DOCKET NO. CV20-5000646-S	STATE OF CONNECTICUT :SUPERIOR COURT G.A. 19	SUPERIOR COURT
FELIX R.[1]	2024 MAY 29 A 11:59	JUDICIAL DISTRICT OF TOLLAND
V.		
COMMISSIONER OF CORRECTION		MAY 29, 2024

MEMORANDUM OF DECISION

The petitioner, Felix R., initiated this second amended petition for a writ of habeas corpus, claiming that his habeas counsel was ineffective for failing to raise claims that his trial counsel was ineffective: (1) for failing to investigate and call certain witnesses, (2) for failing to introduce exculpatory evidence, and (3) for failing to investigate and make DNA-related arguments. The respondent denies these allegations and raises collateral estoppel as a special defense. The court heard evidence on January 3, 2024.

For the reasons set forth below, the claims are denied.

I
FACTUAL AND PROCEDURAL BACKGROUND

The Appellate Court summarized the evidence presented to the jury as follows:

> The complainant, the [petitioner's] daughter, was born in the Dominican Republic to parents who never married one another. The [petitioner] moved to the United States, and the complainant continued to live with her mother in the Dominican Republic until 2005 when she moved to the United States to live with the [petitioner] and her paternal grandmother. At the time she came to the United States, the complainant was ten years old and spoke no English. Her mother remained in the Dominican Republic.
>
> The [petitioner] began to touch the complainant in a sexual manner approximately three months after she arrived in Connecticut. On occasion the [petitioner] tried to kiss her and have her touch his penis. In 2006, the [petitioner] took the complainant to a mental health clinic because she wept frequently, was having difficulty sleeping, and was anxious. When she was seen at the clinic, the complainant did not mention the [petitioner's] sexual

[1] In accordance with the policy of protecting the privacy interests of the victims of the crimes of domestic violence and risk of injury to a child, this court uses initials to identify the petitioner and others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

advances toward her because the [petitioner] had threatened to hurt her if she told anyone about it. At trial, the clinical psychologist, Patricia Nogelo, who counseled the complainant, testified that she saw the complainant for individual and family therapy. According to Nogelo, the complainant did not have mental health problems but needed help adjusting to her new life in Connecticut.

The complainant attempted to tell her mother about the [petitioner's] sexual advances by writing her a letter. She asked the [petitioner] to deliver the letter when he traveled to the Dominican Republic. The complainant does not know whether her mother ever received the letter. In late 2007 or early 2008, the complainant and the [petitioner] together visited the Dominican Republic. During their visit, the complainant told her paternal aunt that the [petitioner] abused her. The paternal aunt confronted the [petitioner], who denied the accusations of abuse. The complainant's paternal aunt then accused the complainant of being a liar. In late 2008, the complainant's maternal aunt, Mercedes, asked the complainant about a letter in which the complainant had stated that she did not want to live with the [petitioner] and threatened to commit suicide. The complainant told Mercedes that the contents of the letter were untrue. In March 2009, a representative of the Department of Children and Families (department) visited the complainant at her school. When the representative from the department asked the complainant whether she was being sexually abused, the complainant gave a negative response. The complainant later stated that she was afraid to tell anyone about the [petitioner's] sexual advances because she was fearful; the [petitioner] was sometimes aggressive. The complainant did not know who had contacted the department about her situation.

On the morning of May 9, 2009, when the complainant was fourteen, the [petitioner] awakened her by touching her breasts. The [petitioner] held the complainant's hands above her head and took off her pajamas. The complainant asked the [petitioner] to stop, but he covered her mouth, told her to shut up, and forced her to engage in sexual intercourse. The [petitioner] used a condom, but it broke. The complainant saw 'white stuff' in the broken condom and on her body. The [petitioner] instructed the complainant not to tell anyone what had occurred. Later that morning, the [petitioner] purchased a pregnancy test and Plan B (morning after pill). He directed the complainant to take one of the morning after pills and gave her a second pill approximately twelve hours later. On May 12, 2009, the [petitioner] gave the complainant a pregnancy test, which produced a negative result.

During the Memorial Day weekend of 2009, the [petitioner] took the complainant to New York City, where she visited Mercedes. During the visit, the complainant told Mercedes that, for more than a year, the [petitioner] had been sexually abusing her when he was drinking, had sexual intercourse with her, and had purchased a morning after pill for her. The complainant told Mercedes that she did not want to return to Connecticut and be abused by the [petitioner] again. Mercedes told the complainant that she could not do anything from New York, but advised her to tell her guidance counselor.

The complainant telephoned the defendant from New York and told him that she did not want to return home because she did not want to be abused any longer. The [petitioner] instructed her to come home and not to tell anyone about the sexual abuse. On the Wednesday following the Memorial Day holiday, the complainant took the train to Connecticut. On Thursday morning, May 28, 2009, the [petitioner] touched the complainant

while she was sleeping. The complainant awakened, pushed the [petitioner] away, and slapped him. The [petitioner] left the complainant alone but warned her not to tell anyone or he would do something to her.

The complainant went to school and reported the [petitioner's] sexual abuse to her guidance counselor. She told her guidance counselor that the [petitioner] had touched her breasts that morning and had done so many times previously. She also told him that the [petitioner] had penetrated her and threatened to send her back to the Dominican Republic if she told anyone about it. Moreover, the complainant also stated that she was afraid to go home from school. The guidance counselor telephoned the department hotline to report what the complainant had told him. A department social worker, Tira Gant, interviewed the complainant at school. The department placed the complainant in foster care that day.

Later, on the evening of May 28, 2009, department personnel informed the [petitioner] of the complainant's accusations and that she was being removed from his home. The [petitioner] denied having abused the complainant. He stated that he knew that the complainant would accuse him because he had accused her of having been with a boy while she was in New York during the Memorial Day holiday. He claimed that the complainant was angry with him for having confronted her about the boy. He acknowledged, however that during the previous year, the complainant's mother had accused him of having sexually abused the complainant.

Detective John Ventura interviewed the [petitioner]. The [petitioner] told Ventura that, on a couple of occasions, he had taken the complainant to the hospital for an evaluation because he thought she was having sex with a boy. The [petitioner] claimed that the hospital had refused to see the complainant on those occasions for 'ethical reasons.' The [petitioner] also informed Ventura that the complainant slept in his bed because she was not getting along with her paternal grandmother, and that he saw nothing wrong with the complainant's sleeping with him. When Ventura asked the [petitioner] if he had purchased a pregnancy test for the complainant, the [petitioner] became excited and extremely nervous. He denied having purchased a pregnancy test and claimed that the complainant had used his credit card without telling him why. He also denied that he had bought the complainant a morning after pill.

The following day, however, the [petitioner] telephoned Ventura and admitted that he had purchased a morning after pill and a pregnancy test for the complainant. The [petitioner's] credit card statement, a Walgreens electronic report and its surveillance photographs confirmed that the [petitioner] had made the subject purchases at 10:02 a.m. on May 9, 2009. The [petitioner] explained to Ventura that he had not been truthful when Ventura was questioning him because he was embarrassed that the complainant was having unprotected sex with boys.

On June 1, 2009, a social worker from the Yale Child Sexual Abuse Clinic, Theresa Montelli, conducted a forensic interview of the complainant. Although the complainant told Montelli that no one other than the [petitioner] had ever touched her sexually, she testified at trial that she had had sex with two boys.

In early June 2009, a pediatric nurse practitioner, Janet Murphy, conducted a physical examination of the complainant. According to Murphy, the complainant's vaginal examination was normal, which was not dispositive of whether the complainant had had sexual intercourse. The complainant's blood and urine tests, however, indicated that she was pregnant. Within days of Murphy's examination, the complainant had a miscarriage while she was at school. Although medical tests were inconclusive as to who had impregnated her, Beth Rackow, an obstetrician and gynecologist who examined the complainant on June 8, 2009, testified that the complainant's pregnancy was consistent with her having had sexual intercourse and become pregnant on May 9, 2009, notwithstanding the negative May 12, 2009 pregnancy test. Given the timing of the complainant's menstrual cycle and her hormone levels, the complainant could not have become pregnant during the Memorial Day holiday.

In mid-June 2009, department social workers Anamaris Colon and Gant met with the [petitioner] to inform him that the department was considering placing the complainant with one of her maternal aunts, either Elka or Mercedes, in New York. The [petitioner] objected to placing the complainant with her maternal aunts on a number of grounds, claiming that they would not be good supervisors. He asserted that, when the complainant had visited her aunts during the Memorial Day weekend, she had run away for fourteen hours and had sex with a boy named Jonathan. The complainant, Mercedes, and the New York equivalent of the department denied that the complainant had run away for fourteen hours. The [petitioner] reported to Colon and Gant that the complainant 'was pretty much loose with the boys' and that she had accused him of sexual assault because she was afraid that he would punish her. He also reported that the complainant had posted an image of her face and a penis on her social network website. The complainant provided Colon with access to the website, but Colon was unable to locate the alleged image during an extended search.

Later that day, after Colon and Gant had met with the [petitioner], Ventura and Detective Sean Houlihan were notified by the Bridges Community Center that the [petitioner] had expressed suicidal ideation. The officers went to the [petitioner's] home and observed him in an agitated and tearful state. The [petitioner] stated that he was upset because the department was attempting to place the complainant with her maternal aunts in New York. Moreover, the [petitioner] stated that he was angry with Elka, and told a hotline worker that he wanted to harm Elka as he blamed her for the fact that he was losing his daughter. When the police asked the [petitioner] if he was suicidal, he stated that if he killed himself, 'everything would get better.' He became emotional. The officers arranged for an emergency commitment, and the [petitioner] was taken to a hospital.

The [petitioner] was arrested in January 2010, and charged with various crimes. A jury trial was held in May 2011. Given the lack of direct evidence, the complainant's credibility was a principal issue at trial. The evidence focused not only on her allegations against the [petitioner], but also on when and with whom she had had sexual relations. The [petitioner] attempted to impeach the complainant's credibility by highlighting inconsistencies between her trial testimony and her out-of-court statements. The jury found the [petitioner] guilty of all charges. The court sentenced the [petitioner] to thirty years in prison followed by twenty years of special parole.

State v. Felix R., 147 Conn. App. 206, 208-15, 83 A.3d 619 (2013).

The petitioner was convicted of two counts of sexual assault in the first degree in violation of General Statutes § 53a–70 (a) (1), two counts of sexual assault in the third degree in violation of General Statutes § 53a–72a (a) (2), one count of sexual assault in the fourth degree in violation of General Statutes § 53a–73a (a) (1) (E), and three counts of risk of injury to a child in violation of General Statutes § 53–21 (2). "On appeal, ... the [petitioner] claim[ed] that he should be granted a new trial due to a pattern of prosecutorial impropriety that occurred during closing argument. More specifically, the [petitioner] claim[ed] that the prosecutorial impropriety appealed to the emotions of the jury by soliciting the jury's sympathy for the complainant and inciting its anger toward him thereby infringing on his sixth amendment right to confront his accuser and to present a defense at a public trial. The [petitioner] further claim[ed] that the prosecutor improperly conveyed to the jury his personal opinion as to the [petitioner's] credibility and guilt and commented on facts not in evidence." (Footnote omitted.) State v. Felix R., supra, 147 Conn. App. 215-16. The Appellate Court concluded that the petitioner's right to a fair trial was violated and remanded the matter for a new criminal trial. The state petitioned the Supreme Court for certification to appeal, which was granted, and ultimately resulted in the Supreme Court reversing the decision of the Appellate Court. State v. Felix R., 319 Conn. 1, 19, 124 A.3d 871 (2015). Attorney Stacey Van Malden represented the petitioner during his appeal.

On August 10, 2016, the petitioner filed his first habeas petition, alleging that his trial counsel, Attorney Elton Williams, was ineffective in failing to investigate and call two fact witnesses, Mary Tart and Gladys Mendez, to testify at the criminal trial.[2] The habeas court, *Kwak, J.*, denied the petition in a written decision dated November 13, 2018, finding the petitioner failed to prove that Attorney William's performance was deficient or that the petitioner was prejudiced thereby. The

[2] The petition also alleged additional claims for ineffective assistance of trial counsel and violations of due process but these claims were subsequently withdrawn by the petitioner.

petitioner was again represented by Attorney Van Malden. The petitioner did not appeal the habeas court's decision.

On June 3, 2020, the petitioner initiated the present habeas matter. In his second amended three count petition, filed on May 4, 2023, the petitioner claims that his habeas counsel, Attorney Van Malden, was ineffective in failing to raise the claims that trial counsel, Attorney Williams, was ineffective in failing to: (1) investigate and call Maria Isabel Ramirez and Yvette Cortez as witnesses; (2) introduce and submit available evidence favorable to the defense at trial; and (3) investigate and argue a lack of DNA testing and match between the petitioner and embryonic tissue recovered from the victim. On December 29, 2023, the respondent filed an amended return denying the petitioner's material allegations and asserting the special defense of collateral estoppel.

A trial was held on January 3, 2024, at which the petitioner called Attorney Van Malden, Yvette Cortez, Attorney Williams, and himself as witnesses. The petitioner also submitted numerous exhibits, including the underlying criminal transcripts. Both parties filed posttrial briefs.

Additional facts will be discussed below as necessary to address the petitioner's specific claims.

II
DISCUSSION

"A criminal defendant's right to the effective assistance of counsel ... is guaranteed by the sixth and fourteenth amendments to the United States constitution and by article first, § 8, of the Connecticut constitution.... To succeed on a claim of ineffective assistance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)." (Citations omitted.) Small v. Commissioner of Correction, 286 Conn. 707, 712, 946 A.2d 1203, cert. denied, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

The petitioner has the burden to 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." (Emphasis in original.) Johnson v. Commissioner of Correction, 285 Conn. 556, 575, 941 A.2d 248 (2008), citing Strickland v. Washington, supra, at 466 U.S. 694.

"To satisfy the performance prong, a claimant must demonstrate that 'counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed . . . by the [s]ixth [a]mendment.'" Ledbetter v. Commissioner of Correction, 275 Conn. 451, 458, 880 A.2d 160 (2005), cert. denied, 546 U.S. 1187, 126 S. Ct. 1368, 164 L. Ed. 2d 77 (2006), quoting Strickland v. Washington, supra, 466 U.S. 687. "It is not enough for the petitioner to simply prove the underlying facts that his attorney failed to take a certain action. Rather, the petitioner must prove, by a preponderance of the evidence, that his counsel's acts or omissions were so serious that counsel was not functioning as the 'counsel' guaranteed by the sixth amendment, and as a result, he was deprived of a fair trial." Harris v. Commissioner of Correction, 107 Conn. App. 833, 845–46, 947 A.2d 7, cert. denied, 288 Conn. 908, 953 A.2d 652 (2008). When assessing trial counsel's performance, the habeas court is required to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance...." Strickland v. Washington, supra, 466 U.S. 689.

Under the second prong of the test, the prejudice prong, the petitioner must show that "counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." (Internal quotation marks omitted.) Michael T. v. Commissioner of Correction, 307 Conn. 84, 101, 52 A.3d 655 (2012). Ultimately, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied on as having produced a just result." Strickland v. Washington, supra, 466 U.S. 686.

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Aillon v. Meachum, 211 Conn. 352, 362, 559 A.2d 206 (1989), quoting Strickland v. Washington, supra, 466 U.S. 697; King v. Commissioner of Correction, 73 Conn. App. 600, 602–603, 808 A.2d 1166 (2002) ("[b]ecause both prongs of the Strickland test must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong"), cert. denied, 262 Conn. 931, 815 A.2d 133 (2003).

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a 'habeas on a habeas,' was approved by our Supreme Court in Lozada v. Warden, 223 Conn. 834, 613 A.2d 818 (1992). In Lozada, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51–296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition." (Footnote omitted.) Sinchak v. Commissioner of Correction, 126 Conn. App. 684, 686–87, 14 A.3d 343 (2011).

The Appellate Court explained that when the Strickland standard is "'applied to a claim of ineffective assistance of prior habeas counsel, [it] requires the petitioner to demonstrate that his prior habeas counsel's performance was ineffective and that this ineffectiveness prejudiced the petitioner's prior habeas proceeding.... [T]he petitioner will have to prove that one or both of the prior habeas counsel, in presenting his claims, was ineffective and that effective representation by habeas counsel establishes a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial....' Harris v. Commissioner of Correction,

108 Conn. App. 201, 209–10, 947 A.2d 435, cert. denied, 288 Conn. 911, 953 A.2d 652 (2008). 'Therefore, as explained by our Supreme Court in Lozada v. Warden, [supra, 223 Conn. 834], a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of [trial] counsel must essentially satisfy Strickland twice: he must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his [trial] counsel was ineffective.'... Ham v. Commissioner of Correction, 152 Conn. App. 212, 230, 98 A.3d 81, cert. denied, 314 Conn. 932, 102 A.3d 83 (2014). 'We have characterized this burden as presenting a herculean task....' Alterisi v. Commissioner of Correction, 145 Conn. App. 218, 227, 77 A.3d 748, cert. denied, 310 Conn. 933, 78 A.3d 859 (2013)." Mukhtaar v. Commissioner of Correction, 158 Conn. App. 431, 438–39, 119 A.3d 607 (2015). Therefore, pursuant to the foregoing case law, to set forth a prima facie case of ineffective assistance of habeas counsel on the ground of ineffective assistance of trial counsel, the petitioner must set forth a prima facie case of ineffective assistance of trial counsel.

A

Failure to Investigate and Call Witnesses

The petitioner first alleges that Attorney Van Malden was ineffective for failing to raise the claims that Attorney Williams was ineffective for failing to investigate and call Yvette Cortez and Maria Isobel Ramirez as witnesses at the petitioner's criminal trial. The petitioner failed to sustain his burden of proving either claim.

1.

Collateral Estoppel

First, the respondent argues that the petitioner's claims are barred by the doctrine of collateral estoppel. Specifically, the respondent argues that the petitioner raised the issue of ineffective assistance as to trial counsel's failure to investigate and present witnesses and is barred from once again litigating the issues here.

"The common-law doctrine of collateral estoppel, or issue preclusion, embodies a judicial policy in favor of judicial economy, the stability of former judgments and finality.... Collateral estoppel ... is that aspect of res judicata [that] prohibits the relitigation of an issue when that issue was actually litigated and necessarily determined in a prior action between the same parties upon a different claim.... For an issue to be subject to collateral estoppel, it must have been fully and fairly litigated in the first action. It also must have been actually decided and the decision must have been necessary to the judgment....

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined.... An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered.... [C]ollateral estoppel [is] based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate.... Stability in judgments grants to parties and others the certainty in the management of their affairs which results when a controversy is finally laid to rest." (Citation omitted; internal quotation marks omitted.) Carter v. Commissioner of Correction, 203 Conn. App. 794, 807, 249 A.3d 749 (2021).

In his prior habeas matter, the petitioner raised claims alleging that Attorney Williams was ineffective in failing to properly investigate Mary Tart and Gladys Mendez as fact witnesses at the petitioner's criminal trial. Tart, the grandmother of the victim's friend, testified that she overheard the victim say that she was pregnant and did not know who the father was, but thought it was either Jonathan or Miguel. Tart indicated that she also overheard the victim say she was going to New York to visit her aunt, who had devised a plan to blame the petitioner for her pregnancy and accuse him of rape. Mendez, the petitioner's mother, testified as to information supporting an alibi defense for the petitioner. The habeas court, *Kwak, J.*, discredited the testimony by both Tart and Mendez

and found that the petitioner failed to submit credible evidence that Attorney William rendered deficient performance or that the petitioner was prejudiced thereby.

In the present matter, the petitioner has raised claims alleging that his prior habeas counsel, Attorney Van Marden, was ineffective for failing to raise claims that Attorney Williams was ineffective for failing to investigate and present Yvette Cortez and Maria Isobel Ramirez as witnesses. The petitioner has not raised claims in a prior matter alleging that his prior habeas counsel was ineffective. Additionally, whether trial counsel was ineffective for failing to present Cortez and Ramirez as witnesses are not claims that have been decided in a prior matter as the failure to raise such claims is the basis of the petitioner's habeas counsel ineffectiveness claims here. As a result, this court finds that the petitioner's claims are not barred by the doctrine of collateral estoppel.

2.
Standard

"[C]onstitutionally adequate assistance of counsel includes competent pretrial investigation.... We are mindful of the principle that, although it is incumbent on a trial counsel to conduct a prompt investigation of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction ... counsel need not track down each and every lead or personally investigate every evidentiary possibility.... In a habeas corpus proceeding, the petitioner's burden of proving that a fundamental unfairness had been done is not met by speculation ... but by demonstrable realities.... One cannot successfully attack, with the advantage of hindsight, a trial counsel's trial choices and strategies that otherwise constitutionally comport with the standards of competence.... The burden to demonstrate what benefit additional investigation would have revealed is on the petitioner." (Citations omitted; internal quotation marks omitted.) Humble v. Commissioner of Correction, 180 Conn. App. 697, 709–10, 184 A.3d 804, cert. denied, 330 Conn. 939, 195 A.3d 692 (2018).

"[A]s a general rule, a habeas petitioner will be able to demonstrate that trial counsel's decisions were objectively unreasonable only if there [was] no...tactical justification for the course taken." (Internal quotation marks omitted.) Spearman v. Commissioner of Correction, 164 Conn. App. 530, 540-41, 138 A.3d 378, cert. denied, 321 Conn. 923, 138 A.3d 284 (2016). "[T]he presentation of testimonial evidence is a matter of trial strategy.... Defense counsel will be deemed ineffective only when it is shown that a defendant has informed his attorney of the existence of a witness and that the attorney...without adequate explanation...failed to call the witness at trial.... Furthermore, [t]he failure of defense counsel to call a potential defense witness does not constitute ineffective assistance unless there is some showing that the testimony would have been helpful in establishing the asserted defense." (Citation omitted; internal quotation marks omitted.) Id., 541.

a.
Cortez

At the habeas trial, Yvette Cortez testified that she was an investigative social worker for Department of Children & Families (DCF) assigned to a case involving the victim and the petitioner that was reported two months prior to the report that led to the petitioner's arrest. Cortez testified that DCF received the case through two anonymous phone calls, and she interviewed the petitioner and the victim who both denied the sexual assault allegations. Cortez prepared a report that concluded that the investigation was unsubstantiated because there was not sufficient evidence to support the allegations. Two months later, a second case was opened and another DCF social worker, Tira Grant, investigated the allegations and drafted a report substantiating the claims. Grant testified at the criminal trial, and her report was submitted into evidence. Cortez was not called as a witness.

Cortez also testified at the habeas trial that she was familiar with delayed disclosure and that it was not uncommon for sexual assault victims to deny the allegations and later disclose that they

were true. Cortez indicated that several factors could affect disclosure, including threats, immigration status, and family members.

Attorneys Van Malden and Williams both testified that they did not recall Cortez's name. Attorney Van Malden testified that she read Cortez's report, but the petitioner never informed her that he wanted Cortez to be part of his habeas petition. Attorney Van Malden further testified that it would not have been necessary for Attorney Williams to call Cortez as a witness because her testimony was cumulative to other witnesses who testified at the trial that the victim denied being assaulted, including the victim herself and her middle school guidance counselor, William Carter. Carter testified at the criminal trial that he was present at the initial DCF interview where the victim denied the allegations. Attorney Van Malden also testified that if Attorney Williams had called Cortez to testify, it would have opened the door to cross-examination regarding delayed disclosure and her testimony indicating that often a victim's denial of abuse does not mean it did not actually occur.

The court finds that Attorney Williams's decision to not call Cortez as a witness did not constitute deficient performance. In light of the fact that other witnesses testified that the victim denied the assault occurred and Attorney Van Malden's testimony that the state would have been able to introduce the concept of delayed disclosures through Cortez's testimony, the petitioner has failed to prove that trial counsel's decision to not call Cortez as a witness was objectively unreasonable under the circumstances. Additionally, the petitioner failed to prove prejudice by demonstrating that there is a reasonable probability that the outcome of the proceedings would have been different had Attorney Williams called Cortez to testify at the criminal trial. The credible evidence before this court indicates that Cortez's testimony regarding the victim's initial denial would have been cumulative to other evidence presented and could have been detrimental to the defense had the state cross-examined Cortez regarding delayed disclosures. As a result, the petitioner

has failed to sustain his burden of establishing that Attorney Williams was ineffective for failing to investigate and present Cortez as a witness, and, therefore, his claim of ineffective assistance against Attorney Van Malden as to this issue must be denied.

b.

Maria Isabel Ramirez

Maria Isabel Ramirez did not testify at the habeas trial. Attorney Van Malden testified that the petitioner did not provide her with Ramirez's name or information. The petitioner testified that he gave Attorney Williams Ramirez's information and that the pair met at an office, but she was not called to testify. The petitioner also testified that Ramirez would have testified that the victim was in New York on vacation with her on May 9th, when the incident allegedly occurred.

"[T]o prove prejudice under Strickland, the petitioner must demonstrate that, in the absence of the deficient performance at issue, the likelihood of a different result must be substantial, not just conceivable. [T]he petitioner must meet this burden not by use of speculation but by demonstrable realities." (Citation omitted; internal quotation marks omitted.) Grant v. Commissioner of Correction, 225 Conn. App. 55, 80, __ A.3d __ (2024). Ramirez did not testify at the habeas trial. Thus, this court has no way of knowing what Ramirez's testimony would have been or whether it would have been beneficial to the petitioner. Thus, the petitioner failed to prove that trial counsel's failure to call Ramirez as a witness prejudiced him. This court need not address whether Attorney William's performance was deficient. See Aillon v. Meachum, supra, 211 Conn. 362. As a result, the petitioner has failed to sustain his burden of establishing that Attorney Williams was ineffective for failing to investigate and present Ramirez as a witness, and, therefore, his claim of ineffective assistance against Attorney Van Malden as to this issue must be denied.

B

Failure to Present Favorable Evidence

The petitioner next alleges that Attorney Van Malden was ineffective for failing to raise the claim that Attorney Williams was ineffective for failing to present and submit favorable evidence at the petitioner's criminal trial. Specifically, the petitioner alleges that trial counsel failed to submit the DCF report prepared by Cortez and the DNA report stating that no conclusion could be made regarding the paternal contributor of the embryonic tissue recovered after the victim suffered a miscarriage. The petitioner failed to sustain his burden of proving these claims.

1.

DCF Report

As discussed herein, Tira Grant, a DCF investigator, testified at the petitioner's criminal trial as to her investigation process and her conclusion that the abuse claims were substantiated. A report prepared by Grant was presented into evidence at the criminal trial. Approximately two months prior, Cortez had interviewed the victim and the petitioner and prepared a report concluding that the abuse claims were not substantiated. Cortez testified at the habeas trial that the victim denied the allegations at that time and thus there was insufficient proof to support the claims. The underlying record indicates that other witnesses testified at the criminal trial regarding the victim's earlier denial of the allegations, including Carter, her guidance counselor who was present for the DCF interview with Cortez. Attorney Williams testified at the habeas trial that he did not recall the DCF report. Attorney Van Malden testified that she read the report but could not recall if she received a copy of it prior to the first habeas trial.

The court finds that the petitioner failed to prove prejudice by demonstrating that there is a reasonable probability that the outcome of the proceedings would have been different had Attorney Williams presented the DCF report into evidence. Similar to this court's analysis regarding Cortez's testimony, the court finds that the DCF report she prepared would be cumulative to other evidence

presented regarding the victim's earlier denial of the allegations. As a result, the petitioner has failed to sustain his burden of establishing that Attorney Williams was ineffective for failing to present the DCF report into evidence, and, therefore, his claim of ineffective assistance against Attorney Van Malden as to this issue must be denied.

2.
DNA Report

The underlying record reveals that the victim suffered a miscarriage, and DNA testing was conducted on the recovered embryonic tissues. A DNA report was generated, indicating that only maternal DNA was present and the results were inconclusive regarding the "paternal contributor to the 'embryonic products.'" At the petitioner's criminal trial, Dr. Beth Rackow testified as to the DNA report results, noting that the test could not determine the paternal contributor from the material collected from the victim. Detective John Ventura also testified at the criminal trial that it was the petitioner who requested the DNA testing, and the results were inconclusive. Attorney Williams did not submit the DNA report into evidence at trial.

Attorney Van Malden testified at the habeas trial that she did not believe the DNA report would be helpful to the defense because it did not constitute inculpatory or exculpatory evidence. The report only indicated that the DNA results were inconclusive due to an insufficient amount of paternal DNA found in the sample, thereby preventing the lab from identifying a paternal source. Attorney Van Malden further testified that the jury was aware that there was not a sufficient sample available to make a determination regarding paternal DNA.

The court finds that the petitioner failed to prove prejudice by demonstrating that there is a reasonable probability that the outcome of the proceedings would have been different had Attorney Williams presented the DNA report into evidence. The court agrees with Attorney Van Malden's assessment that the DNA report was not exculpatory and was cumulative to other evidence presented at trial discussing the test results. As a result, the petitioner has failed to sustain his burden

of establishing that Attorney Williams was ineffective for failing to present the DNA report into evidence, and, therefore, his claim of ineffective assistance against Attorney Van Malden as to this issue must be denied.

C

Failure to Challenge DNA Evidence

The petitioner further alleges that Attorney Van Malden was ineffective for failing to raise the claim that Attorney Williams was ineffective for failing to challenge the DNA evidence presented at the petitioner's criminal trial. The petitioner failed to sustain his burden of establishing either deficient performance or prejudice with respect to these claims.

The petitioner argues that Attorney Williams failed to argue the lack of DNA testing and match during the criminal trial. As discussed herein, the DNA test results were inconclusive and could not identify a paternal source in the tissue sample provided from the victim's miscarriage. There was testimony presented to the jury regarding the inconclusive DNA test results. There was also testimony given by Detective Ventura indicating that it was the petitioner who requested the DNA test. Additionally, Attorney Williams discussed the inconclusive test results in his closing argument. As a result, the court finds that the petitioner has not proven that Attorney Williams performed deficiently in challenging the DNA evidence presented at trial.

Additionally, the petitioner failed to prove prejudice by demonstrating that there is a reasonable probability that the outcome of the proceedings would have been different had Attorney Williams performed differently. The petitioner argues that Attorney Williams failed to argue the lack of a DNA match to the victim's embryonic tissues but the results did not exclude the petitioner as a match; rather, the results indicated that there was an insufficient sample to identify a paternal source. The court finds that Attorney Williams' performance fell within the wide range of reasonable professional assistance, and the petitioner was not prejudiced thereby. As a result, the petitioner has failed to sustain his burden of establishing that Attorney Williams was ineffective for failing to

challenge the DNA evidence, and, therefore, his claim of ineffective assistance against Attorney Van Malden as to this issue must be denied.

III
CONCLUSION

Pursuant to the foregoing, the petitioner has not met his burden of proving his ineffective assistance of habeas counsel claims. The petition is therefore denied.

EWagner
Wagner, J.

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JDNO