***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**Memorandum**

To: CAFL Appellate Panel Support Unit

From: Law Student Intern (MS)

Re: Ineffective Assistance of Counsel—Conceding Unfitness against Client’s Wishes

Date: July 30, 2018

**Questions Presented:**

1. Does trial counsel’s concession of Father’s unfitness against his wishes constitute ineffective assistance of counsel and therefore require a new trial only upon a finding of prejudice?

2. Does such concession constitute constructive denial of the right to counsel and thus require the automatic granting of a new trial?

**Brief Answers:**

1. In this case, trial counsel’s unauthorized concession of Father’s unfitness likely does not constitute ineffective assistance of counsel. Trial counsel’s failure to mount any defense to DCF’s unfitness allegations is clearly conduct that falls below that expected of an ordinary fallible lawyer, the first prong of the Saferian/Georgette test. But, given DCF’s overwhelming evidence against Father—and our inability, as appellate counsel, to find and proffer evidence that would rebut that overwhelming evidence—it is impossible for Father to satisfy the “prejudice” prong of the Saferian/Georgette test. Therefore, Father probably cannot show ineffective assistance of counsel.

2. Trial counsel’s unauthorized concession of Father’s unfitness may constitute constructive denial of the right to counsel following the recent Supreme Court decision in McCoy v. Louisiana, 200 L. Ed. 2d 821, 827 (2018). By conceding unfitness, trial counsel conceded the most important factual issue in dispute at trial and therefore failed to provide a meaningful adversarial test to DCF’s case against Father. Trial counsel’s unauthorized concession of unfitness likely constitutes constructive denial of counsel.

**Facts:**

Emily Doe (“Child”), d/o/b 6/13/2013, was removed from the custody of her father, Joseph Doe (“Father”), at a preliminary hearing on June 14, 2017. Father met with his attorney on several occasions leading to trial. During this time, he asserted adamantly that he wished to challenge DCF’s allegation of unfitness. He also wished to challenge whether termination served the child’s best interests. Father lacks stable housing, has been homeless since September 2015, and has a history of substance abuse and domestic violence. Father has never participated in an extended treatment program, has never given DCF drug screens, and has been unwilling to admit that he has a problem with drugs or domestic violence. During opening statements at trial, Father’s counsel conceded unfitness. At trial, he offered no evidence to contest DCF’s case on unfitness and focused, instead, only on whether termination served the child’s best interests. The judge terminated Father’s parental rights, and Father appealed. We represent Father on appeal and are looking into whether trial counsel’s actions constituted ineffective assistance of counsel or, alternatively, whether his actions constructively denied Father counsel.

**Discussion:**

1. **The right to effective assistance of counsel**

 Under Massachusetts law, children and indigent parents have a right to counsel based on statute and due process. See G. L. c. 119, § 29 (stating that “[w]henever the department or a licensed child placement agency is a party to child custody proceedings, the parent, guardian or custodian of the child… shall have and be informed of the right to counsel at all such hearings”); see also Department of Public Welfare v. J.K.B., 379 Mass. 1, 3 (1979) (holding that where the department initiates proceedings to terminate parental rights, an indigent parent has a constitutional right to counsel).[[1]](#footnote-1) Noting that the right to counsel “is of little value unless there is an expectation that counsel’s assistance will be effective,” the Supreme Judicial Court held that the right to *effective* assistance ofcounselis necessarily implied. Care and Protection of Stephen, 401 Mass. 144, 149 (1987). Consequently, parents in child welfare cases have the right to a new trial when counsel is found to have rendered ineffective assistance. Id.

1. **Father is unlikely to prevail on a claim of ineffective assistance of counsel**

Child welfare proceedings adopt the criminal standard for determining ineffective assistance of counsel but alter the second prong of the analysis to require a showing of “prejudice.” See Care and Protection of Georgette, 439 Mass. 28, 33 n. 7 (2003) (citing Commonwealth v. Saferian, 366 Mass. 89, 96 (1974)). Under this approach, the court must determine whether: (1) counsel’s behavior fell “measurably below that which might be expected from an ordinary fallible lawyer” and (2) counsel’s conduct prejudiced the client. Id. If trial counsel’s poor performance concerns strategic decision-making, her decisions must have been “manifestly unreasonable.” See Adoption of Yvette, 71 Mass. App. Ct. 327, 345 (2008). Poor tactical decisions alone are insufficient. Id. The second prong—prejudice—cannot be satisfied if the evidence of unfitness is overwhelming. Contrast Adoption of Azziza, 77 Mass. App. Ct. 363, 368 (2010) (holding that the second prong was satisfied when the evidence of unfitness was sufficient but not overwhelming), with Adoption of Holly, 432 Mass. 680, 690 (2000) (concluding that there was no prejudice because evidence of unfitness was overwhelming).

Reversals of termination decisions on the basis of ineffective assistance of counsel are rare. But see Azziza, 77 Mass. App. Ct. at 368; see also Adoption of Flora, 60 Mass. App. Ct. 334, 339 (2004) (concluding that following the logic of Georgette, child’s counsel’s failure to advocate for child’s wishes at trial warranted reversal, although not specifically labeling counsel’s failure as ineffective assistance). In Azziza, the Massachusetts Appeals Court concluded that trial counsel’s failure to mount a defense for a father constituted ineffective assistance of counsel. Id. Following the termination of his parental rights, Father appealed, alleging that trial counsel rendered ineffective assistance by failing to prepare for trial, file proposed findings of fact, and call key witnesses on his behalf. Id. The court held that trial counsel’s conduct satisfied the first prong of the Saferian/Georgette test and focused on the question of prejudice. Id. The court reasoned that while Father’s chronic unemployment, lack of stable housing, and abdication of childcare responsibilities was sufficient evidence of unfitness, it was not overwhelming. Id. at 365-6, 368. As a result, the court concluded that trial counsel’s failure to properly test DCF’s case prejudiced Father and therefore constituted ineffective assistance of counsel. Id. at 368.

* 1. **Conceding unfitness as ineffective assistance of counsel**

In two unpublished cases, the Massachusetts Appeals Court applied the two-prong Saferian/Georgette analysis in determining whether counsel’s unauthorized concession of unfitness constituted ineffective assistance of counsel. See Adoption of Quenia, 2016 Mass. App. Unpub. LEXIS 459, \*5 (2016); Adoption of Unity, 2011 Mass. App. Unpub. LEXIS 463, \*6 (2011). In both cases, the court did not address the first prong—poor lawyering—because the concession of unfitness did not prejudice the client; therefore, the claim of ineffective assistance of counsel failed. See Quenia, 2016 Mass. App. Unpub. LEXIS at \*5 (concluding that the court “need not decide if counsel’s stipulation was constitutionally ineffective because… [t]he evidence of [Father’s] unfitness was clear”); Unity, 2011 Mass. App. Unpub. LEXIS at \*6 (holding that because the judge “independently concluded based on the vast amount of evidence presented that [m]other was currently unfit,” the concession of unfitness did not prejudice the client) (internal quotations omitted). Other jurisdictions have adopted a similar approach. See In re Dependency of D.E.B., 2011 Wash. App. LEXIS 163\*, 13 (2011) (holding that counsel’s concession of unfitness did not constitute ineffective assistance of counsel “because the State presented substantial evidence to support the trial court’s finding”); In re J.W., 2008-Ohio-1423, \*P13 (Ohio Ct. App. 2008) (concluding that even if counsel essentially conceded unfitness, “appellant cannot satisfy the prejudice prong”).

* 1. **Application to Father**

In our case, Father is unlikely to prevail on a claim of ineffective assistance of counsel. Even if trial counsel’s conduct satisfied the first prong of the Saferian/Georgette test, Father’s unstable housing, untreated substance abuse, and domestic violence are overwhelming (as opposed to merely sufficient) evidence of unfitness. See Azziza, 77 Mass. App. Ct. at 364 (holding that Mother’s untreated substance abuse and history of leaving the children for days at a time constituted overwhelming evidence of unfitness); see also Adoption of Octavia, 2013 Mass. App. Unpub. LEXIS 207, \*2 (2013) (concluding that there was no prejudice because mother’s substance abuse, intermittent homelessness, and inability to parent her other children constituted overwhelming evidence of unfitness). Because the evidence of unfitness was overwhelming, Father cannot prove the second prong—prejudice. Therefore, a claim of ineffective assistance of counsel will likely be unsuccessful.

Note that in different circumstances—that is, where there is not overwhelming evidence of unfitness—the unauthorized concession of unfitness would probably constitute ineffective assistance of counsel. See Azziza, 77 Mass. App. Ct. at 368. In order to show the trial court and Appeals Court that the evidence of unfitness is not overwhelming, Father would have to show that he had testimonial and documentary evidence that, had trial counsel proffered it, would have provided some defense to DCF’s allegations. In this case, such rebuttal evidence does not exist.

1. **Father may have an argument for constructive denial of counsel**

Father may not, however, be out of luck. His trial counsel’s performance was so poor as to be almost non-existent.

In some cases, an attorney’s performance may be so poor that it constitutes a constructive denial of the right to counsel. See Strickland v. Washington, 466 U.S. 668, 692 (1984). Constructive denial of counsel occurs when there is a complete breakdown of the adversarial system during a critical stage of the proceeding. See, e.g., United States v. Cronic, 466 U.S. 648, 658 (1984). Because there is no reliable measure of prejudice from the constructive denial of counsel, prejudice is assumed. See United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006) (reasoning that a harmless error analysis “would be a speculative inquiry into what might have occurred in an alternative universe”); see also Commonwealth v. Goodman, 60 Mass. App. Ct. 605, 609 (2014) (reasoning that deprivation of the right to counsel is never harmless because it so infringes on the defendant’s right to a fair trial). The reasoning of these criminal cases also applies in the child welfare context. See Vivek S. Sankaran, No Harm, No Foul? Why Harmless Error Analysis Should Not Be Used to Review Wrongful Denials of Counsel to Parents in Child Welfare Cases, 63 S.C. L. Rev. 13, 14 (2011) (noting that in child welfare proceedings the overwhelming majority of jurisdictions treat wrongful denial of counsel as warranting immediate reversal); see also In the Interest of K.B., 2017 Tex. App. LEXIS 8778, 16 (2017) (holding that “the record need not establish a specific showing of prejudice” because parent met the burden of establishing constructive denial of counsel).

In Cronic, the Supreme Court posited three situations that constitute constructive denial of counsel: (1) denial of counsel at a critical stage; (2) counsel’s complete failure to provide a meaningful adversarial test; and (3) situations in which, although counsel is available, the circumstances would render even a fully competent lawyer unlikely to provide effective assistance. Cronic, 466 U.S. at 658. While there is no Massachusetts case law explicitly defining “critical stage” in child welfare proceedings, other jurisdictions have suggested that, at a minimum, trial constitutes a “critical stage.”  See  A.P. v. Kentucky, 270 S.W.3d 418, 421 (Ky. App. 2008); see also Sankaran, supra, at 21 (contending that every stage of a care and protection proceeding should be considered a “critical stage”).

* 1. **Concession of unfitness as failure to provide a meaningful adversarial test**

The only relevant situation posed by our case is (2), counsel’s failure to provide a meaningful adversarial test to DCF’s case against Father. This may occur where counsel *appears* to mount a defense but concedes the only substantive issue of the case. See, e.g., United States v. Swanson, 943 F.2d 1070, 1071 (9th Cir. 1991) (holding that conceding that there was no reasonable doubt concerning client’s guilt constitutes constructive denial of counsel). Counsel’s concession of some issues (as opposed to all) does not necessarily rise to the level of a constructive denial of counsel. See, e.g., Commonwealth v. Velez, 77 Mass. App. Ct. 270, 276 (2010). In Velez, defense counsel conceded the defendant’s responsibility for some of the crimes charged and used the trial as an extended effort to seek leniency in sentencing. Citing Bell v. Cone, 535 U.S. 685, 697 (2002), the Appeals Court reasoned that there was not a “complete” lack of adversary testing because counsel competently argued other elements of the case (i.e., that the search of the defendant’s apartment, his stop and arrest, and the search of his car were improper). Id. at 276. The court held that conceding guilt of a less serious offense can be a tactical strategy. Id. at 277; see also Duffy v. Foltz, 804 F.2d 50, 52 (6th Cir. 1986) (concluding that counsel’s admission that his client committed the alleged acts but was not guilty by reason of insanity was a reasonable strategy); Walker v. State, 194 So. 3d 253, 282 (Ala. 2015) (concluding that it is not constructive denial of counsel for an attorney to concede guilt of burglary, a lesser offense of the capital-murder charge).

An important new United States Supreme Court case, McCoy v. Louisiana, 200 L. Ed. 2d 821, 827 (2018), provides insight into what constitutes a “complete” lack of adversary testing. In McCoy, the defendant was charged with murdering his estranged wife’s mother, stepfather, and son. Id. at 825. Despite the defendant’s adamant “object[ion] to any admission of guilt” at trial, counsel conceded that his client committed the crimes but urged mercy in light of the defendant’s “serious mental and emotional issues.” Id. The Supreme Court reasoned that such decisions are “not strategic choices about how best to *achieve* a client’s objectives,” but rather, “choices about what the client’s objectives in fact *are*.” Id. at 830 (emphasis in original). While counsel may believe that conceding guilt will strategically result in the best outcome, the Court concluded, the client may not share this objective. Id. Ultimately, the Court held that “a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experienced-based view is that confession of guilt offers the defendant the best chance to avoid the death penalty.” Id.

In its reasoning, the Court explicitly distinguished McCoy from Florida v. Nixon, 543 U.S. 175 (2004). In Nixon, defense counsel conceded the accused’s commission of murder and concentrated, instead, on establishing cause for sparing the defendant’s life. Id. at 181. On at least three occasions prior to trial, counsel attempted to explain this strategy to the defendant; however, the defendant remained “generally unresponsive” and “never verbally approved or protested” the proposed strategy. Id. According to the Court, “[t]he reasonableness of counsel’s performance, after *consultation with the defendant yields no response*, must be judged in accord with the inquiry generally applicable to ineffective-assistance-of-counsel claims.” Id. at 178 (emphasis added). Thus, in McCoy, the Court draws a clear distinction between when a “defendant, informed by counsel, neither consents nor objects” and when a defendant explicitly objects to such a strategy. Id. While the concession of guilt absent verbal approval or protest by the defendant requires application of the ineffective assistance test, the Court holds that conceding guilt against the client’s *explicit* wishes, regardless of the tactical advantage, represents a complete failure to provide a meaningful adversarial test. McCoy, 200 L. Ed. 2d at 830.

* 1. **Implications of McCoy for child welfare proceedings**

Massachusetts has not explicitly considered constructive denial of counsel in the child welfare context. However, the unauthorized concession of unfitness is akin to the unauthorized concession of guilt in criminal proceedings. The decision to concede unfitness is a choice about the client’s objectives as opposed to a choice of strategy. Just as the defendant in a criminal proceeding may “wish to avoid, above all else, the opprobrium that comes with admitting he killed family members,” McCoy, 200 L. Ed. 2d at 830, a parent-client may wish to avoid the stigma associated with a concession of unfitness.

Additionally, by conceding unfitness, trial counsel does not concede a less serious offense, but rather, concedes the most important factual issue in dispute. Although termination of parental rights requires a finding that termination is in the child’s best interests in addition to a finding of unfitness, see Adoption of Garret, 92 Mass. App. Ct. 664, 671 (2018), the two findings “are not mutually exclusive” but “reflect different degrees of emphasis on the same factors.” Care and Protection of Three Minors, 392 Mass. 704, 714 (1984) (internal quotations omitted). In determining whether termination is in the best interests of the child, judges consider “the ability, capacity, fitness and readiness of the… parents.” Adoption of Gillian, 63 Mass. App. Ct. 398, 404 (2005). Parental fitness is thus the “critical inquiry” in custody disputes. Id. Conceding unfitness to instead focus on whether termination served the child’s best interests is therefore analogous to the concession of guilt in McCoy. By conceding the most important material issue in dispute, trial counsel *completely* fails to provide a meaningful adversarial test to the state’s case. Contrast Velez, 77 Mass. App. Ct. at 276 (holding that a concession of some charges is not constructive denial of counsel where trial counsel competently challenged other factual issues), with McCoy, 200 L. Ed. 2d at 829 (concluding that merely urging leniency in the face of an unauthorized concession of guilt represents a complete failure to challenge the government’s case).

Still, McCoy does not control within the child welfare context. McCoy addresses the criminal defendant’s right to counsel under the Sixth Amendment, which does not extend to civil cases. See Susan Calkins, Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts, 6 J. App. Prac. & Process 179, 187 (2004). In Massachusetts the right to counsel in child welfare proceeding is based upon statute and due process. See G. L. c. 119, §29; J.K.B., 379 Mass. at 3. However, pre-McCoy appellate decisions in several jurisdictions suggest that the unauthorized concession of guilt violates a defendant’s due process right to a fair trial, not just the defendant’s Sixth Amendment rights. See Cooke v. State, 977 A.2d 803, 808 (Del. 2009) (concluding that trial counsel’s concession of guilt “so undermined the proper functioning of the adversarial process contemplated by the Sixth Amendment and the Due Process Clause that the trial cannot be relied upon as having produced a just result”) (cited in McCoy, 200 L. Ed. 2d at 829); see also State v. Carter, 270 Kan. 426, 440 (2000) (holding that counsel’s admission of client’s involvement in murder against client’s adamant protests contravened the Sixth Amendment right to counsel and the due process right to a fair trial) (cited in McCoy, 200 L. Ed. 2d at 829). These cases suggest that McCoy applies to instances in which the right to counsel is based upon due process as well as those guaranteed by the Sixth Amendment.

 Additionally, the Massachusetts Supreme Judicial Court has historically treated unauthorized concessions of guilt the same way the Supreme Court treated the matter in McCoy. Although the Supreme Judicial Court has applied the two-prong Saferian test, it concluded that the unauthorized concession of guilt satisfies both prongs. See Commonwealth v. Triplett, 398 Mass. 561, 568-9 (1986) (holding that counsel’s closing statements which were “tantamount to an admission of his client’s guilt” constituted ineffective assistance of counsel); Commonwealth v. Westmoreland, 388 Mass. 269, 586 (1983) (concluding that defendant was deprived of the effective assistance of counsel when counsel suggested that temporary insanity was likely not applicable and instead argued for a verdict of guilty of voluntary manslaughter despite the lack of evidence of provocation). The Court’s early acknowledgement of the damage caused by unauthorized concessions of guilt suggests that it may be more open to a broader interpretation of McCoy and more likely to extend the holding to child welfare cases.

* 1. **Application to Father**

McCoy suggests that Father can succeed on a claim of constructive denial of counsel. By conceding unfitness against Father’s express wishes, trial counsel conceded the most important issue in dispute. See Three Minors, 392 Mass. at 714. Because parental unfitness is the critical inquiry in termination proceedings, conceding unfitness to focus on whether termination served the child’s best interests is akin to seeking leniency in sentencing following the unauthorized concession of guilt. Trial counsel’s concession of unfitness therefore satisfies situation (2) of the constructive denial of counsel analysis. See McCoy, 200 L. Ed. 2d at 827; Cronic, 466 U.S. at 658. In completely failing to provide a meaningful adversarial test to DCF’s case, trial counsel constructively denied Father the right to counsel. Id. As a result, a finding of prejudice is not required. See Goodman, 60 Mass. App. Ct. at 609.

**Conclusion:**

Trial counsel’s unauthorized concession of Father’s unfitness—in the circumstances of this case—likely does not constitute ineffective assistance of counsel. See Unity, 2011 Mass. App. Unpub. LEXIS at \*6. Even if trial counsel’s conduct fell below that expected of an ordinarily fallible lawyer, there was no prejudice to Father because the evidence of his unfitness was overwhelming. See Azziza, 77 Mass. App. Ct. at 368.

However, trial counsel’s unauthorized concession of Father’s unfitness likely constitutes the constructive denial of his right to counsel. McCoy, 200 L. Ed. 2d at 827. Although McCoy is a Sixth Amendment constructive denial case which is not controlling in the child welfare context, cases cited in McCoy hold that the unauthorized concession of guilt also offends due process. See Cooke, 977 A.2d at 808; Carter, 270 Kan. at 440. Additionally, Massachusetts decisions pre-McCoy suggest that the Massachusetts appellate courts may be open to a broader interpretation of the decision. See Triplett, 398 Mass. at 568-9; Westmoreland, 388 Mass. at 586. Parental fitness is the critical inquiry in child custody proceedings. See Gillian, 63 Mass. App. Ct. at 404. By conceding unfitness against Father’s express wishes, trial counsel conceded the most important matter in dispute at trial and therefore failed to provide a meaningful adversarial test to DCF’s case against Father. See McCoy, 200 L. Ed. 2d at 829. Thus, trial counsel’s unauthorized concession of unfitness likely constitutes constructive denial of counsel. Id.

1. Almost every jurisdiction guarantees a parent’s right to counsel when the state seeks to terminate parental rights. See Susan Calkins, Ineffective Assistance of Counsel in Parental-Rights Termination Cases: The Challenge for Appellate Courts, 6 J. App. Prac. & Process 179, 180 (2004). [↑](#footnote-ref-1)