the commission of counts 1-3 within the meaning of section 1203.066, subdivision (a)(8).

On March 27, 2010, an officer of the Napa Police Department responded to a report of child abuse.² The officer met with Cristina Mendoza, who reported that she had been contacted by an acquaintance named Monica, who worked at WalMart in Napa, and is married to Mendoza’s nephew. Monica told Mendoza that she was processing some photographs from a CD at work and recognized appellant. She said there was video on the CD and she observed appellant having sex with his 16-year-old stepdaughter. Monica made a copy of the CD and then contacted appellant to pick up his order, which he did. Monica gave the copied CD to Mendoza.

² The statement of facts is derived in large part from the presentence probation report.

Mendoza and her husband later watched the video and observed appellant, who was 28 years old, having sex with his 16-year-old stepdaughter, who is also Mendoza's niece. They called the police and turned over the CD.

The officer reviewed the CD which contained several video clips of an adult male engaged in sex acts with a young female. It appeared that the male set up a hidden camera in the room before the female entered; she did not appear to notice the camera.

The case was then turned over to the Napa County Sheriff's Department.

On March 28, 2010, Detective Carlisle of the Napa County Sheriff's Department viewed the video footage and found that it showed four separate video clips of an Hispanic adult male having sexual intercourse and engaging in other sex acts with a minor Hispanic female. The first video clip clearly showed the male suspect's face and the face of the victim.

The first video clip is 9 minutes and 50 seconds long, and has a date stamp of February 1, 2010. Appellant spends time setting the camera up on a shelf or some higher vantage point while it is recording and before the victim enters the room. When the victim enters the room, she partially disrobes, lies down on the floor, and appellant engages her in various sexual acts including the victim masturbating appellant, the victim performing oral sex on appellant, appellant performing oral sex on the victim, and sexual intercourse.

The second video clip is 9 minutes and 50 seconds long and was date stamped September 7, 2008. The camera is apparently on the floor and positioned to be inconspicuous. It is not possible to see the individuals' faces, but based upon physical characteristics it appears to be appellant and the same victim. As in the first video, the victim lies down on the floor. Appellant then engages her in various sexual acts including the victim masturbating appellant, the victim orally copulating appellant, and sexual intercourse.

The third video clip is 9 minutes and 50 seconds long, and has a date stamp of September 11, 2008. The camera is placed on the floor. Again, faces cannot be seen but the physical characteristics of the individuals appear the same as in the first and second

videos. Appellant and the victim engage in sexual intercourse and appellant digitally penetrates the victim's vagina.

The fourth video clip is 9 minutes and 50 seconds long, and has a date stamp of September 14, 2008. This video is similar to the second and third clips: the victim again lies on her side: she masturbates appellant and he engages her in sexual intercourse.

A search warrant for appellant's residence was prepared and executed on March 28, 2010. While at the residence, the detective spoke with the victim who stated that she did not need medical aid, the last time appellant had sex with her was about three years ago, after which he had acknowledged that it was wrong and it had not happened again.

Appellant was located in a bedroom and was arrested. He was transported to the Sheriff's Department and agreed to be interviewed. He initially stated that he did not know why he was there, and then asked if he could speak with an attorney. Ultimately, he decided to speak to the detective without an attorney. In summary, he admitted to having sex with the victim 16 or 17 times over the last year to year and a half. He realized it was illegal and knew it was wrong. He estimated that they started having sex when the victim was 15 and the most recent time they had sex was the previous day, i.e., March 27.

A search of a pump house at appellant's place of employment was conducted. A DVD player and a television were found, plugged into a power outlet. The DVD tray contained a DVD entitled "Tiny Titty Teens #7." A CD/DVD case full of pornographic DVD's was also found, as was a video camera that was being charged. The owner of the pump house stated that all items belonged to appellant.

On March 29, 2010, Detective Carlisle met with the victim at the Courage Center where Napa Police Department Detective Winegar, who is MDIT³ certified, conducted the interview. The victim cried periodically while recalling details of the sexual encounters between her and her stepfather. She said the first sexual encounter took place in their home when she was 13. She was asleep on the living room floor with her siblings

³ (See, e.g., Fam. Code, § 3118, subd. (b)(4) ["multidisciplinary interview team"].)

when appellant lied down behind her. He pulled out his erect penis and told her to “touch it.” She refused, but he told her to touch it or “I’m not going to leave.” He then put her hand on his penis and moved it. He ultimately ejaculated. She stated that the next day she could not look at him and was physically sick having to sit next to him at the dinner table.

The victim stated that appellant left her alone for about two weeks before he attempted sexual contact with her again. He tried to pull her pants down, but settled for having her masturbate him again. She complied so he would leave her alone. This type of encounter happened about 10 more times, i.e., appellant having her masturbate him until he ejaculated and telling her to comply or he would not leave her alone. During these encounters, he would also rub her breasts and her vagina. He also inserted his finger into her vagina. Subsequently, appellant had the victim orally copulate him. He then progressed to having sexual intercourse with the victim.

When the victim turned 14, appellant started having sexual intercourse with her about every two days. He would orally copulate her, digitally penetrate her, and have her orally copulate him. Several incidents took place on the bed appellant shared with the victim’s mother. The first incident of sexual intercourse took place in appellant’s truck. The victim estimated that they had sexual intercourse in his truck at least 50 times and he usually wore a condom.

Between the ages of 14 and 15, appellant had sexual intercourse with the victim in appellant’s and the victim’s mother’s bed, appellant’s truck, and outside near the vineyard where he worked. Then they started having sexual intercourse inside a water pump house at the same vineyard because appellant preferred to have sex there. When the victim was menstruating, appellant would have her orally copulate him only. When they had sexual intercourse, he would ejaculate outside her body on her breasts, her face, and her body.

When the victim was 15, appellant told her he loved her and started getting involved in her personal life. If he found out she had talked with a boy, he would get angry and call her a slut.

The victim estimated that after she turned 16, she had sexual intercourse and engaged in other sex acts with appellant at least 20 times. She also estimated that she and appellant had sex about 20 times in her mother's car and about 30 times in his work truck. She recalled that in November 2009, appellant had put his fingers in her anus while having sex with her on five different occasions.

The victim was asked if she was aware appellant had ever filmed them having sex. She said yes. One time while she was in his truck, he had gone to talk with a friend and she started looking at his video camera. She saw a video appellant had taken of them having sex in the truck; her back was turned so she did not know he was filming. This made her angry and when she confronted appellant, he apologized. She said she erased the video when she saw it.

The victim said she complied with performing the sex acts because appellant manipulated her. For example, he told her he would not buy her certain things or he would ground her unless she complied; he would leave her mother and go back to Mexico, leaving them with no money if she did not comply; and if she would just do the sex act in question, it would be over more quickly for her and then he would leave her alone.

On May 21, 2010, appellant pleaded no contest to one count of continuous sexual abuse of a child (§ 288.5) and the remaining counts were dismissed with a *Harvey*⁴ waiver. Appellant was referred to probation for a presentence report and to a court-appointed clinical psychologist for a section 288.1 evaluation.

On June 9, 2010, appellant was interviewed at the Napa County Department of Corrections with the assistance of a Spanish speaking translator. He admitted to the sexual relationship with his stepdaughter. He said he did not remember when it started, but estimated it was about three years ago. He said “ ‘ideas’ ” had come into his head, and that he regretted everything. “ ‘I know it wasn't rape because I didn't force her but I

⁴ *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

know she wasn't comfortable either. I know it wasn't right but I couldn't stop myself. It was an addiction.' ”

Appellant said he was willing to pay for counseling for the victim and wanted to apologize to her for his actions. He was aware that his “whole family [was] suffering now.” He said he loved his wife and children, was willing to accept the consequences, and was willing to go to counseling.

He admitted telling the victim he would leave the family but denied making the other statements the victim reported. He said he wanted to leave “to control myself.” Regarding the videotaping, he said he “ ‘wasn't thinking right. I had curious ideas.’ ” He also said he did not bring the CD to WalMart to make copies of the videos. He had photos on the CD of a family trip to Mexico and did not remember that he had sex videos on the disc. He said he had “no intentions of making something bad happen with the videos.”

According to the probation report, appellant is a citizen of Mexico and a legal resident of the United States. “Attempts to contact I.C.E. [U.S. Immigrations and Customs Enforcement] have been unsuccessful and therefore, it is unknown if the defendant is facing possible deportation.” The probation report recommended a 90-day evaluation at a state prison pursuant to section 1203.03 and an evaluation pursuant to section 288.1. Appellant received scores indicating a low risk of recidivism on both the Static-99 (the State Authorized Risk Assessment Tool for Sex Offenders (SARATSO) (see § 1202.8) and the Level of Service/Case Management Inventory (LS/CMI) evaluation.

The court appointed Richard Geisler, Ph.D., to conduct the section 288.1 evaluation. He concluded that appellant was at low risk for reoffending and opined that, if he were given probation, he would likely complete it successfully. In support of his conclusions, he noted that appellant had no prior criminal record or any history of substance abuse and seemed to have been a law-abiding citizen with a strong work ethic up until the time of the current offenses.

At the sentencing hearing on June 22, 2010, the court suspended proceedings and committed appellant to a diagnostic facility for evaluation and a report pursuant to section 1202.03.

At San Quentin, Hari Murthy, Psy.D., conducted a “Brief Psychological Evaluation.” Dr. Murthy found that appellant accepted responsibility for his crime, had a positive attitude toward treatment, and that among his strengths were an excellent work history and no prior criminal record. Murthy also found that appellant “minimizes aspects of his behavior and aspects of his own sexual deviance.” He thought that appellant was “likely a hebephile: a type of pedophile with a preference for children around the age of puberty.” He believed that appellant had “the potential to harm another victim if allowed to be free on probation at this time.”

A San Quentin correctional counselor, W.N. Burkhart, conducted a diagnostic study and evaluation of appellant. Burkhart stated that the offense was serious and could not be “overlooked or minimized. This is one of the most extensive sexual abuse cases this writer has seen in his past 28 years of experience.” Noting the nearly 100 incidents of sexual intercourse and “countless” incidents of oral copulation, all of which went undetected by other family members for nearly three years, and the “extremely vulnerable” victim, Burkhart concluded that appellant “took advantage of a position of trust to satisfy his own sexual needs and should be held accountable for his actions.” The study recommended a prison term followed by supervised parole.

The District Attorney’s sentencing statement argued against probation and recommended an upper, 16-year term.

Appellant’s attorney submitted a lengthy statement in mitigation and about 60 letters in support of appellant from family members, friends, and co-workers. About 40 were originally in Spanish and were translated into English. Appellant himself wrote a letter to the court which was translated from Spanish into English.

On September 2, 2010, the court ordered a supplemental probation report. The probation officer acknowledged that appellant was found to have a low risk of

reoffending but noted that the circumstances of this case were “extremely serious,” and recommended a prison sentence.

On September 29, 2010, the court denied probation and sentenced appellant to the upper, 16-year term.

Appellant filed a timely notice of appeal.

III. DISCUSSION

A. Whether Appellant Was Denied the Effective Assistance of Counsel at Sentencing.

Appellant contends that his attorney failed to recognize that appellant was eligible for probation only if the court found that certain statutory conditions were met, and failed to make any showing or to argue that those conditions existed. A reasonably competent attorney would not have made such errors, according to appellant. Appellant further contends that there is a reasonable probability both that a showing could have been made that those conditions were satisfied and, had such a showing been made, that the court would have granted probation.

A defendant in a criminal proceeding has the right under the United States and California Constitutions to the effective assistance of counsel. In *In re Scott* (2003) 29 Cal.4th 783, 811-812, our Supreme Court explained this right as follows: “ ‘Petitioner had the right to the effective assistance of counsel at trial, and thus was “entitled to the reasonably competent assistance of an attorney acting as his diligent and conscientious advocate.” [Citation.] A defendant claiming ineffective representation bears the burden of proving by a preponderance of the evidence both (1) that counsel’s performance was deficient, i.e., that the representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel’s unprofessional errors, the result would have been more favorable to defendant, i.e., a probability sufficient to undermine confidence in the outcome. [Citations.]’ (*In re Ross* (1995) 10 Cal.4th 184, 201; see also *Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 [*Strickland*]).

“The United States Supreme Court has recently reemphasized that, in applying these principles, ‘a court must indulge a “strong presumption” that counsel’s conduct falls within the wide range of reasonable professional assistance because it is all too easy

to conclude that a particular act or omission of counsel was unreasonable in the harsh light of hindsight.’ (*Bell v. Cone* (2002) 535 U.S. 685, 702.) Accordingly, a court must ‘view and assess the reasonableness of counsel’s acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.’ (*People v. Ledesma* (1987) 43 Cal.3d 171, 216; also quoted in [*People v.*] *Scott* [(1997)] 15 Cal.4th [1188,] 1212.)” (*In re Scott, supra*, 29 Cal.4th at pp. 811-812.)

In evaluating appellant’s claim, we may first determine whether he has in fact suffered prejudice. (*In re Fields* (1990) 51 Cal.3d 1063, 1079 (*Fields*), citing *Strickland, supra*, 466 U.S. at p. 697.) “*Strickland* . . . advises that ‘a court 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, which we expect will often be so, that course should be followed.’ ” (*Fields, supra*, 51 Cal.3d at p. 1079.) To demonstrate prejudice, appellant must show “ ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’ ” (*People v. Ledesma, supra*, 43 Cal.3d at pp. 217-218, quoting *Strickland, supra*, 466 U.S. at pp. 693-694.)

The complaint charged appellant with the special allegation, in connection with the lewd conduct counts (counts 1-3), that he had “substantial sexual conduct” with the victim within the meaning of section 1203.066, subdivision (a)(8). That provision *prohibits* a court from granting probation to a defendant who has substantial sexual conduct with a victim under the age of 14. However, in conjunction with the plea agreement, the section 1203.066 allegation was dismissed. Thus, appellant was not absolutely ineligible for probation pursuant to subdivision (a) of section 1203.066.

Appellant’s contention on appeal pertains to subdivision (d) of section 1203.066, which prohibits the court from granting probation to any defendant convicted of continuous sexual abuse unless certain terms and conditions are met. Section 1203.066, subdivision (d)(1), provides in relevant part: “If a person is convicted of a violation of Section . . . 288.5, . . . probation may be granted only if the following terms and

conditions are met: (A) If the defendant is a member of the victim’s household, the court finds that probation is in the best interest of the child victim. (B) The court finds that rehabilitation of the defendant is feasible and that the defendant is amenable to undergoing treatment, and the defendant is placed in a recognized treatment program designed to deal with child molestation immediately after the grant of probation or the suspension of execution or imposition of sentence. (C) If the defendant is a member of the victim’s household, probation shall not be granted unless the defendant is removed from the household of the victim until the court determines that the best interests of the victim would be served by his or her return. While removed from the household, the court shall prohibit contact by the defendant with the victim, with the exception that the court may permit supervised contact, upon the request of the director of the court-ordered supervised treatment program, and with the agreement of the victim and the victim’s parent or legal guardian, other than the defendant. . . . [¶] (E) The court finds that there is no threat of physical harm to the victim if probation is granted.” (§ 1203.066, subd. (d)(1).)

Appellant contends that the record shows circumstantially that defense counsel was unaware of the terms and conditions that had to be met before probation could be granted. In his mitigation statement, counsel stated, “The defendant here is not ineligible for probation nor is he in the restricted eligibility category. Probation has not cited any statute that precludes the defendant from probation.” At the sentencing hearing, counsel made no effort to show that the section 1203.066, subdivision (d), terms and conditions had been met, and stated to the court, “Your Honor, there’s nothing here that would prevent you from allowing Mr. Cortes to be placed on probation.”

We find appellant’s contention that his counsel was unaware of the limitations on the court’s ability to grant probation unpersuasive. First, the Statement in Mitigation cites *People v. Wills* (2008) 160 Cal.App.4th 728, 737 (*Wills*), and includes a parenthetical explaining in part that the “court may grant probation when defendant meets all criteria of Penal Code, § 1203.066, including that probation is in best interest of child victim” The *Wills* court applied former section 1203.066, subdivision (c), because

the sexual offenses took place in 1995, but explained in a footnote that the Legislature amended the statute in 2005, substituting the present subdivision (d)(1) for former subdivision (c). (*Wills, supra*, 160 Cal.App.4th at p. 737, fn. 6.) The footnote also includes the text of section 1203.066, subdivision (d)(1), in its entirety. (*Ibid.*) Moreover, the prosecutor included a statement of the section 1203.066, subdivision (d)(1), terms and conditions in the People’s Sentencing Statement, under a heading entitled “Probation Limitations.” We presume defense counsel read the prosecutor’s submission.

In any event, we find no deficiency in counsel’s argument at sentencing. Appellant has made no showing that his counsel failed to present mitigating information that was otherwise unavailable to the court. (See, e.g., *People v. Cropper* (1979) 89 Cal.App.3d 716, 719-721.) Although defense counsel did not specifically cite section 1203.066, subdivision (d), we are satisfied from our review of the record that all of the terms and conditions that had to be met before the court could consider probation were addressed. We agree with the Attorney General that “[t]he manner in which he argued those factors [was a] tactical decision[] best left to counsel.” In addition, the court is presumed to have considered all factors relevant to its sentencing decision unless the record affirmatively demonstrates the contrary. (Cal. Rules of Court, rule 4.409; *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 836.) Here, there is no such demonstration.

The first term or condition under subdivision (d)(1), applicable where the defendant is a member of the victim’s household, is a finding by the court that probation is in the best interest of the child victim. (§ 1203.066, subd. (d)(1)(A).) Appellant contends that probation was in the victim’s best interest because (1) the family needed his financial support; and (2) the victim would be happier and would feel better.⁵ Appellant

⁵ Appellant reasons that the victim’s mother, brother, sister, and “all the family members who wrote letters and crowded the courtroom” would be happier if appellant were not in prison, which would in turn make the victim happier (“everyone knows from personal experience the fact of human nature that, if one’s close relatives are happy, one

faults defense counsel for failing to present evidence regarding the family's need for appellant's financial support and evidence from an expert in child psychology or evidence of the victim's psychological condition. These arguments have no merit.

The record contains an impact statement from the victim in which she claimed that she was not traumatized by the situation, that she just wanted to get on with her life, and that her siblings would miss appellant if he were sentenced to prison. The impact statement from the victim's mother/appellant's wife stated that, while she understood that her husband "must never come near" the victim, her two younger children really missed their father. She asked that appellant be given treatment and not sent to prison. In both the mitigation statement and at the hearing, defense counsel urged the court to grant probation because appellant was the family's chief breadwinner and his imprisonment would have a detrimental effect on the family. Counsel also made the point that appellant would not be able to pay for counseling for the victim, other family members, and himself if he were in prison. Further, counsel argued that probation would "substantially decrease the likelihood of his reoffending," and would better serve the victim because the court could order his participation in treatment, while in prison he would receive little in the way of treatment. Regarding appellant's suggestion that the family may have blamed the victim and she may have felt some guilt, the court addressed that possibility when it stated at the sentencing hearing: "She is the victim in this case, and everyone in this courtroom should make sure that they understand that she is the victim, and never blame her for anything."

Second, subdivision (d) of section 1203.066 precludes probation unless the court finds that rehabilitation of the defendant is feasible and the defendant is amenable to placement in a treatment program. (§ 1203.066, subd. (d)(1)(B).) Appellant argues that

is happier, and that nothing makes one more miserable than the misery of those near and dear"). The victim would feel better about probation, according to appellant because it would "relieve[]" the guilt she "may have felt" for engaging in sex acts with her stepfather and not telling her mother, and the "disapprobation" of "some family members" who "probably blamed her."

his counsel made no showing as to these factors. However, in the mitigation statement, counsel noted the appointed expert's conclusion that appellant would be a good candidate for probation and would likely be successful on probation. In addition, appellant was willing to comply with all the terms and conditions of probation, knew that what he did was wrong, and was willing to undergo treatment and to pay for counseling for his family.

The third condition necessary for a grant of probation is that the defendant be removed from the household until the court determines that it would be in the victim's best interest for him to return. (§ 1203.066, subd. (d)(1)(C).) This paragraph also requires the court to prohibit the defendant from having contact with the victim with the possible exception of supervised contact in specified circumstances. (*Ibid.*) As appellant acknowledges, the terms and conditions of this paragraph are terms with which the court must comply, not terms appellant had to meet. However, consistent with these provisions, counsel assured the court that appellant agreed to be enrolled in a treatment program. Both the mother's impact statement and appellant's own statement to the court indicate the understanding that he would stay away from the victim. Implicit in counsel's argument was the agreement that appellant would be removed from the victim's household.

Finally, section 1203.066, subdivision (d)(1)(E), required the court to find that appellant did not present a threat of physical harm to the victim if probation were granted. Counsel presented evidence and argued that the psychological screening tests placed appellant in the low risk to reoffend category; appellant had no prior criminal history and no issues with drugs or alcohol; Dr. Geisler concluded that appellant did not sexually identify with children, did not exhibit misogynistic tendencies, and was not a pedophile; counsel submitted and cited numerous letters from friends and family members attesting

to appellant's character and their trust in him to take care of their own children; and counsel argued that the victim was a "willing"⁶ participant in the incidents.

Appellant faults his attorney for failing to make a further showing of the lack of danger to the victim by presenting evidence of what appellant's and the victim's living arrangements would be if appellant were on probation, and how she would be protected from him until the court determined that it would be in her interests for him to return home. Specifically, appellant argues that his attorney should have pointed out to the court that appellant had "many family members he could live with," as he stated to the correctional officer who interviewed him at San Quentin, and that these places were separate from where the victim was living. This would have permitted the court to make a finding that appellant would not be a threat to the victim if he were granted probation. Although it appears that defense counsel did not specifically address appellant's possible living arrangements, it is clear from the record that the court reviewed the correctional officer's report and was aware of appellant's extensive family support.

Further, even if counsel was unaware of these statutory provisions, there was no prejudice to appellant. Counsel raised a number of arguments for probation in this case, and appellant fails to demonstrate how the result would have been different if counsel had specifically argued the provisions of section 1203.066, subdivision (d)(1). The trial court considered all of the evidence and argument, and simply did not agree with defense counsel that probation was appropriate. In denying probation, the court noted the correctional counselor's statement that "in his 28 years this is one of the worst cases he's ever seen in terms of sexual molestation of a victim." The court further explained, "He [appellant] victimized his stepdaughter for over three years beginning when she was 13

⁶ Counsel explained, in the Statement in Mitigation, that the defense used the term "willing" in the same way the California Supreme Court used it in *People v. Hofsheier* (2006) 37 Cal.4th 1185, 1193. For accuracy's sake, we note that it was the term "voluntary," not "willing," that *Hofsheier* used "in a special and restricted sense to indicate both that the minor victim willingly participated in the act and to the absence of various statutory aggravating circumstances" (*Id.* at p. 1193, fn. 2.) We express no opinion whatsoever regarding the use of the term "willing" by the defense in this case.

years old. Those sexual molestations include oral, vaginal and anal sex, as well as digital penetration and masturbation by the defendant. Even so far as to videotape some of the sexual assaults.” The court also noted the vulnerability of the victim, appellant’s failure to take full responsibility, and appellant’s threats to abandon the family if the victim did not comply with his demands. We find it highly unlikely that the court would have exercised its discretion to grant probation if counsel had expressly argued the section 1203.066, subdivision (d), terms and conditions. Accordingly, appellant did not suffer a denial of his constitutional right to the effective assistance of counsel.

B. *Whether the Court Misunderstood Appellant’s Eligibility for Probation.*

Appellant next contends the court misunderstood the terms and conditions of section 1203.066, subdivision (d)(1), and that it therefore failed to exercise its discretion to grant probation based on a correct understanding of the law. According to appellant, the misunderstanding is revealed in this portion of the court’s statement at the sentencing hearing: “. . . Mr. Cortes is eligible for probation if I find that it’s in the best interest of the minor for me to grant probation. And the minor victim in this case, understandably, doesn’t want to see Mr. Cortes, doesn’t want to have anything to do with Mr. Cortes. [¶] . . . And it’s certainly understandable her position. . . . [¶] I don’t believe that it’s in the victim’s best interest to grant probation in this matter because of what has gone on in the past and the victim’s desire to have no contact in the future.”

According to appellant, the court failed to recognize that whether it was in the victim’s best interest for appellant to be granted probation and whether it was in the victim’s best interest to have contact with appellant “are entirely separate questions. It might be utterly contrary to the child’s best interests to have contact with the defendant and yet very much in the child’s interest that he be granted probation.”⁷ Appellant further

⁷ Appellant suggests as “an extreme example – although one not too far removed from the present case,” a situation in which a 15-year-old minor is “obsessively in love” with a 25-year-old defendant; the hypothetical defendant committed a violation of section 288, subdivision (c) (lewd act on a child); contact with the defendant “would aggravate her obsession and result in further such violations; but, if the defendant had a well-paid

argues that the court compounded its error by failing to consider how probation for appellant would benefit the victim, such as the financial well-being of the family and the happiness of her mother and siblings “because they had contact with appellant”

The argument has no merit. The court gave a detailed explanation for denying probation, prefaced by its statement that appellant “is eligible for probation, if I find that it’s in the best interest of the minor for me to grant probation.” The court expressly found that probation was not in the victim’s best interest: “And the minor victim, in this case, understandably, doesn’t want to see [appellant], doesn’t want to have anything to do with [appellant]. [¶] She has been manipulated and forced against her will to have sex with [appellant] for over three years. And it’s certainly understandable her position. She is the victim in this case, and everyone in this courtroom should make sure that they understand that she is the victim, and never blame her for anything. [¶] I don’t believe that it’s in the victim’s best interest to grant probation in this matter because of what has gone on in the past and the victim’s desire to have no contact in the future. I understand that [appellant] has two other children and those two children are going to suffer as result of the Court’s order here today, but that’s because of [appellant’s] acts, not because of the victim.”

Taking a number of factors into account, the court continued: “When I look at the circumstances in determining whether or not probation should be granted, that’s also a consideration that I must make under rule 4.414, I find that the nature and seriousness and circumstance of this crime appear to me to be greater than others. We have a report from the correctional counselor, from the Department of Corrections, saying in his 28 years this is one of the worst cases he’s ever seen in terms of sexual molestation of a victim.

“He victimized his stepdaughter for over three years beginning when she was 13 years old. Those sexual molestations include oral, vaginal and anal sex, as well as digital

job and was willing and able to pay for therapy which might cure her of the obsession, it would be in her interest that he be granted probation so that he could keep on working.”

penetration and masturbation by [appellant]. Even so far as to videotape some of the sexual assaults. And but for [appellant's] being so callus [sic] as to take the video to have it developed, he may not have ever been contacted. But he was.

“The victim, in this case, was extremely vulnerable. [Appellant] was in a position of trust, being her stepfather, and abused that position of trust and forced her, against her will, to have sex with him. The manner in which the crime was committed demonstrated criminal sophistication in as much that he [] even went so far as to videotape the sexual assault.

“[Appellant] has expressed remorse, however, he does not fully accept responsibility for what he's done. He never really said how many times he did this with the victim. He skirted that issue. He said he knew it was wrong but said he couldn't help himself. The reason he gave to videotape her was that he was curious. Those are all signs to this Court that probation is not appropriate for this defendant.

“The acts of [appellant] evidence a high degree of callusness [sic], as he knew the victim was uncomfortable and didn't want to go forward with this, and continued to have his sexual conduct, using implied threat that he would leave the residence. And he knew that the family was dependent financially upon [him].

“And so for all of those reasons, I am going to deny probation in this matter.”

There is no evidence that the court was unaware of the law or its sentencing options. The court expressly considered the financial impact on the family and the impact on appellant's two other children if appellant were sentenced to prison, the two factors appellant argues should have led the court to grant probation. The court, however, pointed out, first, that the other children's suffering was attributable solely to appellant, not the victim, and, second, that appellant had used the family's economic vulnerability against the victim to force her to comply with his demands. It is apparent that the court found the circumstances of appellant's crime too serious to grant probation, as is evident from the court's statements regarding the ongoing sexual abuse, including the age of the victim, the violation of trust, the frequency of the molestations, the range and extent of the conduct, the steps taken to ensure secrecy over a period of years, and

the clandestine taping of the abuse, as well as appellant's admissions that he continued the abuse despite knowing it was wrong and knowing the victim did not want to participate, and the court's conclusion that appellant did not take full responsibility for his actions. Thus, even if the court misinterpreted section 1203.066, subdivision (d)(1)(A), it is not reasonably probable that the court would have granted probation had it interpreted that provision in the manner urged by appellant.

C. *Whether the Court Erred in Imposing the Upper Term.*

Appellant argues that none of the factors cited by the court was an appropriate basis for imposing the upper term for the violation of section 288.5. He further contends that, had the court not made various mistakes in considering aggravating and mitigating circumstances, it was reasonably probable that the court would have imposed a lower sentence. We disagree.

After denying probation, the court imposed the aggravated term of 16 years for appellant's violation of section 288.5, reasoning as follows: "And when I look at determining the appropriate term of imprisonment in this matter, certainly the number of times that Mr. Cortes abused his stepdaughter is significant. He went over, greatly over a period of three months. One, for three years, over three years. And it's significantly more than three times. Close to 100. No one really knows. That's an estimate.

"The victim indicated that at times the intercourse was happening every other day, every two days. Mr. Cortes stated it was an addiction, that he knew it wasn't right but he couldn't stop himself. That sounds like a dangerous person to me. Mr. Cortes does not have a prior record. And he does, he did enter a plea, in this case, relatively early in this proceeding. And those are two factors that the Court can take into consideration in selecting the term.

"When I look at everything, the reports from all of the doctors, in this case, and I'm not giving a lot of weight to the Department, from Department of Corrections, when Mr. Cortes was not, did not have an interpreter present, but this seems to me to be an aggravated case and so I am going to impose the aggravated term of 16 years."

“ ‘Sentencing courts have wide discretion in weighing aggravating and mitigating factors’ ” (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) “[A] trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. (See, e.g., Cal. Rules of Court, rule 4.420(c) [fact underlying an enhancement may not be used to impose the upper term unless the court strikes the enhancement]; *id.*, rule 4.420(d) [fact that is an element of the crime may not be used to impose the upper term].) The [trial] court’s discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be ‘reasonably related to the decision being made.’ (Cal. Rules of Court, rule 4.408(a).)” (*People v. Sandoval* (2007) 41 Cal.4th 825, 848.)

In addition, in determining whether to impose the lower, middle, or upper term, the court is not limited to the factors set forth in California Rules of Court, rule 4.421; rather, any relevant fact may be considered. (*People v. Covino* (1980) 100 Cal.App.3d 660, 671; Cal. Rules of Court, rule 4.408(a).) It is settled that a single factor in aggravation is sufficient to justify the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433; *People v. Covino, supra*, 100 Cal.App.3d at p. 670.)

“ ‘The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

Appellant faults the court for relying on the overall number of times he molested his stepdaughter and the total length of time over which the abuse took place. He contends that the court was limited to considering only the acts that constituted the section 288.5⁸ violation, i.e., the sexual abuse that took place before the victim turned 14.

⁸ To prove a violation of section 288.5, continuous sexual abuse of a child, a prosecutor must establish that the defendant, “over a period of time, not less than three

Appellant also contends that basing the upper term on the number of acts and the time period over which the abuse took place amounts to using elements of the offense to increase the punishment, which is prohibited by California Rules of Court, rule 4.420(d). Neither argument has merit.

Appellant neglects to mention in his opening brief that his plea was accompanied by a *Harvey* waiver. Pursuant to the *Harvey* waiver, the court was entitled to consider the facts underlying the dismissed counts when sentencing on the section 288.5 count, including considering the facts beyond the minimum elements of the crime as aggravating circumstances. (*People v. Moser* (1996) 50 Cal.App.4th 130, 132-133; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1775-1776; *People v. Webber* (1991) 228 Cal.App.3d 1146, 1169; *People v. Miranda* (1987) 196 Cal.App.3d 1000, 1003.) Appellant's argument that the court improperly relied on elements of the offense to increase the punishment is clearly incorrect because a violation of section 288.5, continuous sexual abuse of a child under the age of 14, does not include the sexual abuse that occurred after the victim turned 14.

In his reply brief, appellant concedes that the court was entitled to consider acts he committed beyond the minimum number and minimum timeframe, but argues that his violation of section 288.5 was not distinctively worse than the ordinary violation of its kind. Multiple acts of sexual abuse over an extended time period are characteristic of the offense, according to appellant. Moreover, he argues, the abuse that took place after the victim turned 14 was charged in other counts; appellant was not convicted of the other counts; and the other misconduct that took place after the victim turned 14 did not make the section 288.5 violation worse than the ordinary violation of that statute. These arguments are without merit. A violation of section 288.5 requires a minimum of three acts of substantial sexual conduct over a three-month timeframe. Both the number of sex acts and the duration of the abuse far exceeded the minimum. Appellant cites no

months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years" (§ 288.5, subd. (a).)

authority for the proposition that, despite the *Harvey* waiver, in sentencing appellant the trial court was limited to considering only the misconduct that occurred before the victim turned 14.

Second, appellant argues that the court, in effect, used an element of the offense to impose a greater term when it relied on appellant's statement that he committed the abuse because he could not control himself. According to appellant, all violations of section 288.5 involve defendants who cannot control themselves: "if they could control themselves, they would not have violated the section." In fact, appellant contends, he had "much more self-control than the ordinary violator," such as his "work record, his fidelity to his family, and his lack of a substance abuse problem," and therefore this was not a legitimate aggravating factor.

Not surprisingly, appellant cites no authority for this circular argument. The trial court reasonably interpreted appellant's comment that he could not stop himself from continuously sexually abusing his stepdaughter over a three-year period, to mean that appellant presented a serious danger to society. (See Cal. Rules of Court, rule 4.421(b)(1).) We find no error in the court's reliance on this factor as a circumstance in aggravation.

Finally, in an argument that turns the straightforward into the convoluted, appellant contends that the court imposed an upper term *because* "the case seemed to the judge to be an aggravated case" Appellant argues that this "was not a reason, but a truism, like 'The sky is blue because it looks blue.'" We will take the risk of stating the obvious in pointing out, as is clear from the context, that this was the court's *conclusion*, not a reason for its conclusion: "When I look at everything, the reports from all of the doctors, . . . this seems to me to be an aggravated case"

This conclusion is supported by the record. Appellant continuously sexually abused his stepdaughter from the time she was 13, engaging in various sexual acts with her at frequencies up to and including every other day, in places including his workplace, his truck, the victim's mother's car, and the bed the victim's mother shared with appellant. He surreptitiously videotaped himself having sexual intercourse and engaging

in oral copulation with the victim, and he secured the victim's compliance by, inter alia, threatening to abandon the family and withdraw his financial support.

Even if the trial court erred in relying on one or more of the above contested factors, any error was harmless. “ ‘When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.’ [Citation.]” (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.) We find no such reasonable probability.

In denying probation, the court considered criteria under California Rules of Court, rule 4.414, stating, “I find that the nature and seriousness and circumstance of this crime appear to me to be greater than others. We have a report from the correctional counselor, from the Department of Corrections, saying in his 28 years this is one of the worst cases he's ever seen in terms of sexual molestation of a victim.

“He victimized his stepdaughter for over three years beginning when she was 13 years old. Those sexual molestations include oral, vaginal and anal sex, as well as digital penetration and masturbation by the defendant. Even so far as to videotape some of the sexual assaults. And but for Mr. Cortes being so callus [sic] as to take the video to have it developed, he may not have ever been contacted. But he was.

“The victim, in this case, was extremely vulnerable. Mr. Cortes was in a position of trust, being her stepfather, and abused that position of trust and forced her, against her will, to have sex with him. The manner in which the crime was committed demonstrated criminal sophistication in as much that he [] even went so far as to videotape the sexual assault.

“Mr. Cortes expressed remorse, however, he does not fully accept responsibility for what he's done. He never really said how many times he did this with the victim. He skirted that issue. He said he knew it was wrong but said he couldn't help himself. The reason he gave to videotape her was that he was curious. Those are all signs to this Court that probation is not appropriate for this defendant.

“The acts of Mr. Cortes evidence a high degree of callusness [sic], as he knew the victim was uncomfortable and didn’t want to go forward with this, and continued to have his sexual conduct, using implied threat that he would leave the residence. And he knew that the family was dependent financially upon [him].”

The court could have cited these factors in imposing the aggravated term: the crime involved acts disclosing a high degree of callousness in that appellant entirely disregarded the effect of the ongoing abuse on the victim; the victim was particularly vulnerable; the crime indicated planning and sophistication in that the abuse continued for some three years without arousing suspicion or being detected; and appellant took advantage of a position of trust. (Cal. Rules of Court, rule 4.421(a)(1), (3), (8), (11).) The court’s imposition of the upper term was neither irrational nor arbitrary; there was no abuse of discretion. (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 978.)

D. *Whether Appellant’s Counsel Had a Meaningful Opportunity to Object to Sentencing Errors or Provided Ineffective Assistance in Failing to Object.*

Appellant contends that, in stating its reasons for imposing the upper term, the court did not give his attorney a chance to object and thus he is excused from failing to object to the errors in imposing the upper term. Alternatively, if appellant’s counsel was required to object, then appellant was denied his right to the effective assistance of counsel by his attorney’s failure to object. Having found no errors to which an objection would have been warranted, we need not address this argument.

E. *On Habeas Corpus.*

With his habeas petition, appellant⁹ seeks to withdraw his no contest plea. He advances two arguments: first, he claims his attorney’s failure to advise him of the deportation consequences of entering into the plea agreement constituted ineffective assistance of counsel; second, he contends that his no contest plea was not knowing and intelligent.

⁹ Although he is the petitioner for purposes of his petition for writ of habeas corpus, we will continue to refer to Mr. Cortes as appellant for purposes of consistency.

1. *Factual Background.*

In support of his petition, appellant submitted his own declaration and that of his wife, Dalila Arana. Appellant declares that his attorney advised him that, if he pleaded no contest to a violation of section 288.5, he “would not be deported” because he was a legal resident and the immigration hold had been dropped. His mother, father, three sisters, three brothers, his wife, and his two children live in the United States. His two children were born in the United States and are citizens. He also declares that if he had known he would be deported, he would not have entered into the plea agreement. Instead, he would have tried to negotiate a deal to plead to non-deportable offenses or, failing in that, he would have demanded a jury trial.

Arana’s declaration describes “the financial hardship which I and my children suffered as a result of the arrest and imprisonment of my husband, my unwillingness to cooperate in the prosecution of my husband and [the victim’s] reluctance to testify against him, and how the District Attorney, sexual abuse workers, and social workers forced us to do so,” and includes a letter she wrote to appellant’s trial counsel to the same effect.

The other evidence the parties discuss in connection with the habeas petition is found in the record on appeal. The plea form signed by appellant and his attorney contained the following statement: “I understand that, if I am not a United States citizen, a plea of guilty or no contest could result in my deportation, exclusion from admission to this country, or denial of naturalization.”

When appellant entered his plea on May 21, 2010, the court questioned appellant as follows:

“THE COURT: Do you understand the maximum term of confinement for violation of Penal Code section 288.5 is 16 years in the state prison?”

“[APPELLANT]: Yes, I do understand.

“THE COURT: And you’ve had enough opportunity to speak about possible defenses to your case with your attorney Mr. Duarte?”

“[APPELLANT]: Yes.

“THE COURT: Do you understand that if you’re not a citizen of the United States, a plea of no contest could result in your deportation, exclusion from admission to this country, or denial of naturalization?”

“[APPELLANT]: Yes.

“THE COURT: Do you understand that the violation of Penal Code section 288.5 is a strike offense pursuant to Penal Code section 1192.7:

“[APPELLANT]: Yes.

“THE COURT: And you’ve discussed the consequences of a strike conviction on your record with Mr. Duarte?”

“MR. DUARTE: Can you give me one minute, your Honor?”

“[APPELLANT]: Yes, I do understand.

“THE COURT: All right. Do you have any questions about anything that’s going on here today?”

“[APPELLANT]: No, I have no questions.”

In the September 29, 2010, probation report, the probation officer noted, “According to Napa County Department of Corrections, the defendant currently has an 8CFR287.7 U.S. Immigration and Customs Enforcement (ICE) no bail hold dated April 6, 2010. At this juncture, it appears he will be facing deportation proceedings. However, it appears the hold was lifted on April 7, 2010. Attempts to contact ICE have been unsuccessful.”

At the sentencing hearing, appellant’s counsel requested probation and argued that there were no legal impediments to granting it:

“MR. DUARTE: Just to clarify, Your Honor, Mr. Gero had mentioned that there’s an ICE hold on [appellant], but it’s my understanding that there’s nothing here that he’s illegal in this country, but he is a legal resident status.

“THE COURT: Well the report said the hold was lifted in April. So I don’t know what the status – that’s what I saw in the initial probation report.

MR. DUARTE: Okay. So with regard to that one case, that Mr. Gero would not have any bearing on this because he is legally here and there are no deportation

proceedings occurring and it may not occur. So he is—and would be a, subject to probation under the laws and there would be no reason for him not to, because of his status here as a legal resident.”

2. *Habeas Corpus Legal Principles.*

“Our state Constitution guarantees that a person improperly deprived of his or her liberty has the right to petition for a writ of habeas corpus. [Citations.] Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to plead sufficient grounds for relief, and then later to prove them. ‘For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; defendant thus must undertake the burden of overturning them. Society’s interest in the finality of criminal proceedings so demands, and due process is not thereby offended.’ [Citation.]” (*People v. Duvall* (1995) 9 Cal.4th 464, 474 (*Duvall*).

A petition for writ of habeas corpus “should both (i) state fully and with particularity the facts on which relief is sought [citations], as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations. [Citations.] ‘Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing.’ [Citation.] We presume the regularity of proceedings that resulted in a final judgment [citation], and, as stated above, the burden is on the petitioner to establish grounds for his release. [Citations.]” (*Duvall, supra*, 9 Cal.4th at p. 474.)

At the pleading stage, the petitioner must establish a prima facie case for relief by alleging facts which if true would entitle him or her to relief. (*In re Large* (2007) 41 Cal.4th 538, 549; *Duvall, supra*, 9 Cal.4th at p. 475.) If the petitioner establishes a prima facie case, the court issues an order to show cause which “represent[s] a ‘preliminary assessment that . . . petitioner would be entitled to relief if his factual allegations are proved.’ ” (*In re Hardy* (2007) 41 Cal.4th 977, 1018, quoting *Duvall, supra*, 9 Cal.4th at

p. 475.) If no prima facie case for relief is stated, we will summarily deny the petition. (*Duvall, supra*, 9 Cal.4th at p. 475.)

3. *Ineffective Assistance.*

Appellant contends that his attorney misadvised him regarding the immigration consequences of his no contest plea, assuring him that he would not be deported. Relying on the United States Supreme Court's recent decision in *Padilla v. Kentucky* (2010) 559 U.S. ____ [130 S.Ct. 1473] (*Padilla*), appellant contends his deportation is, in fact, a certainty and his attorney had a duty to make this clear.

To prevail on a claim of ineffective assistance of counsel, a plaintiff must prove that his counsel's performance fell below an objective standard of reasonableness and that the deficiency in his counsel's performance prejudiced him. (*Strickland, supra*, 466 U.S. at p. 692.)

“Plea bargaining and pleading are critical stages in the criminal process at which a defendant is entitled, under both the Sixth Amendment to the federal Constitution and article I, section 15 of the California Constitution, to the effective assistance of legal counsel. [Citations.] ‘It is well settled that where ineffective assistance of counsel results in the defendant’s decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.’ [Citations.] [¶] To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel’s representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel’s deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel’s failings, the result would have been more favorable to the defendant. [Citations.]” (*In re Resendiz* (2001) 25 Cal.4th 230, 239, fn. omitted (*Resendiz*), disapproved on another point in *Padilla, supra*, 559 U.S. at p. ____ [130 S.Ct. at p. 1484]; see also *In re Alvernaz* (1992) 2 Cal.4th 924, 934 (*Alvernaz*)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694.)

Appellant contends that trial counsel misadvised him regarding the immigration consequences of pleading no contest to a violation of section 288.5, that he relied to his detriment on this advice, and that he would have rejected this deal because it involved pleading to a deportable offense and would instead have gone to trial. However, appellant has submitted no declaration from trial counsel, corroborating or otherwise, regarding these contentions. Nor has he provided any explanation for not including any statement from counsel. (*Duvall, supra*, 9 Cal.4th at p. 474 [petition for habeas corpus should include “reasonably available documentary evidence supporting the claim, including pertinent portions of trial transcripts and affidavits or declarations”]; see *Appeals and Writs in Criminal Cases* (Cont.Ed.Bar 3d ed. 2011) § 10.4, p. 497.)

Instead, appellant relies on *Padilla, supra*, 130 S.Ct. at pp. 1481-1482, in which the Supreme Court held that a claim of ineffective assistance of counsel may be based upon failing to advise or misadvising a defendant about the possible immigration consequences of a plea. In addition, appellant points to the portion of the transcript at the sentencing hearing in which his counsel addressed his immigration status in the process of arguing for probation, stating that “he is a legal resident,” and “he is legally here and there are no deportation proceedings occurring and it may not occur.” Appellant argues that this supports his contention that counsel failed to advise him that section 288.5 is a deportable offense and that such failure constituted ineffective assistance. Consistent with appellant’s claim that he was assured of no adverse immigration consequences, it appears from the record of the sentencing proceedings that appellant’s counsel was not attuned to immigration issues, as evidenced by his dismissive remarks concerning a possible ICE hold in arguing for probation and no prison time.

The allegations in the petition, bare as they are, and counsel’s apparent disinterest in and/or disregard of immigration consequences, **are** enough to constitute a prima facie showing of deficient performance by counsel at this stage of the habeas proceeding. (See *Padilla, supra*, 130 S.Ct. at pp. 1482-1483 [incorrect advice regarding the immigration consequences of a guilty or no contest plea may constitute deficient performance];

Resendiz, supra, 25 Cal.4th at p. 235 [same].) We now consider the second prong of the inquiry, prejudice.

The *Resendiz* court articulated the relevant test for prejudice: “[A] defendant who pled guilty demonstrates prejudice caused by counsel’s incompetent performance in advising him to enter the plea by establishing that a reasonable probability exists that, but for counsel’s incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial. [Citations.]” (*Resendiz, supra*, 25 Cal.4th at p. 253, citing *Hill v. Lockhart* (1985) 474 U.S. 52, 58-59; see also *Alvernaz, supra*, 2 Cal.4th at p. 934.) A defendant’s claim that he “would not have pled guilty if given competent advice ‘must be corroborated independently by objective evidence.’” (*Resendiz, supra*, 25 Cal.4th at p. 253, quoting *Alvernaz, supra*, 2 Cal.4th at p. 938.) Whether prejudice has been established is a factual question. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 210 (*Zamudio*).

Appellant claims he would have rejected the plea deal because of the deportation consequence and would instead have had his attorney first attempt to negotiate a plea to non-deportable offenses. Appellant acknowledges that his section 288.5 conviction renders him deportable both because it is an aggravated felony (8 U.S.C., § 1227(a)(2)(A)(iii)) and because it is a crime of child abuse (8 U.S.C., § 1227(a)(2)(E)(i)). He does not contend that any of the dismissed charges are non-deportable offenses. Rather, appellant contends there is a reasonable chance the District Attorney would have agreed to a disposition that would permit him to return to his family after serving his time, or at least would reduce the probability of deportation. For example, appellant suggests that he could have pleaded to violations of section 647.6, subdivision (b), section 273a, subdivision (a), and section 136.1, subdivision (b), offenses that are not mandatorily deportable because they do not necessarily involve “child abuse.” (See, e.g., *Fregozo v. Holder* (9th Cir. 2009) 576 F.3d 1030, 1038 [holding that a misdemeanor violation of section 273a, subdivision (b), was not a deportable offense]; *United States v. Pallares-Galan* (9th Cir. 2004) 359 F.3d 1088, 1100, 1102 [misdemeanor crime of annoying or molesting a child, section 647.6, was not categorically a crime of sexual

abuse of a minor].)¹⁰ Appellant also points out that, under a plea deal involving multiple counts of these or other non-deportable offenses, he could have been sentenced to a total term as long as he actually received; he also would be subject to parole and lifetime sex-offender registration. At the sentencing hearing, trial counsel's sole focus was on attempting to keep his client out of prison, while the prosecutor was adamant in opposing probation and seeking the maximum prison term. We note that the prosecutor expressed no desire for appellant to be deported.

If no negotiated agreement for him to plead to non-deportable offenses could be reached, appellant contends that he would have insisted on going to trial. "In determining whether or not a defendant who has pled guilty would have insisted on proceeding to trial had he received competent advice, an appellate court . . . may consider the probable outcome of any trial, to the extent that may be discerned. [Citations.]" (*Resendiz, supra*, 25 Cal.4th at p. 254.) Had appellant proceeded to trial, he faced 10 counts of sexually abusing his stepdaughter over the course of several years. His guilt was not in dispute since, after being arrested, he decided to give a statement and admitted the sexual conduct with the victim. He also videotaped himself having sex with her on several different occasions.

Neither party addressed the penalties appellant faced if he were convicted of some or all of the charges originally filed in this case. We note that the complaint contains a summary of charges and punishment, according to which, each of three counts of violating section 288, subdivision (a), carried a maximum sentence of eight years, and each violation of the other seven counts carried a maximum sentence of three years. In addition, the section 1203.066, subdivision (a)(8), allegation would have rendered appellant ineligible for probation. (§ 1203.066, subd. (a).) Under the plea agreement, appellant was eligible for probation but faced a maximum prison sentence of 16 years.

¹⁰ Appellant notes that these cases address misdemeanor violations, not felonies. He contends that the reasons the misdemeanor violations are not deportable crimes of child abuse apply equally to felony violations. We of course need make no determination in this regard; nor do we express any opinion on the contention.

Moreover, appellant presents no argument that a conviction at trial would not carry the same immigration consequences as the plea agreement.

Appellant points to nothing in the record indicating how he might avoid a conviction at trial and what defenses might have been available to him. On this point, he offers only suggestions, apparently based on Arana's declaration, that the victim might be reluctant to testify and that her family might attempt to dissuade her from doing so. We are cognizant of the agony the victim would be forced to endure if called as a witness/subpoenaed to testify in this matter; that it would require her to relive her experiences in a public forum and face members of her family and others who apparently blame her for the events that led to charges being filed. However, we will not find prejudice based on the possibility that a witness may disobey a court order or the victim's family members may engage in criminal conduct by attempting to dissuade her from testifying. (§ 136.1.)

The probable outcome of a trial is not the only factor to consider in determining whether appellant would have rejected the plea offer. (See, e.g., *Resendiz*, *supra*, 25 Cal.4th at p. 253, quoting *Alvernaz*, *supra*, 2 Cal.4th at p. 938 [“ ‘In determining whether a defendant, with effective assistance, would have accepted [or rejected a plea] offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain.’ ”].)¹¹ Our Supreme

¹¹ In addition, we note that the Supreme Court recently granted review of a nonpublished case that presents similar issues in the context of a motion to vacate a judgment of conviction. (*People v. Martinez* (Dec. 9, 2011, H036687) [nonpub. opn.] 2011 WL 6141088, review granted Mar. 21, 2012, S199495 (*Martinez*).) In *Martinez*, after pleading guilty to a Health and Safety Code violation, the defendant sought to vacate his conviction based on the failure of his attorney and the court to advise him of the immigration consequences of the plea. (*Id.* at p. *1.) *Martinez* argued that he would not have pleaded guilty had he been aware of the immigration consequences, and instead would have attempted to negotiate an immigration-neutral plea or would have opted to

Court has recognized that “a noncitizen defendant with family residing legally in the United States understandably may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges.” (*Resendiz, supra*, 25 Cal.4th at p. 1187, citing *Zamudio, supra*, 23 Cal.4th at pp. 206-207.) Appellant has been in the United States since he was 15 years old; his parents, six siblings, his wife, and his two children (born in the United States in 2000 and 2006; both United States citizens) live here. We find that appellant has sufficiently alleged a reasonable probability that, had he received competent counsel, he would have insisted on a strategy of avoiding adverse immigration consequences, including seeking an immigration-neutral plea agreement and opting for trial rather than pleading to deportable offenses. Accordingly, we conclude that appellant has established a prima facie case that trial counsel’s performance was deficient and that he was prejudiced as a result.

4. *Whether the Plea Was Knowing and Intelligent.*

In light of our conclusions regarding appellant’s claim of ineffective assistance of counsel, we need not address whether the plea was knowing and intelligent.

IV. DISPOSITION

The judgment is affirmed. An order to show cause shall issue, returnable in the Napa County Superior Court, requiring the Department of Corrections and Rehabilitation to show cause why the relief requested in the petition for a writ of habeas corpus should not be granted. If warranted by the pleadings, the superior court shall conduct an evidentiary hearing to determine whether appellant is entitled to relief.

take his chances at trial rather than entering the plea that ensured his deportation. (*Id.* at p. *1.) The trial court denied the motion and the appellate court affirmed, concluding on the basis of the evidence against him, i.e., his poor prospects at trial, that Martinez was unable to demonstrate prejudice. (*Id.* at p. *2.)

Haerle, J.

We concur:

Kline, P.J.

Lambden, J.