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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-12245

[Filed March 18, 2024]

FRANCISCO DE ARAGON,
Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:23-cv-60558-WPD

Order of the Court

ORDER:

Francisco De Aragon is a Florida prisoner serving a life sentence for capital sexual battery on a child, battery, and lewd or lascivious molestation. He filed a *prose* 28 U.S.C. § 2254 petition, raising seven claims: (1) trial counsel failed to object to the prosecutor's closing argument; (2) trial counsel failed to preserve an

objection to his for-cause challenge to a juror; (3) trial counsel failed to object to repetitious questions by the prosecutor; (4) trial counsel failed to object to sympathy testimony; (5) trial counsel's errors resulted in cumulative error; (6) his convictions violated the Double Jeopardy Clause; and (7) appellate counsel failed to argue that the trial court erred in denying a for-cause challenge to a juror and forcing him to exhaust his peremptory strikes. The district court denied the petition on the merits. De Aragon now moves this Court for a certificate of appealability ("COA").

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotation omitted).

Here, reasonable jurists would not debate the district court's denial of the petition because De Aragon failed to make the required showing. First, Claim 1 fails because De Aragon could not establish a reasonable probability that the outcome of trial would have been different had counsel objected to the state's closing arguments. *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

Second, reasonable jurists would not debate the denial of Claims 2 and 7 because De Aragon cannot show prejudice given that the juror rehabilitated her

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. *See id.*; *Pinkney v. Sec'y, Dep't of Corr.*, 876 F.3d 1290, 1295 (11th Cir. 2017).

Third, reasonable jurists would not debate the denial of Claims 3 and 4 because 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. *See Strickland,* 466 U.S. at 694. Fourth, 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. *United States v. Gamory*, 635 F.3d 480, 497 (11th Cir. 2011).

Finally, reasonable jurists would not debate Claim 6 because there was no double jeopardy violation for De Aragon to have been sentenced for both simple battery and lewd and lascivious molestation. *Missouri v. Hunter*, 459 U.S. 359, 366-68 (1983).

Accordingly, De Aragon's motion for a COA is DENIED.

/s/ Nancy G. Abudu
UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-60558-CIV-DIMITROULEAS

[Filed June 12, 2023]

FRANCISCO DE ARAGON,
Petitioner,

vs.

RICKY D. DIXON, SEC'Y D.O.C.,
Respondent.

FINAL JUDGMENT AND ORDER DENYING HABEAS PETITION

THIS CAUSE is before the Court on Petitioner De Aragon's March 22, 2023 Petition for Writ of Habeas Corpus [DE-1], and his unsworn March 28, 2023 Memorandum [DE-6]. The Court has considered the State's May 8, 2023 Response [DE-7] with Appendices [DE-8-9] and Petitioner's June 7, 2023 Reply [DE-10] and finds as follows:

1. On June 10, 2015, De Aragon was charged by Information with Lewd or Lascivious Molestation against A.P. [DE-9-1, pp. 7-8]. An Amended Information was filed on June 15, 2015 which alleged charges of Sexual Battery upon a Child (A.C.), Lewd or

Lascivious Molestation (A.C.), Sexual Battery upon a Child (B.E.) and Lewd and Lascivious Molestation. (B.E.). All four crimes occurred on May 19, 2015. [DE-9-1, pp. 4-6]. On May 18, 2017, an Amended Information was filed charging Count One: Sexual Battery upon a Child (A.C.); Count Two: Lewd and Lascivious Molestation (A.C.); Count III; Sexual Battery upon a Child (B.E.); Count IV: Lewd and Lascivious Molestation (B.E); and Count V: Lewd and Lascivious Molestation (A.P.). Again, all crimes occurred on May 19, 2015. The counts involved Aragon's sexually assaulting three, six-year old girls while giving them swimming lessons.

2. During jury selection, both parties used all of their allotted, ten peremptory strikes. [DE-8-1, pp. 405-415]. The Court then asked if there were any challenges for cause. [DE-8-1, pp. 413-414]. The State successfully challenged Juror Ferro for cause, which brought up Juror Preciado. [DE-8-12, p. 415]. Earlier in the jury selection the Court had denied a challenge for cause on Juror Gentil. Juror Gentil was one of the ten jurors who the defense had previously exercised a peremptory strike against, [DE-8-1, p. 406]. After exercising the last strike, 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. [DE-8-1, pp. 416-417]. That request was denied [DE-8-1, p. 420] as was a challenge for cause. Juror Preciado served on the jury.

3. On May 18, 2017, De Aragon was found guilty of Count II: Lewd and Lascivious Molestation in

case number 15-6543CF. [DE-9-1, p. 10]. He was also found guilty of Count I: Sexual Battery upon a Child and Counts IV and V: Lewd and Lascivious Molestation [DE-9-1, pp. 11-13]. On Count III, he was found guilty of Battery, a lesser included offense. [DE-9-1, p. 14].

4. On May 18, 2017, De Aragon was sentenced to Life in Prison, without the possibility of parole. [DE-9-1, pp. 18-25].

5. On June 16, 2017, the trial court denied Defendant's Motion for New Trial. [DE-9-1, p. 37.

6. On May 22, 2019, the Fourth District Court of Appeal affirmed. [DE-9-1, pp. 144-155]. There was a dissent. *De Aragon v. State*. 273 So. 3d 26 (Fla. 4th DCA 2019). Mandate issued on June 21, 2019. [DE-9-1, p. 151]. On November 22, 2019, the Florida Supreme Court declined jurisdiction to review. [DE-9-1, p. 162]. *De Aragon v. State*, 2019 WL 6271577 (Fla 2019). De Aragon's conviction became final on February 20, 2020.

7. On March 27, 2020, De Aragon filed a Habeas Petition alleging ineffective assistance of appellate counsel. [DE-9-1, pp. 164-258]. On April 24, 2020, the Fourth District Court of Appeal denied the petition. [DE-9-1, p. 260]. Rehearing was denied on May 29, 2020. [DE-9-1, p. 268].

8. On January 5, 2021, De Aragon filed a motion for post conviction relief. [DE-9-2, pp. 2-32]. It was denied on March 31, 2022. [DE-9-2, pp. 50-52]. The Fourth District Court of Appeal affirmed on December 22, 2022. [DE-9-2, p. 118]. *De Aragon v. State*, 353 So. 3d 618 (Fla. 4th DCA 2022). Reconsideration was denied on January 27, 2023. [DE-

9-2, p. 126]. Mandate issued on February 17, 2023. [DE-9-2, p. 128].

9. In this timely habeas petition, De Aragon complains that trial counsel was ineffective in failing to:

A. Object to the prosecutor's closing argument.

(1) Shifting burden.

(2) Misstating Defendant's Admission.

(3) Vouching for victim's credibility.

B. Renew challenge for Cause (Juror Gentil)

C. Object to repetitious questions by the prosecutor in an effort to get desired answers

D. Object to sympathy testimony

He also complains about cumulative error, dual convictions, and ineffective assistance of appellate counsel.

10. First, De Aragon complains about the failure of counsel to object to the prosecutor's closing argument. The Court agrees with the state that the prosecutor's closing argument was a fair comment on the evidence: coincidence or fact[1] [DE-8-1, p. 898]; no

[1] It was a fair comment on whether it made common sense that three, six-year old girls would independently fabricate such serious charges.

conspiracy, no academy award[2]. [DE-8-1, pp. 903-904]; if the girls made up a sex crime, find him not guilty [DE-8-1, p. 925]; don't have to prove motive[3], no reason to disbelieve kids. [DE-8-1, p. 961]. The rebuttal was a fair comment on defense counsel's closing. The Court agrees with the State that there was no prosecutorial argument that De Aragon "admitted" the crime. [DE-8-1, p. 927]. Indeed, he was asked point blank on direct examination whether he molested these girls and denied it. [DE-8-1, p 834]. The court reporter obviously wrote the word "admitted" instead of "committed". De Aragon is not entitled to a windfall for a scrivener's error[4], particularly when "admitted" does not make sense and "committed" does. Moreover, the jury was properly instructed that what the lawyers say is not evidence [DE-8-1, pp. 449, 897]. No improper vouching occurred. Finally, none of the objections would have been a strong one. *Holland v. Florida*, 775 F. 3d 1294, 1317 (11th Cir. 2014) *cert. denied*, 577 U.S. 1021 (2015). Given, the propriety of the prosecutor's closing argument, defense counsel cannot be faulted for failing to request a mistrial, which would have been denied.

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[2] It was a fair comment on the jury instruction suggesting using common sense when weighing the facts.

[3] The actual argument was, "my job is not to figure out why the crimes were committed", which is not an improper argument.

[4] Other court reporter errors are obvious: "someone touched their profits" [DE-8-1, p. 902] instead of "privates"; I've been in a pool "sinks" I'm two [DE-8-1, p. 925], instead of "since" (De Aragon's testimony was that he had been in aquatics, all his life, practically since he was toddler [DE-8-1, p. 838].

10.. Second, he complains that counsel failed to renew the objection to the denial of a challenge for cause. However, by asking for an additional strike to be used against Juror Preciado, defense counsel was, in effect, renewing the denial of the challenge for cause against Juror Gentil. Moreover, no prejudice can be shown as the trial court did not abuse its discretion, given Juror Gentil's ultimate statement to the Court that she could be fair. [DE-8-1, p. 219].

11. Third, he complains that trial counsel failed to object to repetitious questions by the prosecutor. A judge has considerable leeway in allowing repetitious or leading questions of child witnesses. *U.S. v. Torres*, 894 F. 3d 305, 316 (D.C. Cir.) *rehearing denied*, 910 F. 3d 1245 (D.C. Cir. 2018); *U.S. v. Carey*, 589 F. 3d 187, 191-192 (5th Cir. 2009), *cert. denied*, 559 U.S. 1024 (2010), *U.S. v. Grassrope*, 342 F. 3d 866, 869 (8th Cir. 2003); *Begley v. State*, 483 So. 2d 70 (Fla. 4th DCA 1986).

12. Fourth, he complains about trial counsel's failure to object to the prosecutor's eliciting sympathy responses. This speculative complaint does not warrant any relief.

13. Fifth, he complains about cumulative error. There was no error to accumulate.

14. Sixth, he complains about dual convictions. There was no violation. *Roughton v. State*, 185 So. 3d 1207, 1209 (Fla. 2016).

15. Seventh, he complains about ineffective assistance of appellate counsel. Appellate counsel cannot be faulted for failing to raise an unpreserved

error on appeal. Moreover, the issue was not plainly stronger than the three issues [DE-9-1, p. 42] that were raised on appeal. *Davila v. Davis*, 582 U.S. 521, 533 (2017). Appellate counsel was able to get a written opinion, with a dissent, from the Fourth District Court of Appeal, thereby allowing review by the Florida Supreme Court. Finally, no prejudice can be shown.

Wherefore, De Aragon's habeas petition [DE-1] is Denied.

The Clerk shall close this case and deny any pending motions as Moot.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of June, 2023.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-60558-CIV-DIMITROULEAS

[Filed June 12, 2023]

FRANCISCO DE ARAGON, Petitioner,	)
vs.	)
RICKY D. DIXON, SEC'Y D.O.C., Respondents.	)

FINAL JUDGMENT FOR RESPONDENT, ORDER DENYING CERTIFICATE OF APPEALABILITY

THIS CAUSE is before the Court upon the Final Judgment and Order Denying Habeas Petition, signed on June 12, 2023. Accordingly, pursuant to Rule 58(a), Fed. R. Civ. Proc. and Rule 11(a), Section 2254 Proceedings, it is

ORDERED AND ADJUDGED as follows:

1. Judgment is entered on behalf of Respondents, against the Petitioner, Francisco De Aragon.

2. On consideration of a Certificate of Appealability, the Court will deny such Certificate as

this Court determines that Petitioner has not shown a violation of a substantial constitutional right. This Court notes that pursuant to Rule 22(b)(1), Fed. Rules App. Proc. Petitioner may now seek a certificate of appealability from the Eleventh Circuit Court of Appeals.

3. The Clerk shall close this case and deny any pending motions as Moot. The Clerk shall mail a copy of this order to Petitioner

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 12th day of June, 2022.

/s/ William P. Dimitrouleas
WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of Record

APPENDIX D

**IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA**

**CASE NO. 15-6543-CF10A
JUDGE ROTHSCHILD**

[Filed March 31, 2022]

STATE OF FLORIDA, Plaintiff,	)
vs.	)
FRANCISCO DE ARAGON Defendant.	)

ORDER DENYING MOTION FOR POSTCONVICTION RELIEF UNDER 3.850

Defendant having presented to this Court a Motion For Postconviction Relief under 3.850 and the Court having reviewed the motion in chambers, having ordered and received a response from the State and having reviewed the transcript it is

ORDERED AND ADJUDGED that said Motion is hereby DENIED.

As to Ground One, part 1, of the motion; that Defendant's attorney may not have objected to the

statements of the prosecutors only renders the failure ineffective if the statements were so prejudicial as to create a likelihood that the statements would have led to a different verdict. The Court's review of the statements alleged to have constituted burden shifting are not so evident on the face of the statements to have prejudiced the jury in their consideration of the evidence. So even though the comments may have been marginally objectionable; they did not rise to the level of prejudice where the failure to object constitutes ineffectiveness. The same applies as to the claim that the State misstated the law or mischaracterized evidence.

As to Ground One, part 2, of the motion; it is clear that Defendant's counsel failed to properly preserve the objection as to the juror by renewing the objection before the swearing of the jury. However the test for ineffectiveness requires a showing that the juror was actually biased to warrant their exclusion. Carratelli v. State, 961 So. 2d 312 (Fla. 2007) 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. Merely because the juror was the victim of a crime similar to the one being prosecuted would not be enough to make a finding that the juror was, *per se*, ripe for a challenge for cause. *See*, Gonzalez v. State, 143 So. 3d 1171 (Fla. 3d DCA 2014), *review denied*, 157 So. 3d 1043 (Fla. 2014).

As to Ground One, part 3, of the motion; Defendant has failed to show prejudice resulting from the effort of the prosecutor to get the victim to answer questions in a consistent manner. The presumption that the Court

would have struck testimony and then would have acquitted Defendant is conclusory and is not supported by the record.

As to Ground One, part 4, of the motion; the Defendant has failed to show the prejudice from the conclusory assertion that the questions were only to generate sympathy. The additional evidence in the case was sufficient to maintain the verdict and even if the questioning generated sympathy; it was not so insidious as to prejudice the verdict in light of the record evidence.

As to Ground One, part 5, of the motion; this cumulative argument is denied for the cumulative reasoning as stated herein.

As to Ground Two of the motion, there is no issue of double jeopardy because the information alleges different acts for each of Defendant's charges. Defendant was not convicted of multiple crimes related to the same act. Rather Defendant was charged, and convicted, of independent acts, requiring different elements of proof, as to each victim. As the crimes were premised on different acts, and the convictions were for charges with different elements of proof, there is no double jeopardy issue as alleged.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida on March 31, 2022.

/s/ Michael I. Rothschild
HON. MICHAEL I. ROTHSCHILD
CIRCUIT COURT JUDGE

Copies furnished to:
Attorney(s) for Defendant
Assistant State Attorney(s).