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MICHAEL T.¹ *v.* COMMISSIONER
OF CORRECTION
(AC 30046)

Bishop, Beach and Peters, Js.

Argued February 11—officially released July 6, 2010

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

Frederick W. Fawcett, special assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Gerard P. Eisenman*, senior assistant state's attorney, for the appellant (respondent).

Temmy Ann Pieszak, chief of habeas corpus services, for the appellee (petitioner).

Opinion

PETERS, J. This habeas case contests the petitioner's conviction of sexual assault and risk of injury to a young child. In accordance with *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and citing *Gersten v. Senkowski*, 426 F.3d 588, 607 (2d Cir. 2005), cert. denied sub nom. *Artus v. Gersten*, 547 U.S. 1191, 126 S. Ct. 2882, 165 L. Ed. 2d 894 (2006), the habeas court held that trial counsel had been ineffective in failing to present expert testimony to challenge the state's presentation of incriminatory expert evidence on medical issues relating to the child's symptomatology and on psychological issues relating to her credibility. Concluding that trial counsel's failure to present such expert evidence had been prejudicial to the petitioner, the court rendered judgment on the petitioner's behalf. With the permission of the habeas court, the commissioner of correction has appealed. We affirm the judgment of the habeas court insofar as it rests on trial counsel's failure effectively to challenge the state's inculpatory medical testimony.

On February 9, 2007, the petitioner, Michael T., filed an amended three count petition for a writ of habeas corpus, alleging ineffective assistance of trial counsel and actual innocence with respect to his conviction of sexual assault in the first degree in violation of General Statutes (Rev. to 2001) § 53a-70 (a) (2)² and risk of injury to a child in violation of General Statutes (Rev. to 2001) § 53-21 (a) (2).³ The respondent, the commissioner of correction,⁴ filed a denial and a special defense alleging that the petitioner had procedurally defaulted by failing to pursue his claim of ineffective assistance of counsel in a previous petition for a writ of habeas corpus. After an evidentiary hearing, the habeas court rejected the respondent's special defense and the petitioner's claim of actual innocence but granted the petition with respect to his allegation of ineffective assistance of trial counsel. The respondent has appealed.

The factual basis for the criminal judgment against the petitioner is described in the opinion of this court affirming his conviction. *State v. Michael T.*, 97 Conn. App. 478, 480–83, 905 A.2d 670, cert. denied, 280 Conn. 927, 909 A.2d 524 (2006). In 2002, when the child was four years old, she was living at home with her mother, her older brothers and the petitioner. At the end of May, 2002, after the child complained of vaginal pain, her mother took her to a clinic in Bridgeport, where testing disclosed that the child was infected with trichomonas.⁵ *Id.*, 480.

Because the pediatric clinic nurse who assisted in the examination suspected that the child had been sexually abused, she properly reported the incident to the department of children and families (department).

When subsequently questioned by a departmental investigative social worker assigned to the case, the child stated that no one had ever touched her private parts. A subsequent inquiry by a pediatric nurse practitioner affiliated with the child sexual abuse evaluation program at Yale-New Haven Hospital elicited the same response, that nothing had happened to her. *Id.*, 480–81.

In light of the child's infection, everyone in the child's family was asked to be tested for trichomonas. Only the child's mother tested positive for the disease. The petitioner, who had moved out of the family home in the interim, did not keep a scheduled appointment for testing. *Id.*, 480.

Approximately one year later, after attending a " 'good touch-bad touch' " presentation in her kindergarten class, the child told her mother that the petitioner had touched her inappropriately. She testified to the same effect at his trial. *Id.*, 481.

At the criminal trial, the state presented expert witnesses on two subjects, trichomonas and the reliability of children's statements. Four expert witnesses who were questioned about trichomonas testified that it was a condition that was sexually transmitted.⁶ To explain the delay in the child's reporting that someone had touched her inappropriately, an expert witness who was a school psychologist and forensic interviewer testified that, because a four year old child could not be expected to have knowledge of sexual activity, she would not know that she had been abused until she learned what abuse was. *Id.*, 482. Trial counsel challenged this expert testimony only by cross-examination of the state's witnesses.

The petitioner was the only defense witness to testify at his trial. He denied having sexually abused the child. Defense counsel, in his closing argument to the jury, argued for acquittal either because trichomonas could be transmitted nonsexually or because the state had not proven penetration. The jury found the petitioner guilty of sexual assault in the first degree and risk of injury to a child.

In the petitioner's direct appeal to this court, the only issues that he raised were two challenges to the trial court's jury instructions. This court affirmed the judgment against him. *Id.*, 490.

At the petitioner's habeas hearing, senior assistant state's attorney Cornelius P. Kelly, who had successfully prosecuted the petitioner, testified that the petitioner's trial counsel, David M. Abbamonte, now deceased, had been given access to everything in the state's file. There was no evidence, at the habeas trial, that trial counsel had ever requested funding for expert testimony.

The principal witness at the habeas hearing was Suzanne M. Sgroi, a physician who is an adjunct professor at St. Joseph College in West Hartford, the director

of the St. Joseph College Institute for Child Sexual Abuse Intervention for the treatment of child sexual abuse and the executive director of New England Clinical Associates, an organization that works with child abuse trauma. Without objection by the respondent, Sgroi was found to be qualified as an expert in child sexual abuse and venereal disease. Furthermore, the respondent did not challenge the admissibility of any of her testimony.

The habeas court found that Sgroi's testimony identifying "mistakes, flaws and omissions" in the petitioner's criminal trial was highly credible. Sgroi testified that the child had had urinary-vaginal symptomology at least eight months prior to being diagnosed with trichomonas. Contrary to the state's expert testimony at trial linking trichomonas to sexual abuse, she stated that a child could have contracted such an infection by "living in the same home with somebody who had the infection, who wasn't all that careful about hygiene, perhaps because of not being careful about laundering towels or having community towels in the bathroom, perhaps because of washing the child in bath water already used by adults and the like." She further testified that guidelines published by the American Academy of Pediatrics do not include trichomonas as a disease that is diagnostic of sexual abuse.

Sgroi also expressed her professional opinion that the record raised questions about the reliability of the information provided by the child. In her view, in light of the child's developmental delays, "the interviewing procedures were inadequate to the task of finding out [whether the information the victim provided was] a detailed, reliable, trustworthy account of alleged sexual abuse by [the petitioner]."

In addition to relying on Sgroi's testimony, the habeas court also found persuasive the testimony of attorney Michael Blanchard about the use of expert witnesses to assist the defense in a criminal trial. Blanchard testified that the proper preparation for a criminal trial involving charges of sexually assaulting a minor, in particular when the defendant denies the charges and will proceed to trial, necessitates the utilization of an expert witness both for trial preparation and during the trial itself. In his view, such required evidence was exemplified by Sgroi's testimony describing nonsexual modes of transmitting trichomonas and challenging the manner in which the child had been interviewed.

In her posttrial brief, the respondent did not challenge the propriety or the accuracy of the expert testimony presented by the petitioner. She argued only that the issues identified by the experts at the habeas hearing had been adequately brought to the attention of the trial jury by trial counsel's cross-examination of the state's lay and expert witnesses.

The habeas court concluded, however, that trial counsel's failure to call an expert witness in the petitioner's criminal trial constituted ineffective assistance of counsel that had been prejudicial to the petitioner.⁷ The court faulted trial counsel for failing to utilize a subject matter expert during the criminal trial to inform the jury about issues relating to the transmission of trichomonas and the reliability of the belated disclosure of an assault by the child.

The respondent's appeal challenges only the legal conclusions of the habeas court.⁸ We begin by setting forth our standard of review. "In a habeas appeal, this court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous, but 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." (Internal quotation marks omitted.) *Mock v. Commissioner of Correction*, 115 Conn. App. 99, 103–104, 971 A.2d 802, cert. denied, 293 Conn. 918, 979 A.2d 490 (2009).

The respondent advances three arguments in support of her claim that, as a matter of law, the habeas court should not have faulted trial counsel for failing to present expert evidence to inform the jury about transmission of trichomonas infections. First, the respondent claims that trial counsel's cross-examination of the state's witnesses at trial and his argument to the jury sufficiently informed the jury about the possibility of nonsexual transmission of trichomonas. Second, the respondent hypothesizes that trial counsel's decision not to present expert evidence on this subject may have been "sound trial strategy." Third, the respondent questions the extent to which Sgroi's testimony would have been admissible at trial. Finally, the respondent questions the validity of the habeas court's determination that the petitioner was prejudiced by the identified omissions in his trial representation.

The habeas court expressly considered and rejected the respondent's first two arguments about the necessity for defense counsel to present expert evidence under the circumstances of this case. The court relied on this court's dictum, in *Peruccio v. Commissioner of Correction*, 107 Conn. App. 66, 76, 943 A.2d 1148, cert. denied, 287 Conn. 920, 951 A.2d 569 (2008), that, under certain circumstances, such as those involving the sexual abuse of children, the failure to use *any* expert can result in a determination that a criminal defendant was denied the effective assistance of counsel. The habeas court also cited with approval the detailed analysis contained in *Gersten v. Senkowski*, *supra*, 426 F.3d 607, and the cases cited therein, in which that court held that "[i]n sexual abuse cases, because of the centrality of medical testimony, the failure to consult with or call a medical expert is often indicative of ineffective

assistance of counsel. . . . This is particularly so where the prosecution's case, beyond the purported medical evidence of abuse, rests on the credibility of the alleged victim, as opposed to direct physical evidence such as DNA, or third party eyewitness testimony." (Citations omitted.) *Id.*; see also B. A. Townsend, "Defending the 'Indefensible': A Primer to Defending Allegations of Child Abuse," 45 A.F. L. Rev. 261, 270 (1998) ("[i]t is difficult to imagine a child abuse case . . . where the defense would not be aided by the assistance of an expert"). Except for stating her disagreement with the court's conclusion, the respondent has not proffered a reasoned basis for rejection of the court's analysis of these issues. We are not persuaded to do so.

Turning to the respondent's third ground for reversal, we note that the habeas court was not asked to address the admissibility of Sgroi's testimony in a judicial proceeding. When she presented evidence at the habeas hearing, the respondent did not question Sgroi's professional credentials or challenge the admissibility of her testimony. At the same hearing, when attorney Blanchard testified that Sgroi's testimony would have transmitted valuable information to the jury based upon her medical expertise and the medical issues presented in this case, the respondent did not question whether that testimony would have been admissible at trial. The respondent filed no motion for articulation; see Practice Book § 66-5; to supplement the record. We decline to overturn the judgment of the habeas court on this ground.

Finally, even though a habeas court may deny a petition for habeas corpus because of the failure of the petitioner to demonstrate prejudice from trial error, the respondent has failed to present a reasoned argument why, in this case, the habeas court improperly found prejudice to have been established. Having been persuaded by Sgroi's expert testimony of "mistakes, flaws and omissions" in the medical testimony underlying the criminal prosecution of the petitioner, the court properly determined that trial counsel's ineffectiveness prejudiced the petitioner.

On this state of the record, we are persuaded that we need not address the habeas court's alternate conclusion questioning the reliability of the child's recollection, one year after the event, that the petitioner had engaged in sexual conduct with her. The respondent has not briefed this issue separately. We need not, therefore, decide today whether jurors are so likely to be unfamiliar with issues relating to the alleged suggestibility of young children as to require expert evidence to be presented by the defense. For this case, it suffices to affirm the habeas court's judgment on the ground that the petitioner is entitled to a new trial because his trial counsel was ineffective in failing to present expert testi-

mony to challenge the state's expert medical testimony that strongly linked the child's trichomonas to a sexual assault.

The judgment is affirmed.

In this opinion BISHOP, J., concurred.

¹ In accordance with our policy of protecting the privacy interests of the victims of sexual abuse and the crime of risk of injury to a child, we decline to use the petitioner's full name or to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

² General Statutes (Rev. to 2001) § 53a-70 (a) provides in relevant part that "[a] person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than two years older than such person"

³ General Statutes (Rev. to 2001) § 53-21 (a) provides in relevant part that "[a]ny person who . . . (2) has contact with the intimate parts, as defined in section 53a-65, of a child under the age of sixteen years . . . shall be guilty of a class C felony."

⁴ At the time the petition was filed, the commissioner of correction was Theresa C. Lantz.

⁵ Trichomonas is a parasitic protozoa that can infect the urinary tract or prostate of males and the vagina or urinary tract of females.

⁶ The state's case included the testimony of Sanjeev Rao, a medical doctor, who stated categorically that the disease had only been documented to be transmitted through a deposition of semen.

⁷ The court declined to address trial counsel's pretrial and investigative efforts because there was an inadequate record, as a result of trial counsel's death prior to the habeas hearing.

⁸ The respondent's brief states: "The habeas court's historical fact determinations are not erroneous."