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OSCAR ANDERSON *v.* COMMISSIONER
OF CORRECTION
(AC 31339)

Bishop, Bear and Borden, Js.

Argued October 28, 2010—officially released May 17, 2011

(Appeal from Superior Court, judicial district of
Tolland, Fuger, J.)

Daniel J. Foster, special public defender, for the
appellant (petitioner).

James A. Killen, senior assistant state's attorney,
with whom, on the brief, were *John A. Connelly*, former
state's attorney, and *Catherine Brannelly Austin*,
senior assistant state's attorney, for the appellee

(respondent).

Opinion

BEAR, J. The petitioner, Oscar Anderson, appeals following the denial of his petition for certification to appeal from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the court abused its discretion in denying his petition for certification to appeal and improperly rejected his claim that his trial counsel had rendered ineffective assistance.¹ We conclude that although the court abused its discretion in denying the petition for certification to appeal, it, nonetheless, properly rejected the petitioner's claim that he was prejudiced by any ineffective assistance of counsel. Accordingly, we affirm the judgment of the habeas court.

In the petitioner's direct appeal, in which we affirmed his conviction of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (2) and risk of injury to a child in violation of General Statutes § 53-21 (a) (1),² this court summarized the underlying facts as follows: "In 1997, the [petitioner] and the victim's mother met at their place of employment and became romantically involved. Shortly thereafter, when the victim was seven years old, the [petitioner] moved into the mother's household. The mother worked the second shift and was not at home when the victim returned from school. The [petitioner], who worked a different shift, was there. At first the victim and the [petitioner] had a good relationship, but later the victim told people she did not like the [petitioner]."

"The [petitioner] punished the victim. The [petitioner] struck her face with his hand when he was angry because she had not done her homework correctly. She did not tell her mother about this because she was afraid of what the [petitioner] might do. On one occasion, the [petitioner] hit her so hard her nose bled. The [petitioner] also compelled her to hold a book bag filled with tapes and clothes on a stick over her head for long periods of time. On another occasion, he made her kneel on grains of rice. Although the victim did not tell her mother about these events, she confided in her best friend. The friend's mother testified that she noticed behavioral changes in the victim beginning in 1998. The victim, who had been carefree, had become quiet and withdrawn. The victim's grades suffered, and she exhibited a poor attitude at school. After school one day, the victim was terrified to go home on the school bus. Her teacher and school principal conferred with her mother. The victim, however, had not told anyone other than her friend that she was afraid of the [petitioner]."

"The victim also testified that the [petitioner] made her rub his back or his feet while he was wearing only his underwear. In addition, he called her into the bedroom and asked her to rub his private parts. One night

she woke up and the [petitioner] was attempting to put his penis in her mouth. She reported this to her mother who told her that she must have been dreaming. The victim testified that the [petitioner] had sexual intercourse with her by putting his private into [her] butt. When she was nine and in the fourth grade, the [petitioner] had intercourse with her almost every other night or twice a week. The [petitioner] forced the victim to have oral, anal and vaginal intercourse with him.

“The victim did not tell her mother about the incidents of sexual abuse until shortly after a fire occurred in their home, the day after Thanksgiving, 2000. The victim was spending time with her grandmother who overheard her talking to herself. The grandmother insisted that the victim tell her what she was talking about. The victim told her grandmother of the [petitioner’s] sexual abuse. The grandmother informed the mother and immediately took the victim to the police station. The victim gave a statement to the police in which she related the [petitioner’s] sexual abuse. The police advised the victim’s mother to take her to a hospital that specialized in assessing children who are victims of sexual abuse. The mother followed the advice of the police. The victim was examined by Judith Kanz, a certified pediatric nurse practitioner, who specializes in child forensic medical examinations.

“The [petitioner] testified that the victim did not like him because she felt that he was replacing her father and because he planned to marry her mother. He admitted that he disciplined the victim for not doing her homework or her chores. As punishment, he took away the victim’s privileges or gave her time outs. He also testified that he made the victim hold a stick on which an empty book bag was suspended for five minutes. The [petitioner] denied that he had sexually assaulted the victim. Following the jury’s [guilty] verdict, the [petitioner] . . . was given an effective sentence of eighteen years in prison, ten years of probation and special conditions of probation as a sex offender.” (Internal quotation marks omitted.) *State v. Anderson*, 86 Conn. App. 854, 856–59, 864 A.2d 35, cert. denied, 273 Conn. 924, 871 A.2d 1031 (2005); see also *State v. Anderson*, 119 Conn. App. 98, 985 A.2d 1096 (2010) (vacating petitioner’s sentence on risk of injury charge and remanding case for resentencing).

Subsequently, the petitioner filed a petition for a writ of habeas corpus, alleging that his confinement was illegal because he had been denied the effective assistance of trial counsel. In an oral decision, the habeas court denied the petition, concluding that the petitioner had failed to prove that he had been denied the effective assistance of trial counsel under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).³ Although primarily focusing its analysis on the prejudice prong,

the court concluded, nonetheless, that the petitioner had failed to meet either prong of the *Strickland* test. The court later denied the petitioner's request for certification to appeal. This appeal followed.

"In a habeas appeal, although this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, our review of whether the facts as found by the habeas court constituted a violation of the petitioner's constitutional right to effective assistance of counsel is plenary. . . . Faced with a habeas court's denial of a petition for certification to appeal, a petitioner can obtain appellate review of the dismissal of his petition for habeas corpus only by satisfying the two-pronged test enunciated by our Supreme Court in *Simms v. Warden*, 229 Conn. 178, 640 A.2d 601 (1994), and adopted in *Simms v. Warden*, 230 Conn. 608, 612, 646 A.2d 126 (1994). First, he must demonstrate that the denial of his petition for certification constituted an abuse of discretion. . . . Second, if the petitioner can show an abuse of discretion, he must then prove that the decision of the habeas court should be reversed on its merits. . . .

"To prove an abuse of discretion, the petitioner must demonstrate that the [resolution of the underlying claim involves issues that] are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." (Internal quotation marks omitted.) *Harris v. Commissioner of Correction*, 121 Conn. App. 240, 243–44, 994 A.2d 685, cert. denied, 297 Conn. 926, 998 A.2d 1193 (2010); see *Strickland v. Washington*, supra, 466 U.S. 687. With those standards in mind, we now turn to the petitioner's claims.

On appeal, the petitioner first claims that the court improperly denied his request for certification to appeal from its denial of his petition for a writ of habeas corpus. He asserts that his claim of ineffective assistance of counsel is debatable among jurists of reason and, therefore, that the habeas court should have granted his request for certification to appeal. Although the habeas court found that the petitioner had failed to meet either prong under *Strickland*, we conclude that the evidence quite strongly suggests that counsel should have investigated the petitioner's claims that he had suffered from sexually transmitted diseases throughout the period that the state alleged he had been sexually assaulting the victim and that counsel's failure to do so likely constituted ineffective assistance.⁴ Notwithstanding our ultimate conclusion that counsel's ineffectiveness did not prejudice the outcome of his criminal trial, we believe that reasonable jurists could disagree as to whether the petitioner has demonstrated that he was prejudiced by counsel's deficiencies in performance. On this basis, we conclude that the habeas court should

have granted the petition for certification to appeal. However, because we agree with the habeas court's assessment of the petitioner's claim regarding *Strickland's* prejudice prong, we affirm the court's judgment denying the habeas petition.

The petitioner bases his underlying claim of ineffective assistance of trial counsel principally on counsel's alleged failure to introduce exculpatory evidence regarding the petitioner's history of having sexually transmitted diseases; retain a medical expert or challenge the state's medical evidence; and "investigate, perform effective discovery or impeach the alleged victim's testimony." The focus of the petitioner's arguments on appeal is that he told his attorneys that he had suffered from sexually transmitted diseases during the time that he was said to have been sexually assaulting the victim. He contends that counsel failed to secure medical records and testimony concerning whether the victim had contracted these diseases, that counsel should have retained an expert to testify that the petitioner had these diseases during the relevant time periods, and that counsel should have secured expert testimony concerning the likelihood of transmission of these diseases during sexual contact. This, he argues, would have persuaded the jury that the victim likely would have contracted these diseases from the petitioner if the petitioner had been sexually assaulting her in the manner alleged. After thoroughly reviewing the record, we conclude that the petitioner has failed to prove that he had sexually transmitted diseases that would have infected the victim during the time he was sexually assaulting her. Consequently, he did not prove that he was prejudiced by the alleged failures on the part of his counsel to investigate his sexually transmitted disease claims.

After hearing the evidence at the habeas trial, the court issued an oral ruling, which provides in relevant part: "The issue [in this case] is whether the petitioner suffered from a sexually transmitted disease, which, in his assertion, should have been communicated to the victim had the events taken place [as alleged]. . . . [I]t is clear from the evidence that was produced that the petitioner on November 16, 1997, did, in fact, test positive for the presence of the chlamydia bacteria. Those same records establish that in November of 1997, the petitioner was treated for this chlamydia infection.

"The testimony by Dr. [Stephen] Scholand [the medical expert for the respondent, the commissioner of correction] is that chlamydia can be eliminated from the body if treated with antibiotics. The medical records support that there was an antibiotic treatment, and it would take approximately a week to eliminate the active chlamydia infection. There is no further evidence of any chlamydia infection from which the petitioner suffered. . . . January, 1998, is the earliest date of sex-

ual contact. By January of 1998, the petitioner would have been clear of the chlamydia infection. So, the absence of any chlamydia infection in the victim [would not have] serve[d] as an exculpatory piece of evidence. . . .

“[W]hen I look at the evidence that has been presented here, I have the testimony of the petitioner, who testifie[d] that he suffered from various sexually transmitted diseases. I have the medical records to support that. I have no reason to disbelieve that the petitioner did, in fact, suffer from various sexually transmitted diseases. The evidence and the petitioner’s testimony is not inconsistent in establishing that the latest date upon which a chlamydia infection existed was November 16, 1997.

“Now, what I don’t have is . . . any evidence as to whether the victim in this case did or did not suffer from a chlamydia infection. So, I can’t make a conclusive finding as to whether she, in fact, did suffer from such infection. But if I take the premise that the petitioner is putting forward, that he, in fact, was positive for chlamydia in November of 1997, and even if we assume that the evidence would have shown that the victim was negative, that still doesn’t go to exonerating.

“First of all, based upon the testimony that I’ve received here today, it is highly likely that in January of 1998 when the sexual abuse began, the petitioner was not infectious. Even if he [were] infectious, there is still a 70 percent chance that the partner, in this case unwilling, would not be infected. . . .

“In this case, it’s difficult to find that there’s been deficient performance [by counsel]. To be sure, the petitioner did inform [counsel] that he had had sexually transmitted diseases; however, the petitioner did not ever produce any sort of medical record to support that [as had been requested by counsel]. . . . But even if the court makes the assumption that it was deficient performance not to investigate the sexually transmitted disease issue, it is, however, crystal clear that on the basis of the testimony I’ve heard today, there’s been no prejudice that could have occurred. Had it been investigated and even assuming that the victim was negative for chlamydia, the testimony that I heard today is clear that that does not in any way exonerate the . . . petitioner [B]ased on the evidence presented, I cannot find that the performance by either attorney is in violation of the standard set forth in *Strickland v. Washington* [supra, 466 U.S. 687].”

The petitioner argues that he repeatedly was diagnosed with sexually transmitted diseases throughout the entire period that he was alleged to have been sexually assaulting the victim and that the court credited this evidence.⁵ Thus, he argues, whether the victim contracted any of these diseases from the petitioner may

have had an effect on the jury's verdict. He argues that if the victim did not contract any diseases from the petitioner, "the medical evidence at least [would raise] a reasonable doubt as to [the petitioner's] guilt, particularly in light of the weakness of the state's case."⁶

Although the petitioner argues that his medical records and the testimony of his medical expert, Timothy Grady, proved that he had sexually transmitted diseases throughout 1997-2000, his claims in this regard are not substantiated by the records adduced at trial. We conclude that the record does not demonstrate that the petitioner's "diagnoses" were substantiated by the penile cultures that were taken from the petitioner during his hospital visits. Prior to the time that the petitioner was alleged to have begun sexually assaulting the victim, he went to St. Mary's Hospital in Waterbury, on November 16, 1997, complaining of a possible sexually transmitted disease. His medical records for that visit show that he was prescribed two forms of medication, and a urethral culture was taken from him and sent to the laboratory for analysis. The culture came back positive for chlamydia. Then, on January 6, 1998, the petitioner again went to St. Mary's Hospital complaining of a swollen left hand and a possible venereal disease. There is no indication that any cultures were taken during this visit to provide objective substantiation of the petitioner's self-diagnosed complaint of a possible venereal disease. Nevertheless, he was prescribed medication. On June 28, 1998, the petitioner again went to St. Mary's Hospital complaining of penile discharge and possible venereal disease. The petitioner again was prescribed medication, and cultures were taken from the petitioner, which were sent to the laboratory for analysis and confirmation of any sexually transmitted diseases. There is no indication in the medical records, however, whether those cultures proved positive for any sexually transmitted diseases. On October 4, 1998, the petitioner returned to St. Mary's Hospital and initially was diagnosed with a urinary tract infection. We agree that the record for this visit includes a notation that he also was diagnosed with a sexually transmitted disease. This diagnosis, however, was not based on any laboratory findings. Indeed, as a result of this visit, another urethral culture was taken and sent to the laboratory for analysis, and the petitioner again was prescribed medication. The laboratory results of this culture, however, proved to be *negative* for sexually transmitted diseases. Thus, the laboratory report contradicts the notation on the petitioner's medical record for this visit. On October 15, 1999, the petitioner again went to St. Mary's Hospital, where a diagnosis of a "disorder of [the] penis" was noted on his patient registration form. The physician evaluation form stated that the petitioner had a probable sexually transmitted disease. Penile cultures were taken and sent to the laboratory for analysis, and the petitioner again was

prescribed medication. The record, however, does not reveal the laboratory results of that culture.

From our review of the medical records in evidence at the habeas trial, we conclude that these records contained only one objectively substantiated diagnosis of a sexually transmitted disease and that such substantiated diagnosis occurred in November, 1997, prior to the petitioner's having sexually assaulted the victim. The petitioner, at that time, was treated with medication. All of the remaining records, although containing essentially the same physical complaints by the petitioner, either contain no laboratory results or they contain results that were *negative* for sexually transmitted diseases. The petitioner offered no explanation at the habeas trial as to why the scientific laboratory results were absent from his medical records, and he did not produce anyone from the hospital to explain the absence of the laboratory findings from his medical records.

We also carefully reviewed the testimony presented at the habeas trial, which further supports our conclusion that the petitioner failed to prove that he had sexually transmitted diseases during the period he was sexually assaulting the victim. The petitioner's medical expert, Grady, was asked on direct examination: "In your review of [the petitioner's] medical records from St. Mary's, was [the petitioner] infected with any [sexually transmitted diseases] during that time?" Grady responded: "Well, he certainly presented with complaints of [sexually transmitted diseases] on a number of occasions. We did not—I was at least not provided with the culture results of several of those visits, so *I don't know if, indeed, he was ultimately confirmed to have those diseases*, but there were certainly multiple occasions throughout 1997 and 1998 and 1999 where he presented with signs and symptoms and was treated empirically for [sexually transmitted diseases], specifically, gonorrhea and chlamydia. And there was at least one positive culture for chlamydia." (Emphasis added.) Our review of this testimony demonstrates that even the petitioner's own medical expert could not state with any reasonable degree of medical certainty that the petitioner actually had sexually transmitted diseases at the time he was tested, with the exception of the one confirmed result in November, 1997, before the petitioner began to sexually assault the victim and for which he received medication to treat the disease. Accordingly, it is clear to us that the petitioner failed to prove that he had one or more sexually transmitted diseases during the time that he was sexually assaulting the victim.⁷

On the basis of the foregoing, we are unable to conclude that the petitioner was prejudiced by the alleged deficiencies in counsel's performance. Neither the petitioner's medical records nor the testimony of Grady

demonstrate that the petitioner had one or more sexually transmitted diseases during the period of time that he was sexually assaulting the victim. Accordingly, he has not demonstrated that he was prejudiced by counsel's failure to investigate his claims that he had sexually transmitted diseases during the time he was alleged to have been sexually assaulting the victim. In sum, although we conclude that the issues raised by the petitioner are debatable among jurists of reason and that the court, therefore, abused its discretion in denying the petition for certification to appeal, we also conclude, nonetheless, that the petitioner has failed to meet his burden of proof under *Strickland* that he was prejudiced by the alleged deficiencies of his counsel. Accordingly, the court properly denied the petition for a writ of habeas corpus.

The judgment is affirmed.

In this opinion BISHOP, J., concurred.

¹ The petitioner had two trial attorneys, one having replaced the other prior to trial. For ease of reference, we simply refer to the attorneys as counsel.

² The petitioner also had been charged with one additional count of sexual assault in the first degree, of which the jury found him not guilty.

³ Under the test established by *Strickland v. Washington*, supra, 466 U.S. 687, a petitioner alleging ineffective assistance of counsel must establish that "(1) counsel's representation fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because there was a reasonable probability that the outcome of the proceedings would have been different had it not been for the deficient performance." (Internal quotation marks omitted.) *Johnson v. Commissioner of Correction*, 288 Conn. 53, 63, 951 A.2d 520 (2008).

⁴ We say "likely" in this regard on the basis of our conclusion that we need not undertake a detailed analysis of *Strickland*'s first prong in this instance because of our belief that counsel's likely ineffectiveness does not erode our confidence in the judgment.

⁵ As we have noted, the court specifically found: "I have the testimony of the petitioner, who testifie[d] that he suffered from various sexually transmitted diseases. I have the medical records to support that. I have no reason to disbelieve that the petitioner did, in fact, suffer from various sexually transmitted diseases. The evidence and the petitioner's testimony is not inconsistent in establishing that the *latest date upon which a chlamydia infection existed was November 16, 1997.*" (Emphasis added.) Despite the petitioner's argument, our reading of this statement by the court is that the court found that the petitioner had testified that he had various sexually transmitted diseases and that the medical records supported that he had a history of these diseases. We note that each of the medical records states that the petitioner had a history of sexual transmitted diseases. The court then stated that it believed that the petitioner did suffer from sexually transmitted diseases but that the latest *confirmed* date of infection was November 16, 1997.

⁶ We note that the petitioner did not provide any evidence at the habeas trial to support his contention that the victim likely did not have a sexually transmitted disease. Although the record demonstrates that he attempted to secure the department of children and families' records related to the victim, there is nothing in the record before us that demonstrates any attempt to secure her medical records that were in the possession of her doctors or the hospital where she was examined, diagnosed and treated once her allegations came to light. Accordingly, he made no evidentiary attempt to prove through her medical records whether the victim had any sexually transmitted diseases during the time period that he was sexually assaulting her. We also do not agree with the petitioner's assertion that the state had a weak case.

⁷ Furthermore, the habeas court found that even if the petitioner had been infected during the time he was alleged to have been sexually assaulting the victim, this would not have exonerated the petitioner because there was a 70 percent likelihood that the victim would not have become infected by the petitioner. This finding is not challenged on appeal, and it does find

support in the record testimony of Scholand.

Scholand testified that a person who has chlamydia has a 30 percent chance of infecting his sexual partner. In response to the petitioner's question as to whether the chances of contracting the disease from an infected partner increase with each new act of sexual intercourse, Scholand stated that it does not change.

Furthermore, the record clearly shows that the court found that the petitioner suffered from a sexually transmitted disease, namely, chlamydia, in November, 1997, and that he was treated for this disease at that time. The petitioner does not challenge these facts. In the underlying criminal trial, in addition to being found guilty of risk of injury to a child for the physical abuse he inflicted on the victim, he was found guilty of *one count* of sexual assault in the first degree for the sexual abuse he inflicted on the victim. He was found not guilty of an additional count of sexual assault in the first degree for acts alleged to have taken place in November, 2000. The count of sexual assault on which he was found guilty alleged that he had engaged in sexual intercourse with the victim on various dates between January 1, 1998, and October 31, 2000. To find the petitioner guilty of that charge, the jury only had to find that the petitioner engaged in sexual intercourse with the victim *once* during that period of time.