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# STATE OF CONNECTICUT v. JEFFREY G.*
(AC 45397)

Prescott, Moll and Clark, Js.**

*Syllabus*

The petitioner, who had previously been convicted, following a jury trial, of sexual assault in the first degree, appealed to this court from the judgment of the trial court denying his petition for postconviction DNA testing of certain evidence that had been collected during the criminal investigation into the assault. In his petition, which was filed pursuant to the applicable statute (§ 54-102kk), the petitioner claimed that additional DNA testing of fingernail scrapings and clippings collected from the victim, A, would reveal the presence of his DNA and would demonstrate that A instigated the assault, and DNA testing of bloodstain evidence collected from A's toe, her pants' cuff, and the deck near where the incident occurred would demonstrate that A exerted force against the petitioner during the incident and would refute A's testimony regarding the timing and location of the assault. The petitioner also claimed that DNA testing of the clothes A wore on the night of the assault would reveal the absence of his DNA and refute her testimony that the petitioner forcefully removed her clothes. The trial court denied the petition, finding that the petitioner failed to establish that a reasonable probability existed that he would not have been convicted if the purportedly exculpatory results had been obtained through the requested DNA testing. *Held* that the trial court correctly determined that the petitioner failed to sustain his burden under § 54-102kk of demonstrating that the DNA evidence he sought to have tested created a reasonable probability that he would not have been prosecuted or convicted had such evidence been available at trial: the hypothetical presence of the petitioner's DNA in the fingernail scrapings and clippings obtained from A could have been explained by a host of reasons, which did not discredit A's testimony that she was assaulted or bolster the petitioner's assertion that he and A consensually engaged in intercourse; moreover, the hypothetical presence of the petitioner's DNA in the various bloodstain evidence did not discredit A's testimony because the jury reasonably could have inferred that the petitioner had injured his foot during the assault and that his foot then came into contact with A's foot and pant leg, A did not testify regarding the manner in which the petitioner was injured and any such testimony would not have been central to her overall testimony about the assault, and, when viewed in light of the totality of the evidence, A's possible impeachment regarding the injury was not enough to undermine this court's confidence in the fairness of the outcome of the trial, as the petitioner presented inconsistent and conflicting versions of the event, and the results of the medical examination performed on A following the incident, the DNA testing of A's vaginal swab, which revealed the presence of the petitioner's DNA, and the observations of the nurse who treated A all corroborated A's version of events; furthermore, the hypothetical absence of the petitioner's DNA on the clothing A wore on the night of the incident was not proof that he did not touch it because the amount of touch DNA left on the clothing could have been affected by a variety of factors, including the amount of skin cells left behind, the type and length of the contact, and the texture of the clothing's surface.

Argued September 12—officially released November 14, 2023

*Procedural History*

Petition for postconviction DNA testing of certain evidence collected in connection with the defendant's previous criminal trial, brought to the Superior Court in the judicial district of New Britain, where the court, *Keegan*, *J.*, denied the petition, and the defendant appealed to this court. *Affirmed*.

*Robert L. O'Brien*, assigned counsel, with whom, on the brief, was *Christopher Y. Duby*, assigned counsel, for the appellant (defendant).

*Denise B. Smoker*, senior assistant state's attorney, with whom, on the brief, was *Brian Preleski*, former state's attorney, for the appellee (state).

*Opinion*

CLARK, J. The defendant, Jeffrey G. (petitioner), appeals from the judgment of the trial court denying his petition for postconviction DNA testing pursuant to General Statutes § 54-102kk.[1] On appeal, the petitioner claims that the trial court erred in concluding that he failed to establish that a reasonable probability existed that he would not have been prosecuted or convicted if exculpatory results obtained through DNA testing had been available at his criminal trial. We affirm the judgment of the court.

The record reveals the following facts that the jury reasonably could have found, as well as the relevant procedural history. The petitioner's conviction stemmed from the May 11, 2011 sexual assault of his stepdaughter, A. On that date, A was twenty-five years old and living with her two children at her mother's and the petitioner's house. A's brother was also at the house that evening. A's mother had been working during the evening but arrived home at around 8:30 or 9:30 p.m. A testified that she knew the petitioner had been drinking throughout the night and could tell that he was intoxicated.

After A's mother arrived home from work and went to bed, the petitioner invited A out onto the back deck of the home so that they could drink vodka together. The petitioner then suggested that the pair go down the steps of the deck, toward the backyard, so that if A's mother came outside, they could throw the bottle of vodka into the bushes. A agreed and followed the petitioner down the steps to the backyard, where she took a drink from the bottle of vodka given to her by the petitioner. The petitioner then came up behind A, pushed her down onto the ground with his weight so that she dropped to her knees, pulled down her capri pants, and put his penis in her vagina. After about one minute, A was able to roll over onto her back and get up. A ran back up the steps toward the house and, in the process, flung a glass off the railing of the deck in an attempt to deter the petitioner from following her. When A entered the house, she ran into her mother's room, where she "jumped on her bed and . . . screamed at her" and told her what had happened. Her mother left the room, and A subsequently locked herself in the bathroom, where she was crying and screaming for her mother. A's mother called the police, and when the police arrived at the home, they found A in the bathroom and the petitioner in the kitchen. The officers advised the petitioner that he was not under arrest, but they handcuffed him for safety purposes and removed him from the home so that they could evaluate the situation. The police arranged for A to be transported by ambulance to New Britain General Hospital, where she submitted to examinations and completed a rape kit. Subsequent DNA testing of A's vaginal swab revealed the

presence of the petitioner's DNA.

That evening, the petitioner voluntarily went to the police station.[2] Lieutenant Eric Peterson conducted an interview of the petitioner at the station. After Peterson read the petitioner his *Miranda* rights,[3] the petitioner gave a voluntary statement, in which he stated that he did not have sexual intercourse with A and had never done so in the past. After this interview, the petitioner left the police station momentarily. He then came back into the police station and asked to speak with Peterson again. The petitioner proceeded to ask Peterson questions such as, "what if I was the victim?" When the petitioner was asked by Peterson to elaborate or clarify, the petitioner did not respond, but, according to Peterson, he "appeared to be getting nervous . . . ."

On May 12, 2011, Officer Dean Cyr took the petitioner to Bristol Hospital to execute a search warrant permitting him to obtain a sample of the petitioner's DNA. After the petitioner arrived at the hospital, he indicated to Cyr that he wanted to give an additional written statement about what had happened the previous evening. Subsequently, the petitioner gave a second sworn statement in which he claimed to have had a consensual sexual encounter with A on the night of May 11, 2011. The petitioner was later arrested and charged with sexual assault.

A jury trial was held over three days beginning on November 5, 2012. The jury heard testimony from various witnesses, including A; Nurse Kristin Loranger, who administered A's rape kit; and Officers Peterson and Cyr. Although the petitioner did not testify, his two sworn statements were read to the jury by Peterson and Cyr. In the petitioner's first statement, made to Peterson, he stated that he did not have sexual intercourse with A.[4] Peterson also testified as to his second encounter with the petitioner after the initial interview, during which the petitioner asked Peterson questions insinuating that the petitioner was the victim.[5] In the petitioner's second statement, made to Cyr, he stated that he had consensual intercourse with A.[6]

On November 7, 2012, following a jury trial, the petitioner was convicted of one count of sexual assault in the first degree in violation of General Statutes § 53a-70 (a) (1). On January 10, 2013, the court, *Alander*, *J.*, imposed a sentence of twelve years of incarceration, followed by five years of special parole. The petitioner appealed from the judgment of conviction to this court, arguing that the trial court had improperly disqualified a prospective juror. See *State* v. *Gould*, 155 Conn. App. 392, 393, 109 A.3d 968 (2015), aff'd, 322 Conn. 519, 142 A.3d 253 (2016). His conviction was affirmed. Id., 409.

On January 30, 2013, the petitioner filed a petition for a writ of habeas corpus, which was subsequently amended two times. *Gould* v. *Warden*, Superior Court,

judicial district of Tolland, Docket No. CV-13-4005276-S (January 10, 2019), appeal dismissed sub nom. *Gould* v. *Commissioner of Correction*, 202 Conn. App. 901, 242 A.3d 1083, cert. denied, 336 Conn. 921, 246 A.3d 2 (2021). The operative petition argued, inter alia, that his trial counsel had rendered ineffective assistance by failing to present a theory that the petitioner was the victim, not the perpetrator, of the sexual assault.[7] Id. The court, *Kwak*, *J.*, denied the habeas petition, finding "no basis to conclude that [defense counsel] was deficient for failing to present a defense theory that [A] sexually assaulted the petitioner." Id.

On January 13, 2022, the petitioner filed the underlying postconviction petition for DNA testing pursuant to § 54-102kk, requesting (1) "[a] differential DNA extraction and comparison on item '1N fingernail scrapings and clippings' of [A]," (2) DNA testing on the "[p]reviously untested, dried secretion swab of 1J-1 (3rd, 4th, and 5th toe) collected from [A]," (3) DNA testing on the "[p]reviously untested . . . Blood Stain (BLS) Scene Evidence on or near rear yard wood deck of [the home where the assault occurred]: Items #1, 2, 3, 4, 5, 6, 7, 8, 15, 16, 17, 19, 18, 20, 22 (broken glass), 24, 42," and (4) "DNA testing on items contained in Trial Exhibit #13 'Victims Clothing,' to determine the presence of touch DNA," in particular, the right side of A's camisole, the waist of her capri pants, and "[a] brown substance, likely a blood substance, found on the inside on the right pant cuff of [A's] capri pants." In support of his petition, the petitioner alleged that the testing would reveal (1) the presence of a sperm rich fraction matching his DNA on the fingernail scraping and clippings, proving that A took hold of his genitalia and forced it into her vagina, (2) that the blood from A's toe, the bloodstain evidence on the deck, and the bloodstain evidence on A's pant cuff came from the petitioner, demonstrating that A exerted force against the petitioner and refuting her testimony regarding the timing and location of the assault, and (3) an absence of the petitioner's DNA on A's clothes, thus refuting her testimony that the petitioner forcefully removed her clothes.

On March 17, 2022,[8] the court, *Keegan*, *J.*, denied the petition on the basis that the petitioner failed to establish that a reasonable probability existed that he would not have been prosecuted or convicted if exculpatory results had been obtained through the DNA testing in accordance with § 54-102kk (b) (1). The court, "[b]ased upon the arguments made and the posture of the case . . . assume[d] that DNA testing of the fingernail samples and various bloodstain evidence would match the [petitioner's] profile, whereas testing of [A's] clothing would reveal the absence of his DNA." The court found that "these purportedly exculpatory results do not support a determination by this court that a reasonable probability exists that the [petitioner] would

not have been convicted had they been presented to the jury.''[9] The petitioner timely appealed.

On appeal, the petitioner claims that the court improperly concluded that he had failed to establish that a reasonable probability existed that he would not have been prosecuted or convicted if exculpatory results obtained through DNA testing had been available at his criminal trial. We are not persuaded.

We begin by setting forth our standard of review and the relevant legal standards. ''[T]he determination of whether a reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing pursuant to § 54-102kk (b) (1) is a question of law subject to plenary review, while any underlying historical facts found by the trial court are subject to review for clear error.'' (Internal quotation marks omitted.) *State* v. *Butler*, 129 Conn. App. 833, 839, 21 A.3d 583, cert. denied, 302 Conn. 923, 28 A.3d 340 (2011).

''[R]easonable probability within the context of § 54-102kk (b) (1) means a probability sufficient to undermine confidence in the outcome. . . . Under this standard, a showing of reasonable probability does not require demonstration by a preponderance that disclosure of the [unavailable] evidence would have resulted ultimately in the defendant's acquittal. . . . The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. . . . A defendant need not demonstrate that after discounting the inculpatory evidence in light of the [unavailable] evidence, there would not have been enough left to convict. . . . Accordingly, the focus is not whether, based upon a threshold standard, the result of the trial would have been different if the evidence had been admitted. We instead concentrate on the overall fairness of the trial and whether [the unavailability] of the [exculpatory] evidence was so unfair as to undermine our confidence in the jury's verdict.'' (Internal quotation marks omitted.) Id., 839–40.

''In analyzing the effect of DNA evidence, § 54-102kk (b) (1) directs us to consider the effect of potential exculpatory results obtained through DNA testing. At this point, it is evident that the petitioner will not know with certainty what DNA testing will show. Thus, § 54-102kk (b) (1) requires the court to consider the effect of the most favorable result possible from DNA testing of the evidence . . . .'' (Internal quotation marks omitted.) *State* v. *Cote*, 129 Conn. App. 842, 849, 21 A.3d 589, cert. denied, 302 Conn. 922, 28 A.3d 341 (2011). Accordingly, in the present case, we assume, as the trial court did, that DNA testing of the fingernail scrapings and clippings, and the various bloodstain evi-

dence, would reveal the presence of the petitioner's DNA, whereas DNA testing of A's clothing would reveal the absence of the petitioner's DNA.

I

The petitioner first claims that the court erred in concluding that the presence of the petitioner's DNA, specifically, the presence of a sperm rich fraction matching his DNA, in the fingernail scrapings and clippings, would not create a reasonable probability that the petitioner would not have been prosecuted or convicted. DNA testing of the fingernail scrapings and clippings was completed prior to the petitioner's criminal trial, which revealed the presence of both the petitioner's and A's DNA. In his motion, the petitioner specifically requests "[a] differential DNA extraction and comparison on item '1N fingernail scrapings and clippings' of [A]" to determine the presence of a sperm rich fraction. The petitioner argues that the presence of this DNA in the fingernail scrapings and clippings would demonstrate that A instigated the assault, stating that "[s]aid testing will provide evidence to support [the petitioner's] claim that [A] grabbed his penis to consensually engage in intercourse, contradicting her claims of force."

The petitioner's DNA, however, could be present in the fingernail scrapings and clippings for a host of reasons. At best, a jury might infer that A's hand encountered the petitioner's semen, a scenario that neither discredits A's testimony that she was assaulted nor bolsters the petitioner's assertion that "[A] grabbed his penis to consensually engage in intercourse . . . ." Thus, we conclude that the hypothetical presence of the petitioner's DNA in the fingernail scrapings and clippings does not create a reasonable probability that the petitioner would not have been prosecuted or convicted had that evidence been available at trial.

II

Next, the petitioner claims that the court erred in concluding that the presence of the petitioner's DNA in the various bloodstain evidence, in particular, the blood found on A's toe, her pant cuff, and the deck, would not create a reasonable probability that the petitioner would not have been prosecuted or convicted. In support of his claim, the petitioner states that "[A] was clear that the [petitioner] was not injured prior to the assault and that she broke the glass running away from the [petitioner] and back into the house. Her clear implication, and the state's corresponding argument, was that the [petitioner] pursued [A] back onto the deck and into the house, running through the broken glass and cutting his feet." The petitioner argues that if we assume the DNA testing of the various bloodstain evidence would reveal the presence of his DNA, this finding would "sharply contradict [A's] testimony about the

timing and location of the assault" and "would further support the version [of events] contained in the [petitioner's] statement that the jury heard." We consider the arguments regarding each of the three pieces of bloodstain evidence in turn.

In regard to the blood found on A's toe, the petitioner argues that the presence of his DNA would refute A's testimony that his foot was not injured prior to the assault and would demonstrate that there was a transfer of blood from the petitioner onto A's toe that was the result of "[A] forcefully getting on top of the [petitioner] . . . [and] forcing intercourse . . . ." Additionally, the petitioner argues that the presence of his blood on A's toe refutes A's testimony about the timing and the location of the assault. Specifically, the petitioner suggests that because A testified that the petitioner was not injured prior to the assault, it would be impossible for A to have gotten the petitioner's blood on her toe if her version of events were true, considering that the glass broke *behind* her as she was running away, and there was no evidence presented of physical contact between the petitioner and A after the assault. The petitioner further suggests that this would support his assertion that A instigated the assault on the deck and that "his foot was injured in [A's] presence, not in the pursuit of her."[10]

In regard to the blood found on A's pant cuff, the petitioner makes a similar argument. He claims that his "blood could not get inside [A's] pants unless his foot was injured when her pants were off, and she put [her pants] back on after his blood was already on her body . . . ." (Emphasis omitted.) Additionally, the petitioner argues that this would prove that A did not merely pull her pants back up, as she suggested in her testimony, but that, instead, she had to have fully put her pants back on, which would allow the blood that was allegedly on her foot to come into contact with the cuff of her pants. The petitioner further argues that this would corroborate his version of events, in which he stated that A voluntarily and fully removed her clothes, and would contradict A's version of events, in which she stated that the petitioner forcibly pulled down her pants but did not fully remove them.

Last, the petitioner argues that, in regard to the blood on the deck, a finding that the blood is the petitioner's would further refute A's testimony regarding the timing and location of the assault. Specifically, the petitioner argues that such evidence would reinforce his theories regarding the bloodstain on A's toe and the bloodstain on A's pant cuff. The petitioner suggests that if the blood on the deck were found to be his, and if the blood on A's toe and pant cuff were also found to be his, these findings together would support the petitioner's version of events and undermine A's testimony.

In reviewing the petitioner's arguments that the pres-

ence of his DNA in the various bloodstain evidence would refute A's testimony that his foot was not injured prior to the assault and would contradict her testimony regarding the timing and location of the assault, "we must consider this evidence within the context of the entire trial." *State* v. *Butler*, supra, 129 Conn. App. 841; see also *State* v. *Marra*, 295 Conn. 74, 90 n.10, 988 A.2d 865 (2010) (reasonable probability analysis requires court to take into account totality of evidence adduced at trial to determine whether absence of exculpatory DNA evidence undermines confidence in jury's verdict). On the basis of our review of the evidence presented at trial, we conclude that the absence of the bloodstain evidence at trial does not undermine confidence in the fairness of the outcome. We agree with the trial court that had this evidence been presented at trial, a jury, at best, might infer that the petitioner injured or cut his foot at some point during the assault and then came into contact with A, a finding that does not undermine A's testimony. A testified that the petitioner pushed her to the ground, forcibly pulled down her pants, and that after about one minute, she was able to roll over onto her back and run into the house. It is reasonable to infer that during the assault, and the subsequent struggle to escape, the petitioner might have injured his foot, and that contact would have been made between the petitioner's injured foot and A's foot and pant leg. Although A testified that the petitioner was not injured *prior to the assault*, she did not state whether the petitioner was injured at some point *during the assault*. In fact, she did not testify at all about how the petitioner came to be injured.[11] Thus, the presence of the petitioner's DNA in the bloodstain evidence does not discredit A's testimony in the way that the petitioner claims.

Moreover, even if the petitioner could have successfully impeached A's testimony regarding the injury he sustained to his foot, that testimony was not central to her overall testimony about the assault, and, when viewed in light of the totality of the evidence, her possible impeachment regarding the injury is not enough to undermine our confidence in the fairness of the outcome. At trial, evidence was presented that A reported the assault immediately, was found crying and shaking in the bathroom of her home, and promptly submitted to vaginal testing, which revealed the presence of the petitioner's DNA. In addition, Loranger, the nurse who administered A's rape kit, testified that A was tearful when recalling the details of the assault. Loranger also testified that she noticed debris and dirt on A, including debris in her ponytail and dirt on her hands, feet, and knees, observations that corroborate A's version of events and refute the petitioner's various versions of events. Additionally, a jury reasonably could have found that the petitioner was not credible, particularly in light of his inconsistent and conflicting versions of events told to the police, beginning with his statement that

there was no sexual contact at all, then his suggestion that he might instead have been the victim of the sexual assault, and, finally, his sworn statement to the police that there was sexual contact but that it was consensual. For these reasons, we conclude that the hypothetical presence of the petitioner's DNA in the various bloodstain evidence does not create a reasonable probability that the petitioner would not have been prosecuted or convicted had that evidence been available at trial.

III

Last, the petitioner claims that the court erred in concluding that the absence of the petitioner's DNA on A's clothing would not create a reasonable probability that the petitioner would not have been prosecuted or convicted. The petitioner argues that the absence of his DNA on A's clothing "contradicts a key portion of [A's] testimony and would be compelling proof that [A's] version [of events] was not credible . . . ." Specifically, the petitioner states that "[A's] clear testimony was that the [petitioner] forcibly removed her pants and held her down during the assault." He argues that, assuming the DNA testing would reveal the absence of the petitioner's DNA on the clothing items, this "would undermine the state's proof that the [petitioner] touched [A] to remove her pants and hold her down on the ground" and "creat[e] a reasonable doubt that [the petitioner] touched [A] in the manner she described."

A lack of touch DNA on an object, however, is not conclusive proof that a person did not touch a particular object. "DNA is not always detectable, meaning that it is possible to have someone touch an object but not leave behind detectable DNA because . . . some people leave more of their skin cells behind than others, i.e., some people are better 'shedders' of their DNA than others. There are also other factors that affect the amount of DNA left on an object, such as the length of contact, the roughness or smoothness of the surface, the type of contact, the existence or nonexistence of fluids, such as sweat, and degradation on the object." *State* v. *Dawson*, 340 Conn. 136, 154, 263 A.3d 779 (2021). Thus, the absence of the petitioner's DNA on A's clothing is not in and of itself proof that the petitioner never touched A's clothing. Given the inconclusive nature of such evidence, and in light of the totality of the evidence presented at trial, we conclude that the hypothetical lack of DNA evidence on A's clothing does not create a reasonable probability that the petitioner would not have been prosecuted or convicted had that evidence been available at trial.

In sum, we agree with the trial court that the petitioner failed to sustain his burden under § 54-102kk that the DNA evidence he seeks to have tested creates a reasonable probability that the petitioner would not have been prosecuted or convicted had such evidence been available at trial.

The judgment is affirmed.

In this opinion the other judges concurred.

* In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim or others through whom the victim's identity might be ascertained. See General Statutes § 54-86e.

** The listing of judges reflects their seniority status on this court as of the date of oral argument.

[1] General Statutes § 54-102kk provides in relevant part: "(a) Notwithstanding any other provision of law governing postconviction relief, any person who was convicted of a crime and sentenced to incarceration may, at any time during the term of such incarceration, file a petition with the sentencing court requesting the DNA testing of any evidence that is in the possession or control of the Division of Criminal Justice, any law enforcement agency, any laboratory or the Superior Court. The petitioner shall state under penalties of perjury that the requested testing is related to the investigation or prosecution that resulted in the petitioner's conviction and that the evidence sought to be tested contains biological evidence.

"(b) After notice to the prosecutorial official and a hearing, the court shall order DNA testing if it finds that:

"(1) A reasonable probability exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;

"(2) The evidence is still in existence and is capable of being subjected to DNA testing;

"(3) The evidence, or a specific portion of the evidence identified by the petitioner, was never previously subjected to DNA testing, or the testing requested by the petitioner may resolve an issue that was never previously resolved by previous testing; and

"(4) The petition before the Superior Court was filed in order to demonstrate the petitioner's innocence and not to delay the administration of justice.

"(c) After notice to the prosecutorial official and a hearing, the court may order DNA testing if it finds that:

"(1) A reasonable probability exists that the requested testing will produce DNA results which would have altered the verdict or reduced the petitioner's sentence if the results had been available at the prior proceedings leading to the judgment of conviction;

"(2) The evidence is still in existence and is capable of being subjected to DNA testing;

"(3) The evidence, or a specific portion of the evidence identified by the petitioner, was never previously subjected to DNA testing, or the testing requested by the petitioner may resolve an issue that was never previously resolved by previous testing; and

"(4) The petition before the Superior Court was filed in order to demonstrate the petitioner's innocence and not to delay the administration of justice. . . ."

[2] Due to his level of intoxication, the petitioner was driven to the police station by police officers.

[3] See *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[4] The petitioner stated in relevant part: "At some point during the evening I was with [A] on the deck. She knocked over a glass. I tried to catch the glass with my foot and got cut. I began to pick up the glass. [A] went into the bathroom and was screaming. [A's mother] came out and said something. I'm not sure what she said. She ran off and I followed after her but never caught up to her. I went back in the house and [A] was still screaming in the bathroom. [A] was screaming, 'mom, mom, mom.' I got a coat hanger and opened the door. [A] was sitting on the floor crying. I went to look for [A's mother]. I never found her. . . . I did not have sexual intercourse with [A]. I did not have intercourse with [A] tonight or have never in the past."

[5] Specifically, Peterson testified that "[the petitioner] asked me a question and said, 'what if I was the victim,' and I asked him to give me some more details. He would just say over and over that, 'what if I was the victim.' He wouldn't elaborate anything on there and I told him it doesn't make sense. You need to explain to me why you think you're the victim or what's going on but he wouldn't speak to much other than saying that.

* * *

"I asked him to explain himself and [he] really didn't give any other detail and just, you know, appeared to be getting nervous, but he just kept saying,

'what if I was the victim' . . . ."

[6] The petitioner stated in relevant part: "Last night, early this morning, I remember drinking outside on the rear deck with my step-daughter, [A]. I was drinking raspberry vodka and she was drinking vodka as well. While drinking [A] reached across the table and one of her boobs fell out of her shirt. I joked with [A] to put her boob back in her shirt. [A] then pulled out her other boob and started shaking her boobs in front of me. I remember [A] then took off her shirt and pants. [A] then started waving her pants over [her] head and she flung her pants into the yard. [A] does not wear a bra or panties.

"[A] then got on top of me. I pulled my shorts down to my ankles. My penis went into her vagina. We had sex for a short time and I may have ejaculated inside of her but I'm not sure. As we were finishing having sex [A] leaned on the table and flipped it over. A glass on the table fell and smashed on the deck.

"When the table flipped over and the glass broke it made a lot of noise. I panicked and I told [A] to get her clothes. [A] then went into the lawn area near the deck and started to dance in the yard naked. I started to pick up the broken glass near my feet. A few minutes later [A's mother] came outside and accused me of 'fucking [A] in the ass.' [A's mother] then went back into the house and I went inside after her. I had the broken glass in my hand. I couldn't find [A's mother] inside the house. [A] locked herself in the bathroom and she was yelling, 'mom, mom.' I then used a coat hanger to force the lock on the bathroom door. [A] was seated on the bathroom floor Indian style. A short time later the police arrived. I want to say that this sexual encounter between [A] and I was consensual. I did not force myself on [A]. I think [A] wanted for us to get caught.

"I was asked several times by police officers what happened last night. I did not remember much until this morning and I held back a little too because I was somewhat embarrassed by this incident because [A] is my step-daughter."

[7] The petitioner changed his theory of what occurred multiple times throughout the course of his criminal trial and his postconviction proceedings. He also provided inconsistent versions of events to the police, first claiming that there had been no sexual contact at all, then suggesting that he might have been the victim of a sexual assault, and then claiming that any sexual contact had been consensual. At his habeas trial, the petitioner claimed that he had instructed his attorney to argue at his criminal trial that A had sexually assaulted him, but his counsel failed to do so.

[8] The court denied the petition orally on February 1, 2022, and issued a written memorandum of decision on March 17, 2022.

[9] It is not clear from the court's memorandum of decision whether it reviewed the transcript of the petitioner's criminal trial before making its determination that he failed to demonstrate that he would not have been prosecuted or convicted if the items had been subject to DNA testing before his trial. The transcripts were not marked as an exhibit by the court, referenced in its memorandum of decision, or originally designated as part of the record on appeal. The petitioner did not seek an articulation from the court to ascertain whether it had reviewed the transcripts and does not raise this issue on appeal. The petitioner subsequently provided this court with a copy of the transcripts to facilitate our review of his claim.

Because our review of the petitioner's claim on appeal is plenary, and we now have a copy of the transcripts of the petitioner's criminal trial, it is not necessary for this court to resolve this ambiguity. We take this opportunity, however, to emphasize that a trial court should be provided with and should review such transcripts in making a proper determination of whether a petitioner is entitled to relief pursuant to § 54-102kk (b) (1).

[10] In both of the petitioner's sworn statements to the police, which were read to the jury, the petitioner stated that the glass broke on the deck while A and the petitioner were both present on the deck, suggesting that the petitioner cut his feet on the glass, bled onto the deck, and was able to transfer that blood onto A while she was also on the deck. In the petitioner's first sworn statement, made to Peterson, in which he asserted that he "did not have sexual intercourse with [A]," he stated, "[a]t some point during the evening I was with [A] on the deck. She knocked over a glass. I tried to catch the glass with my foot and got cut." In the petitioner's second sworn statement, made to Cyr, in which he asserted that he did in fact have intercourse with A, but that it was consensual, he stated that as he and A "finish[ed] having sex [A] leaned on the table and it flipped over. A glass on the table fell and smashed on the deck. . . . I started to pick up the

broken glass near my feet."

[11] The petitioner mischaracterizes A's testimony at the criminal trial. He states that "[A] was clear that the [petitioner] was not injured prior to the assault and that she broke the glass running away from the [petitioner] and back into the house. Her clear implication, and the state's corresponding argument, was that the [petitioner] pursued [A] back onto the deck and into the house, running through the broken glass and cutting his feet." Although A testified that she broke the glass, she did not testify that the petitioner cut his foot on the glass.