No. _____

# In The Supreme Court of the United States

FRANCISCO DE ARAGON,

*Petitioner,*

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

Michael M. Brownlee, Esq.
The Brownlee Law Firm, P.A.
390 N. Orange Ave., Suite 2200
Orlando, FL 32801

Andrew B. Greenlee, Esq.*
Andrew B. Greenlee, P.A.
401 E. 1st Street, Unit 261
Sanford, Florida 32772
407-808-6411
andrew@andrewgreenleelaw.com

* *Counsel of Record for Petitioner*

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## QUESTIONS PRESENTED

This case arises from a habeas petition brought under 28 U.S.C. § 2254 alleging ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. This petition presents the following questions for review:

1. Does *Strickland v. Washington*, 466 U.S. 668 (1984) require a court to evaluate the cumulative effect of the errors of counsel in determining whether prejudice is shown?

2. Does a federal court owe AEDPA deference to findings from a state post-conviction court that a habeas petitioner received deficient performance?

3. In an ineffective assistance of counsel claim predicated on the failure to preserve a cause objection to a juror, does a petitioner have to show that the seated juror is "actually biased" to obtain relief?

4. Does a habeas petitioner make "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), as required for the issuance of a certificate of appealability, where he shows the state post-conviction court applied the wrong standard for prejudice under *Strickland* and identifies multiple errors that undermine the reliability of the result at trial?

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Francisco De Aragon was the Petitioner-Appellant in the court below.

Respondent, Secretary, Florida Department of Corrections, was the Respondent-Appellee in the Eleventh Circuit Court of Appeal.

Petitioner is not a corporation. No party is a parent or publicly held company owning 10% or more of any corporation's stock.

## STATEMENT OF RELATED PROCEEDINGS

- *State of Florida v. Francisco De Aragon*, Case No. 15-6543-CF-10A (Fla. 17th Jud. Cir. 2015). Order Denying Motion for Postconviction Relief entered on March 31, 2022.

- *Francisco De Aragon v. State of Florida*, Case No. 4D22-1481 (Fla. 4th DCA 2022). Order denying postconviction relief per curiam affirmed on December 22, 2022.

- *Francisco De Aragon v. Rick D. Dixon, Secretary, Florida Department of Corrections*, Case No. 0:23-cv-60558-WPD (S.D. Fla. 2023). Final Judgment on petition for writ of habeas corpus entered on June 12, 2023.

- *Francisco De Aragon v. Secretary, Florida Department of Corrections*, Case No. 23-12245 (11th Cir. 2024). Order affirming denial of certificate of appealability entered on March 18, 2024.

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## PETITION FOR WRIT OF CERTIORARI

The State of Florida alleged Francisco De Aragon, a youth swim instructor, sexually assaulted three six-year-old girls while giving them swimming lessons in a crowded community pool in the presence of their teachers and other lifeguards. De Aragon denied any wrongdoing. He asserted that any contact with the children was either accidental or normal contact that regularly occurs during swim lessons.

During closing arguments, the State stripped De Aragon of his defense, erroneously telling the jury that he could be convicted even if the touching was accidental. The State also misstated Florida law, arguing that it had no obligation to prove any illicit motive on the part of De Aragon. The prosecutor, moreover, argued that De Aragon admitted to the crimes, which was false. He consistently maintained his innocence.

After his conviction, De Aragon claimed his attorney provided ineffective assistance of counsel by failing to object to those and other improper arguments. The post-conviction court agreed that his attorney provided deficient performance but held De Aragon suffered no *Strickland* prejudice because he failed to show the objections to the "statements would have led to a different verdict."

That is the wrong standard. This Court expressly disavowed that formulation in *Strickland*, where it held a "defendant need not show that counsel's deficient conduct more likely than not

altered the outcome in the case." *Id.* at 693. Instead, a defendant must only show that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

Even though the state court applied the wrong standard for prejudice, a federal court denied De Aragon's 28 U.S.C. § 2254 petition. In doing so, it disregarded findings of the state post-conviction court that defense counsel performed deficiently in other respects and held that defense counsel committed no errors at all. It declined to evaluate the cumulative effect of the attorney errors and eschewed the issuance of a certificate of appealability. The Eleventh Circuit affirmed and also denied a certificate of appealability.

This Court should grant this petition, which raises important unresolved questions, including whether *Strickland* requires courts to consider the cumulative effect of attorney errors, how that standard operates, whether AEDPA deference is owed to state court findings that a defense attorney performed deficiently, and whether a petitioner must show a seated juror is "actually biased" to establish ineffectiveness based on counsel's failure to preserve an objection to the juror.

The case also involves an egregious misapplication of the law governing certificates of appealability. De Aragon established multiple errors of constitutional magnitude and showed the state

court applied the wrong standard for prejudice under *Strickland*. Even if the Court declines to take up the questions presented, it should grant this petition, vacate the order of the Eleventh Circuit, and remand for the issuance of a COA.

## DECISIONS BELOW

The Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, entered an Order Denying Mr. De Aragon's Motion for Post-conviction Relief. App. 13.

Florida's Fourth District Court of Appeal issued an order per curiam affirming that decision without a written opinion. *De Aragon v. State*, 353 So. 3d 618 (4th DCA 2022).

Mr. De Aragon petitioned the United States District Court for the Southern District of Florida for a writ of habeas corpus under 28 U.S.C. § 2254. The district court denied his petition and ruled he was not entitled to a certificate of appealability. App. 4, 11. Mr. De Aragon renewed his request in the Eleventh Circuit, which denied his motion for a certificate of appealability. App. 1.

## STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over Mr. De Aragon's petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The Eleventh Circuit, which had jurisdiction to review the denial of a certificate of appealability, 28 U.S.C. § 2253(c)(2), issued its order on March 18, 2024. App. 1. This petition is timely filed within 90 days of that order. This Court has jurisdiction to review the denial of a certificate of appealability. *Hohn v. United States*, 524 U.S. 236, 239 (1998).

## STATEMENT OF THE CASE

A. The Trial

During jury selection, two members of the venire expressed doubts about their ability to sit on the jury because they had been the victims of sexual battery during their childhood. Juror Gentil indicated that her initial reaction was that she could not be fair and impartial to both sides because she was "molested" when she was "young." After hearing several questions designed to rehabilitate her, Juror Gentil stated that she could be fair to both sides. T. Tr. 214-217.

Juror Preciado also advised the court that her stepfather sexually assaulted her when she was five or six years old. She was initially "disturbed" by the nature of the charges. Though she "went back and forth" in her mind, she spoke up because she did not know how she would feel "tomorrow or the next day" about the case. When asked, she ultimately stated that she could be impartial, but even that statement was equivocal: "I think I could." T. Tr. 234-36.

The defense moved to strike Juror Gentil for cause, but the trial court denied that request. After both parties used all their allotted peremptory strikes, the court asked if there were any challenges for cause. Defense counsel requested an additional peremptory strike to be used against Juror Preciado because the challenge for cause had been previously denied as to Juror Gentil. When the trial court asked the state why it should not just grant an additional peremptory strike to avoid an appellate issue, the prosecutor responded that the argument had already been waived. The trial court agreed. Juror Preciado served on the jury. App. 5.

During the jury trial, the state called the three complainants to the stand, A.C., B.E. and A.P., all of whom were eight years old at the time of trial. T. Tr. 452-53, 469-70, 483-84. They all attended the same school (B.E. and A.P were in the same class and were friends) and for a time were bused daily from school to an aquatic center for swimming lessons. T. Tr. 453-55, 471, 485-86, 531-32, 812-14. A.C. accused her swimming teacher of doing something bad. T. Tr. 455. "I was going—I was trying to swim underwater and we couldn't put our nose—we couldn't put our hands on our nose. And he said you cannot do that. And then he put his hand on my private part to push me—because I couldn't do it." T. Tr. 456-57. A.C. said he used his whole hand to touch her private part. T. Tr. 457.

The examination of A.C. continued as follows:

> **The State**: Did he do anything else with his hands on your private part?

**A.C.**: No. He was pushing me.

**The State**: What do you mean by pushing you?

**A.C.**: He put his other hand on the back of my butt.

**The State**: Okay. When he put his hand on your private part, did he do anything with his finger?

**A.C.**: No.

**The State**: Okay. Did his hand stay outside of your private part or did it go inside of your private part?

**A.C.**: Outside.

**The State**: Okay. Do you remember if his finger went inside of your private part [or] if it stayed outside of your private part?

**Defense counsel**: Objection, Your Honor.

**A.C.**: It was inside.

**The Court**: I'll overrule the objection.

**The State**: It was inside?

**A.C.**: Uh-huh.

T. Tr. 457-458. Though the Florida Evidence Code instructs courts to "take special care to restrict the unnecessary repetition of questions," when the witness is under the age of 14, *see* Section 90.612, Florida Statutes, defense counsel never preserved that specific objection or moved for a mistrial after the State violated the statutory provision.

B.E. testified that something bad happened in the pool with her swim teacher. T. Tr. 472. "Um, my swim teacher, um, when I was swimming, he tried to teach me, but he touched my private part." T. Tr. 473. When the state asked B.E. what part of his body the man used to touch her, she answered, "His hand." T. Tr. 473.

When the state asked if he used his finger to go inside of her vagina, she could not remember. T. Tr. 473. She said she was afraid to tell her teachers, but she did tell her mother and told a policeman the next day. T. Tr. 474-75. B.E. and A.P. were friends and they spoke together with each other about the man touching their private parts. T. Tr. 477-80.

A.P. testified that the lifeguard touched her private parts with his hand. T. Tr. 487. When asked what the man did with his hand when he touched her, she answered, "He just put his hand on [top of] my private part." T. Tr. 488. According to A.P., she and B.E. told their teachers about the touching later in the playground back at school. T. Tr. 488-89. After school,

she told her mother and later told a policeman. T. Tr. 489-90.

The mothers of all three complainants testified at trial in a manner designed to elicit sympathy in the eyes of the jury. T. Tr. 501-02, 523-24, 538-39. One of the mothers of the alleged victims testified as follows: "My daughter, at that age she doesn't need to be doing this. I don't even know why this happened." T. Tr. 504. At another point a mother testified that "it was like someone took my life away. . . . I was just - - I felt like someone took my life away." T. Tr. 526-28. Later, a mother testified that at the time she was a "little nervous. I was crying a little bit." T. Tr. 544. Defense counsel did not object to any of these prejudicial statements.

The lead investigator in the case spoke to the complainants and their mothers and made video recorded interviews of the children. T. Tr. 594-602, 607-08. The videotaped statement of A.C. was played for the jury. T. Tr. 646-72. While alone with the detective, A.C. described a "bad touch" from a person who "was trying to push me for the wall so I can swim." T. Tr. 656-57.

"And then he went up— he put his hand on my bathing suit. And then, he touched my private." T. Tr. 657. "And then, when I was trying to swim, when I did it wrong, he got it—he went under my bathing suit—and he touched it." T. Tr. 660. When asked by the detective if the man's finger went inside of her private, she answered, "Inside of my private." T. Tr. 661.

The detective interviewed B.E. in the presence of her mother. T. Tr. 672-91. B.E. was very reluctant to give a statement. T. Tr. 672-91. She said that a boy at school named Elijah had touched her private parts. T. Tr. 683-84. Under questioning, she said that an adult, someone who works at the pool or a lifeguard touched her privates. T. Tr. 685-86.

The detective also recorded an interview with A.P. T. Tr. 691-708. She described a "bad touch" on her "pee-pee" by the lifeguard who used his hand. T. Tr. 700-01. She said that the touching on her "pee-pee" was on the inside of her bathing suit. T. Tr. 701. She also said that "somebody else got it too" and that she talked about it with her friend, B.E., and they then told the teacher that "the lifeguard touched her peepee." T. Tr. 705-06.

After the state rested its case, the defense called several witnesses. Three teachers from the complainants' school who were present during the swim classes at the aquatic center testified, including the two teachers who had the complainants in their classrooms. T. Tr. 738-51, 759-775, 812-27. A.P. and B.E. were friends in the same school classroom, were in the swim class together and their teacher took photographs that day from a chair about three feet from the pool for a year-end album which showed them at the pool. T. Tr. 814-20. All the teachers recognized De Aragon as the swim class instructor. T. Tr. 749-50, 766, 820-21. The teachers were at the swimming class to monitor the behavior of the children. T. Tr. 751, 767. The teachers witnessed nothing unusual or improper during the swim classes and testified that

the complainants' demeanor did not change and that the children made no complaints about the swim class that day. T. Tr. 750, 767-82. 822-25.

Two employees from the aquatic center who were present that day, the manager and another lifeguard/swim instructor, testified at trial. T. Tr. 777-87, 789-97. They witnessed nothing unusual or improper that day. T. Tr. 785-87, 794-95. The manager remembered that De Aragon asked to be allowed to work the entire day in the pool because he was tired from the night before. T. Tr. 792-93.

De Aragon testified on his own behalf. T. Tr. 728-30, 829-67. He denied the charges. T. Tr. 832, 853. He frequently had physical contact with children while teaching swim classes but always followed Red Cross guidelines for swim instruction. T. Tr. 834-36. On the morning at issue, he asked to spend the entire day teaching in the pool because he was tired from being up most of the previous night repairing the brakes on his car and believed the bracing pool water would combat drowsiness. T. Tr. 840-43. That day was otherwise unremarkable; he taught five swimming classes while teachers and other lifeguards were present. T. Tr. 830, 849-50. The defense rested its case following De Aragon's testimony. T. Tr. 868.

During closing argument, defense counsel failed to object to series of improper statements made by the prosecutor. At one point, the State erroneously argued that it had no burden to disprove that the touching was accidental:

> And trying to say you don't know what goes on, you don't know who those kids are, you don't know where your hand go, you don't know accidentally if you touched them. That doesn't fly either. I don't care if you touched that kid for thirty seconds. It takes approximately one to touch a kid.
>
> * * *
>
> To put your hand in that kid's vagina. There's no lesser. There's no oh, he accidentally did an unlawful touching. That's battery. No. His finger went in the vagina.

T. Tr. 923, 958.

This is a misstatement of law. Under Florida law, lewd or lascivious molestation is a specific intent crime, and while sexual battery is a general intent crime, the State is still required to prove that the contact was not unintentional. *Olenchak v. State*, 183 So. 3d 1227, 1229-30 (Fla. 4th DCA 2016).

In the same vein, the State argued that it need not prove De Aragon's motive for touching the children:

> And I could care less, I could care less, what the reason is. And the State doesn't care the reason behind it. You will never get a jury instruction that tells you the State has the prove beyond and to the

> exclusion of every reasonable doubt why, or what motivated the defendant to commit a crime. We don't know.
>
> * * *
>
> Again, my job is not to figure out why the crime's committed. I don't know.

T. Tr. 952, 956.

The State did, in fact, have to prove that De Aragon had an illegal motive in committing the touching. According to the jury charge, lewd or lascivious molestation requires "a wicked, lustful, unchaste, licentious, or sensual intent on part of the person doing the act." Fla. Std. Jury Instr. (Crim.) 11.10(c). Hence, contrary to its argument in closing, the State was required to prove beyond a reasonable doubt that De Aragon acted with a wicked, lustful, unchaste, licentious, or sensual intent. Arguing to the contrary watered down its burden of proof.

In addition, during closing the State blatantly mischaracterized the evidence, arguing that De Aragon admitted to the crimes: "And I submit to you, when you heard this testimony and saw what they were doing, the defendant admitted to the crimes alleged." T. Tr. 924-25. This was false. De Aragon consistently professed his innocence throughout the criminal proceedings.

In another line of argument, the prosecution shifted the burden of proof, arguing that the jury had to convict De Aragon if they believed that he did not

prove a coincidence, a conspiracy, or the alleged victims were lying:

> Coincidence or fact? Conspiracy or fact?
>
> * * *
>
> So now these girls decide, it's time for use to do something. We're going to tell. And you saw them on tape. So you would have to think to yourself, if you don't believe anything these girls have to say, if you don't believe that they were molested or penetrated, you might have to think to yourself, boy, not only did they conspire together to do this, not only was this coincidental that they thought about it, but now they are going to get the Academy Award, because guess what, you saw them on tape.
>
> So not only are we going to lie about it, but now we get to put on a good act. Now, not only have we lied, but when we go to the police department, we better act really scared. We better say to ourselves, listen, we've got this guy. We better carry through. We better do what sex crimes victims do. Act scared. So conspiracy, a coincidence, a good act, that just followed through. That's what the defense would like you to believe, . . . there is no way

> that this swim teacher would ever do anything like that.

T. Tr. 896-897, 903-904.

The prosecutor returned to that theme later in closing, suggesting that De Aragon had to prove his accusers were lying to obtain a non-guilty verdict:

> If you go back there and you think that these girls: Listen, it will be a great day for them. If you go back there and think to yourself, this is something that they needed to do, I don't know. Nothing good on T.V. No cartoons, no clay, no barbies. Best thing yet, let's make up a sex crime. If that's how you feel, find him not guilty.

T. Tr. 925, 959.

At another point, the State suggested that the alleged victims lacked the mental ability to be mistaken or to fabricate their story:

> So now these girls decide, it's time for use to do something. We're going to tell. And you saw them on tape. So you would have to think to yourself, if you don't believe anything these girls have to say, if you don't believe that they were molested or penetrated, you might have to think to yourself, boy, not only did they conspire together to do this, not only was this coincidental that they thought about it,

> but now they are going to get the Academy Award, because guess what, you saw them on tape. So not only are we going to lie about it, but now we get to put on a good act. Now, not only have we lied, but when we go to the police department, we better act really scared. We better say to ourselves, listen, we've got this guy. We better carry through. We better do what sex crimes victims do. Act scared. So conspiracy, a coincidence, a good act, that just followed through. That's what the defense would like you to believe, that in is no way, there is no way that this swim teacher would ever do anything like that.

T. Tr. 903-04. Florida courts have condemned precisely this sort of argument. *See*, *e.g.*, *Petruschke v. State*, 125 So. 3d 274, 279-80 (Fla. 4th DCA 2013) (reversing conviction where prosecutor argued alleged victim lacked mental ability to fabricate allegations of sexual abuse).

As noted, though, none of these improper arguments drew an objection from defense counsel. The jury convicted De Aragon, who was sentenced to life in prison, without the possibility of parole. App. 6.

B. The State Post-Conviction Proceedings

After exhausting his appellate rights on direct appeal, De Aragon filed a motion for post-conviction relief pursuant to Florida Rule of Criminal 3.850. He

raised five claims of ineffective assistance of counsel. App. 1-2.

First, De Aragon maintained that his defense attorney provided ineffective assistance of counsel by failing to object and request a mistrial due to the improper closing arguments described above. This claim included the failure to object when the prosecutor made arguments that shifted/decreased its burden and misstated the law. It also included the failure to object when the prosecutor misrepresented the evidence and argued that "the defendant admitted to the crimes alleged," when in fact De Aragon consistently maintained his innocence throughout the proceedings. App. 7-8, 13-14.

Second, he argued that defense counsel provided ineffective assistance of counsel by failing to preserve an objection to the denial of cause challenge, which allowed Juror Preciado to serve on the jury and foreclosed any appellate challenge to the composition of the panel. App. 9.

Third, De Aragon asserted that his defense attorney provided ineffective assistance of counsel by failing to object to the State's repeated question of A.C. to obtain different answers from her original exculpatory testimony. De Aragon noted that, while his attorney said "objection," he never raised section 90.612, Florida Statues, which specifically instructs trial courts to "take special care to restrict the unnecessary repetition of questions" where witnesses are under the age of fourteen. Fla. Stat. § 90.612(3). *See* App. 9.

Fourth, De Aragon argued that he received ineffective assistance of counsel by failing to object to improper sympathy testimony offered by the mothers of the alleged victims. App. 15. In his final claim, the defendant asked the post-conviction court to consider the cumulative effect of all the foregoing errors when evaluating the prejudice component of the *Strickland* test. App. 15.

The state post-conviction court denied the motion without conducting an evidentiary hearing. In adjudicating the first claim, the post-conviction court articulated what it believed was the proper standard for evaluating prejudice under *Strickland*, that is, the error must be "so prejudicial as to create a likelihood that the statements would have led to a different verdict." App. 14.

With regard to the improper burden-shifting, the post-conviction court found that the comments "may have been marginally objectionable," but concluded that those comments "did not rise to the level of prejudice where the failure to object constitutes ineffectiveness." App. 14. As it related to the misstatement of the law and the mischaracterization of evidence, the post-conviction court echoed that logic: "The same applies as to the claim that the State misstated the law or mischaracterized evidence." App. 14.

Regarding the second claim of ineffectiveness, the post-conviction court expressly found it was "clear" that defense counsel "failed to properly preserve the objection as to the juror by renewing the objection

before the swearing of the jury." App. 14. Nevertheless, the trial court concluded that "the test for ineffectiveness requires a showing that the juror was actually biased to warrant their exclusion." App. 14. (citing *Carratelli v. State*, 961 So. 2d 312 (Fla. 2007)). It found that the "juror in this case was the victim of a molestation but consistently indicated an ability to be fair and impartial even with this experience." App. 14.

Regarding the third ground for post-conviction relief, the court found that the "Defendant has failed to show the prejudice resulting from the effort of the prosecutor to get the victim to answer questions in a consistent manner." App. 14. Regarding the fourth claim, the post-conviction court again rested its ruling on the lack of prejudice: "even if the questioning generated sympathy, it was not so insidious as to prejudice the verdict in light of the record evidence." App. 15. Finally, the post-conviction court rejected the argument regarding cumulative error, stating only that the "cumulative argument is denied for the cumulative reasoning as stated herein." App. 15.

De Aragon appealed the decision, but Florida's Fourth District Court of Appeal affirmed the post-conviction court without explanation. *De Aragon v. State*, 353 So. 3d 618 (4th DCA 2022).

C. The Federal Habeas Proceedings

De Aragon filed a timely habeas petition pursuant to 28 U.S.C. § 2254. He renewed the arguments in his prior motion for post-conviction

relief, claiming defense counsel provided ineffective assistance of counsel by failing to (1) object and request a mistrial due to the state's improper closing arguments; (2) preserve an objection to the denial of cause challenge; (3) object to the state's repeated questioning of an alleged victim to obtain a different answer; and (4) object to improper sympathy testimony. App. 7-11.

De Aragon asserted the post-conviction court's prejudice determination was contrary to, or involved an unreasonable application of, the *Strickland* standard because the "different verdict" test employed was "more onerous than that required by *Strickland*." *De Aragon v. Rick D. Dixon, Secretary, Florida Department of Corrections*, Case No. 0:23-cv-60558-WPD (S.D. Fla. 2023) (Doc. 6 at 19-20).

Similarly, he asserted that the post-conviction court applied the wrong standard to his claim based on his attorney's failure to preserve the challenge to the composition of the jury by renewing his objection prior to the swearing of the jury. *Id.* at 28-29. According to De Aragon, a petitioner seeking to establish ineffectiveness in this circumstance is not required to show a seated juror is "actually biased." *Id.* Instead, he argued, the test is whether the outcome would have been different on appeal if the claim had been properly preserved. *Id.* Finally, he asserted that the state court failed to account for the cumulative effect of defense counsel's errors, which were "plentiful and egregious." *Id.* at 20-21, 36-37.

The district court, after receiving a response and a reply, denied De Aragon's petition.

Disregarding the findings of the state post-conviction court, which presumed deficient performance and rested its rulings exclusively on the prejudice prong of the *Strickland* test, the federal district court found that defense counsel had not committed any error at all. App. 9.

In reaching this conclusion, the district court found that the prosecutor's comment that De Aragon "admitted" to the crime was attributable to an error by the transcriptionist, a finding that was notably absent from the opinion of the post-conviction court, which never gave De Aragon a hearing to develop the record on the claim and accepted the veracity of the transcript. App. 8.

The district court also ignored the state post-conviction court's finding that it was "clear" that defense counsel failed to preserve an objection to the denial of the cause challenge. App. 14. Instead, the district court, applying Florida law, concluded that the challenge was sufficiently preserved. App. 9.

In much the same way, the district court declined to credit the state post-conviction court's rulings on the third and fourth ineffective assistance of counsel claims. Unlike the state court, which presumed some level of deficient performance and rested its ruling on the lack of prejudice, the federal district court again found that defense counsel had not performed deficiently at all. App. 9.

Having found no error on the part of defense counsel, the federal district court concluded that there

was "no error to accumulate." App. 9. Notably absent from its ruling was any mention of the argument that the defense counsel provided ineffective assistance of counsel by failing to object when the prosecutor misstated the law regarding De Aragon's accidental touching defense. App. 4-10. In its final judgment, the district court held that De Aragon had not shown a violation of a substantial constitutional right and therefore denied him a certificate of appealability. App. 11-12.

D. The Proceedings in the Eleventh Circuit

De Aragon moved the Eleventh Circuit Court of Appeals for a certificate of appealability. He renewed the arguments raised in the district court regarding the "different verdict" test for prejudice applied by the state post-conviction court. *De Aragon v. Sec'y, Dep't of Corr.*, Case No. 23-12245 (11th Cir. 2024), Doc. 7, Mot. for COA at 18 n.7. De Aragon also observed that the district court's rationale departed from that of the state post-conviction court, which rested its ruling on the lack of prejudice, and not on deficient performance. *Id.* at 25 n.10. As it relates to the issue arising from jury selection, De Aragon also renewed his argument that the post-conviction court employed the wrong standard when it required him to show that a seated juror is "actually biased." *Id.* at 27.

The Eleventh Circuit denied the motion for a certificate of appealability. According to the Eleventh Circuit, De Aragon's initial claim failed because he "failed to establish a reasonable probability that the outcome of the trial would have been different had

counsel objected to the state's closing argument." (citing *Strickland*, 466 U.S. at 694). App. 2.

The Eleventh Circuit also held that De Aragon failed to establish prejudice arising from the failure to preserve the cause challenge because the seated juror "rehabilitated her prior statements prior statements and assured that she could be impartial, and the state courts concluded that the juror being a victim of a similar crime to the one being prosecuted was not enough to show that a for-cause challenge would have prevailed." App. 2-3.

As it relates to the third and the fourth claims, the Eleventh Circuit held that De Aragon "only offered conclusory arguments to establish prejudice as to the repetitious questioning of the minor victims and the alleged sympathy testimony of other witnesses." App. 3. Finally, the Eleventh Circuit held that "reasonable jurists would not debate the denial of Claim 5 because De Aragon's other claims fail, and there cannot be cumulative error when there is no error to accumulate." App. 3 (citing *United States v. Gamory*, 635 F.3d 480, 497 (11th Cir. 2011)).

Finding that De Aragon "failed to make a substantial showing of the denial of a constitutional right," the Eleventh Circuit denied a certificate of appealability. App. 1. This timely petition followed.

## REASONS FOR GRANTING THE WRIT

This Court should issue a writ of certiorari to resolve a split in authority regarding the consideration of cumulative error in ineffective assistance claims. Though *Strickland* instructs courts to consider the "unprofessional **errors**" of counsel in evaluating prejudice, *Strickland*, 466 U.S. at 694 (emphasis added), some circuit courts of appeal like the Fourth and the Eighth have refused to consider the cumulative effect of those errors.

Meanwhile, in the Tenth Circuit, "prejudice may be cumulated among different kinds of constitutional error, such as ineffective assistance of counsel and prosecutorial misconduct," even "when those claims have been rejected individually for failure to satisfy a prejudice component incorporated in the substantive standard governing their constitutional assessment." *Cargle v. Mullin*, 317 F.3d 1196, 1200, 1207 (10th Cir. 2003).

The Eleventh Circuit has observed that this Court "has not directly addressed the applicability of the cumulative error doctrine in the context of an ineffective assistance of counsel claim." *Forrest v. Fla. Dep't of Corr.*, 342 F. App'x 560, 564-65 (11th Cir. 2009). In *Forrest*, though, the Eleventh Circuit ratified the holding of *Parker v. State*, 904 So. 2d 370 (Fla. 2005), in which the Florida Supreme Court stated that "where the individual claims of error alleged are . . . without merit, the claim of cumulative error also necessarily fails."

The Eleventh Circuit applied that same circular logic in this case and refused to consider the cumulative effect of the unprofessional errors of counsel because it found that no individual claim was independently meritorious. This Court should grant this petition, reject that approach, and endorse the rule of the Tenth Circuit.

It should also give courts guidance on whether AEDPA deference applies to findings from state courts on state law that inure to the benefit of habeas petitioners. This Court has chided federal habeas courts for failing to give proper deference to findings made in state post-conviction courts and warned that ineffective assistance of counsel claims should not be used to "drag federal courts into resolving questions of state law." *Shinn v. Kayer*, 141 S. Ct. 517, 523 (2020).

But what happens when a state post-conviction court makes findings on issues of state law that benefit the habeas petitioner? Logic would dictate that the same deference should apply, lest federal courts weigh in unnecessarily on murky issues of state law.

In this case, the federal district court essentially overruled the state post-conviction court on thorny issues of Florida law, including the preservation of error in cause challenges to jurors and the accuracy of transcripts that the state post-conviction court accepted as valid. This Court should repudiate that practice and hold that AEDPA deference applies to *all* the findings of the state post-

conviction court on issues of state law, and not just to those findings that cut against the petitioner.

The third question raises an important issue related to ineffective assistance of counsel in the context of jury selection. The state post-conviction court required De Aragon to show that the seated juror harbored actual bias in order to show ineffective assistance of counsel based on the failure to preserve an objection the denial of cause challenges to two jurors who expressed misgivings about sitting on the jury because they were also the victim of sexual molestation. The proper standard should be the *Strickland* test, which in this context asks whether there is a reasonable likelihood that the outcome on appeal would have been different but for the failure to preserve the objections.

Finally, the Court should review the fourth question presented and reiterate that the bar for obtaining a certificate of appealability is not meant to be insurmountable. De Aragon showed that the state post-conviction court applied the wrong standard to evaluate *Strickland* prejudice and established multiple instances of serious errors on the part of counsel that vitiated the fairness of the proceedings. Even if the Court declines to take up the first three issues, it should grant this petition, vacate the order of the Eleventh Circuit, and remand for the issuance of a certificate of appealability so that these issues can be fully briefed on the merits.

## I. Review is Necessary to Clarify the Proper Standard for Prejudice in Ineffective Assistance of Counsel Claims Predicated on Cumulative Error.

In *Strickland*, this Court stated that a defendant seeking to establish prejudice "must show that there is a reasonable probability that, but for counsel's unprofessional **errors**, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694 (emphasis added). The *Strickland* Court went on to say that this "legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's **errors**. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the **errors**, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695 (emphasis added).

The portions of *Strickland* quoted above are noteworthy because the Court repeatedly used the plural form—"errors"—in describing how courts should assess the prejudice prong of the analysis. This, in turn, suggests that courts should look to the cumulative effect of all the errors of counsel in deciding whether the defendant established prejudice. This makes sense. Courts are required to "consider the totality of the evidence before the judge or jury" and determine whether the "errors" of counsel are "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 695. That inquiry necessarily entails an examination of the cumulative effect of the errors, even if no single error is

independently sufficient to establish prejudice and requires weighing the effect of those errors against the strength of the evidence presented on the other side of the balance.

Just last month, in the capital sentencing context, the Court emphasized the importance of considering the "totality of the evidence" and evaluating the relative strength or weakness of the state's case in determining whether the errors of counsel give rise to *Strickland* prejudice. *Thornell v. Jones*, 22-982, 2024 WL 2751215, at *6 (U.S. May 30, 2024).

In *Thornell v. Jones*, the Court held the Ninth Circuit committed several errors in its prejudice analysis. First, the appellate court "failed adequately to take into account the weighty aggravating circumstances in this case." *Id.* The Ninth Circuit also erred in applying "a strange Circuit rule that prohibits a court in a *Strickland* case from assessing the relative strength of expert witness testimony." *Id.*

Given this analysis, which clearly contemplates weighing *all* the circumstances, "both mitigating and aggravating," *id.*, there can be little doubt that courts applying *Strickland* should consider the cumulative effect of counsel's missteps in evaluating prejudice. Yet, in certain federal circuit courts of appeal, that is not the law.

For instance, the Fourth Circuit held that it is not appropriate to consider the cumulative effect of attorney error when the individual claims of

ineffective assistance do not violate the defendant's constitutional rights. *Fisher v. Angelone*, 163 F.3d 835, 852 (4th Cir. 1998) ("Having just determined that none of counsel's actions could be considered constitutional error . . . it would be odd, to say the least, to conclude that those same actions, when considered collectively, deprived Fisher of a fair trial. Not surprisingly, it has long been the practice of this Court individually to assess claims under *Strickland*").

In *Wainwright v. Lockhart*, 80 F.3d 1226, 1232 (8th Cir. 1996), the Eighth Circuit likewise rejected a request to consider cumulative effect of defense counsel's errors: "Errors that are not unconstitutional individually cannot be added together to create a constitutional violation." *See also Middleton v. Roper*, 455 F.3d 838, 851 (8th Cir. 2006) (noting that a habeas petitioner cannot demonstrate prejudice by showing a series of errors, none of which alone would be sufficiently prejudicial).

The Second, Seventh and Ninth circuits have reached the opposite conclusion. *Rodriguez v. Hoke*, 928 F.2d 534, 535 (2d Cir. 1991) ("Since Rodriguez's claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions, all his allegations of ineffective assistance should be reviewed together."); *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995) ("In making this showing, a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland*'s test."); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir.

1995) (finding for purposes of ineffective assistance of counsel claim, defense may be prejudiced as a result of cumulative impact of multiple deficiencies in defense counsel's performance).

The Tenth Circuit has adopted an even more flexible approach that allows for consideration of all errors, whether they arise from ineffective assistance of counsel or some other error of constitutional significance, such as a *Brady* violation, and regardless of the phase of the proceedings. *Cargle v. Mullin*, 317 F.3d 1196, 1206-09 (10th Cir. 2003). The Tenth Circuit's test is effectively a harmless error analysis that rests on the premise that a prejudice turns on whether the errors undermine the reliability and fairness of the proceedings in their entirety.

As noted above, the Eleventh Circuit previously commented on the lack of guidance from this Court on this point, and in recent decisions it has declined to state a position on whether it recognizes cumulative error in the context of ineffective assistance of counsel claims. *Tarleton v. Sec'y, Fla. Dep't of Corr.*, 5 F.4th 1278, 1292 (11th Cir. 2021) ("we need not reach the issue of whether cumulative error is cognizable in habeas proceedings"); *Sears v. Warden GDCP*, 73 F.4th 1269, 1300 n.19 (11th Cir. 2023) (same).

In this case, however, it applied the same method as in those courts that decline to evaluate the cumulative effect of the errors of counsel, considering and rejecting each claim individually before ultimately concluding "there cannot be cumulative error when there is no error to accumulate." App. 3.

That logic is deeply flawed. A court would never reach the question of cumulative error if a habeas petitioner brought even a single meritorious claim. If a petitioner had a meritorious claim, he would already be entitled to relief, which would obviate the need for the cumulative error inquiry. *See Willingham v. Mullin*, 296 F.3d 917, 935 (10th Cir. 2002) (this analysis "would render the cumulative error inquiry meaningless, since it [would] . . . be predicated only upon individual error already requiring reversal"). The Eleventh Circuit's approach might make sense if a petitioner's claims all faltered for lack of deficient performance, but the court's rulings rested primarily on the prejudice prong of the *Strickland* test.

The Court should reject the Eleventh Circuit's mode of analysis. De Aragon's claims are far from trivial. The prosecutor's comments vitiated his defense by claiming that De Aragon could be convicted even if the touching were accidental and lasted for only one second. The prosecutor also told the jury that De Aragon had admitted to the crimes, which was false, improperly suggested that the victims lacked the ability to fabricate or invent their account, shifted the burden to De Aragon to establish that the victims were lying or engaged in a conspiracy, and incorrectly told the jury that it did not have to prove any motive for the touching. To make matters worse, the trial court (1) seated a juror who also had been molested as a child and expressed serious doubts as to whether she could be fair and impartial; (2) allowed the prosecutor to coax one of the victims into changing her original exculpatory testimony into an inculpatory account; and (3) permitted the introduction of inflammatory

testimony from the mothers of the victims. Defense counsel failed to object properly in all these instances.

Equally important, this is not a case where the State presented overwhelming evidence of guilt. The State's evidence consisted of the three children's allegations that De Aragon touched their private part for a split second as they were attempting to learn how to swim. The children did not allege that De Aragon repeatedly touched their private parts during the swim lesson. The children did not allege that De Aragon touched or fondled their private part for a prolonged period.

Neither the supervising teachers nor other swim instructors that were in the immediate vicinity noticed anything improper or inappropriate while the children were learning to swim. De Aragon also denied the allegations and stated that the children must have been mistaken. He also testified that if any touching did occur, it was accidental.

The Court should not lose sight of the fact that De Aragon could spend the rest of his life in prison for pushing his students' backside during a swim lesson so they could reach the wall. And no court—not the post-conviction court, not the district court, and not the Eleventh Circuit—properly considered the cumulative effect of all of defense counsel's many failings and weighed those errors against the overall weakness of the State's case. Given the foregoing, this Court should repudiate the approach of the Eleventh Circuit and grant certiorari on this important unresolved issue of law.

## II. The Court should Clarify whether Findings from a State Post-Conviction Court that are Beneficial to a Habeas Petitioner are Owed AEDPA Deference.

This Court has on many occasions corrected federal habeas courts for failing to give proper deference to findings of state post-conviction courts on issues of state law. *Shinn*, 141 S. Ct. at 523; *see also Davis v. Ayala*, 576 U.S. 257, 267 (2015); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

The deference afforded state court findings is derived from the habeas statute, which provides that "a determination of a factual issue made by a State court shall be presumed to be correct," 28 U.S.C. § 2254(e)(1), from federalism concerns, and from a reluctance to "drag federal courts into resolving questions of state law." *Shinn*, 141 S. Ct. at 523.

Here, the post-conviction court made several findings regarding issues of state law that benefitted De Aragon. The post-conviction court found it was "clear" that defense counsel "failed to properly preserve the objection as to the juror by renewing the objection before the swearing of the jury." App. 14. It also presumed deficient performance in all other respects and based its rulings exclusively on the supposed lack of prejudice. App. 13-15.

Yet, when the federal district court considered De Aragon's ineffective assistance of counsel claims, it ignored the findings of the post-conviction court, most of which turned on issues of Florida law, and denied

De Aragon's petition on different grounds, *i.e.*, that he had not shown deficient performance. In a particularly notable example, the federal court addressed a thorny issue of Florida law, the preservation of error in the jury selection phase, and found that the claim had been preserved. App. 9. This finding effectively overruled the state post-conviction court, which found it was "clear" that defense counsel *failed to* preserve De Aragon's challenge to the composition of the jury by not renewing that challenge before the jury was sworn.

What is sauce for the goose is sauce for the gander. There is no principled reason why a finding from a state post-conviction court on a unique issue of state law should not be given deference when it benefits the habeas petitioner. This Court should grant this petition on the second question presented and hold that AEDPA deference applies equally to findings that benefit the state and findings that benefit the habeas petitioner.

## III. The Court should Provide Guidance on the Proper Standard to be Applied to Ineffective Assistance of Counsel Claims Based on the Failure to Preserve Cause Challenges to Jurors.

In Florida, to obtain relief on an ineffective assistance of counsel claim based on an attorney "failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased." *Carratelli v. State*, 961 So. 2d 312, 324 (Fla. 2007). To meet the "actual bias" standard, "the

defendant must demonstrate that the juror in question was not impartial—*i.e.*, that the juror was biased against the defendant, and the evidence of bias must be plain on the face of the record." *Id.*

The Eleventh Circuit has affirmed the use of that standard on habeas review. *Fennell v. Sec'y, Fla. Dep't of Corr.*, 582 F. App'x 828, 832 (11th Cir. 2014). That standard for prejudice, however, is more demanding than *Strickland* itself, which only requires a habeas petitioner to show a reasonable likelihood that the outcome would have been different, but for the deficient performance of counsel.

In this case, the petitioner made that showing. As the post-conviction court found, it is "clear" that defense counsel neglected to preserve De Aragon's appellate rights by failing to object to the panel prior to the swearing of the jury. *See Rodas v. State*, 821 So. 2d 1150, 1153-54 (Fla. 4th DCA 2002); *Carratelli*, 961 So. 2d at 318 ("the preservation of a challenge to a potential juror requires more than one objection. When a trial court denies or grants a peremptory challenge, the objecting party must renew and reserve the objection before the jury is sworn.").

Had the error been preserved, De Aragon would have had a very strong appeal. Florida law requires a jury "free of any prejudice for or against either party." *Matarranz v. State*, 133 So. 3d 473, 484 (Fla. 2013). The seated jurors should "not only be impartial, but beyond even the suspicion of partiality." *O'Connor v. State*, 9 Fla. 215, 222 (Fla. 1860). To that end, a "juror must be excused for cause if any

reasonable doubt exists as to whether the juror possesses an impartial state of mind." *Smith v. State*, 699 So. 2d 629, 635 (Fla. 1997).

Close calls "should be resolved in favor of excusing the juror," *Reid v. State*, 972 So. 2d 298, 300 (Fla. 4th DCA 2008), because "if error is to be committed, let it be in favor of the absolute impartiality and purity" of the jury, *Matarranz*, 133 So. 3d at 484. In *Matarranz*, the Florida Supreme Court emphasized the importance of "[i]nitial reactions and comments from a prospective juror," which "offer a unique perspective into whether an individual can be fair and unbiased." *Matarranz*, 133 So. 3d at 490. The *Matarranz* Court also recognized the impropriety of attempts to "rehabilitate" any potential juror who previously admitted to harboring bias: "When a juror expresses his or her unease and reservations based upon actual life experiences, as opposed to stating such attitudes in response to vague or academic questioning**, it is not appropriate for the trial court to attempt to 'rehabilitate' a juror into rejection of those expressions.**" *Matarranz*, 133 So. 3d at 490 (emphasis added).

In this case, Juror Gentil indicated that her initial reaction was that she could not be fair and impartial to both sides because she was "molested" when she was "young." Similarly, Juror Preciado advised the court that her stepfather sexually assaulted her when she was five or six years old. She was initially "disturbed" by the nature of the charges. Though she "went back and forth" in her mind, she spoke up because she did not know how she would feel

"tomorrow or the next day" about the case. At the very least, these jurors presented a "close call," which would require their removal from the panel.

The Eleventh Circuit rested its prejudice determination on the supposed notion that Juror Preciado "rehabilitated" her prior statements and supposedly "assured the court that she could be impartial." Under *Matarranz*, though, this sort of "rehabilitation" is inappropriate where a juror initially expresses doubt about her fitness to serve due to her life experiences. Juror Preciado initially testified that she was "disturbed" by the nature of the charges. In addition, she cautioned the court that she might not know how she would feel about the case tomorrow or the next day. The notion that this juror was "rehabilitated" is dubious, and her serving on the jury would have provided fertile ground for an argument on appeal, particularly since the erroneous denial of a cause challenge under Florida criminal law "cannot be harmless" because it abridges a defendant's "right to peremptory challenges by reducing the number of those challenges available him." *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985).

The failure to object foreclosed De Aragon's ability to raise a strong claim on appeal. Yet the post-conviction court held him to a higher standard than *Strickland* and required him to establish a juror was "actually biased." The Court should grant this petition and resolve this divergence between Florida and federal constitutional law.

## IV. The Court should Resolve Uncertainty regarding what Constitutes a Substantial Showing of the Denial of a Constitutional Right.

This Court should also resolve the ambiguity as to what constitutes a "substantial showing of the denial of a constitutional right" under 28 U.S.C. § 2253(c)(2). And, because Petitioner raised issues that satisfy that threshold, the Court should remand this case to the Eleventh Circuit for the issuance of a certificate of appealability.

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This provision has never been construed as an insurmountable hurdle; indeed, the Court has held a prisoner need only "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see also Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003).

As the Court explained in *Miller-El v. Cockrell*, "a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. . . . Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Miller-El*, 537 U.S. at 336.

Notwithstanding this admonition, the federal circuit courts of appeals have remained exceedingly reluctant to grant certificates of appealability. *See generally* Margaret A. Upshaw, Comment, *The Unappealing State of Certificates of Appealability*, 82 U. Chi. L. Rev. 1609, 1614 (2015) (noting that 92 percent of all COA rulings result in denials).

This case presents a classic example of an erroneous denial of a certificate of appealability. De Aragon identified grave errors in the adjudication of his petition by the post-conviction court, which applied a more onerous standard than articulated in *Strickland*. His petition also identified a startling string of errors by trial counsel that began with the seating of a biased juror who was subjected to the same crime and harbored doubt about her fitness to serve on the jury. It also included the failure to object to a gross mischaracterization of the record regarding his supposed admission to the charged offenses, and the failure to object to improper comments by the prosecutor that, if credited, foreclosed his theory of defense, shifted the burden to De Aragon, and obviated the need to prove an essential element, his motive or intent.

All he needed was to show was that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. at 484. De Aragon made that showing. Even if the Court declines to take up the first three questions presented, it should nevertheless grant this petition and remand for the issuance of a COA.

## CONCLUSION

Based on the foregoing, this Court should grant this petition and review the decision below.

Respectfully submitted on this 17th day of June, 2024.

Michael M. Brownlee, Esq.
The Brownlee Law Firm, P.A.
390 N. Orange Ave., Suite 2200
Orlando, FL 32801

Andrew B. Greenlee, Esq.*
Andrew B. Greenlee, P.A.
401 E. 1st Street, Unit 261
Sanford, Florida 32772
407-808-6411
andrew@andrewgreenleelaw.com

* *Counsel of Record for Petitioner*