BEACH, J., dissenting. I respectfully dissent. While I have reservations regarding the habeas court's conclusions that trial counsel rendered deficient performance, I would reverse the habeas court's judgment because I do not believe that the petitioner, Michael T., was prejudiced by the performance of counsel.

The applicable standard of review is well known. "Under [*Strickland* v. *Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)], to prevail on a constitutional claim of ineffective assistance of counsel, the petitioner must demonstrate both deficient performance and actual prejudice." *Russell* v. *Commissioner of Correction*, 49 Conn. App. 52, 53, 712 A.2d 978, cert. denied, 247 Conn. 916, 722 A.2d 807 (1998), cert. denied sub nom. *Russell* v. *Armstrong*, 525 U.S. 1161, 119 S. Ct. 1073, 143 L. Ed. 2d 76 (1999). "The prejudice prong requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. . . . The [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) *Raynor* v. *Commissioner of Correction*, 117 Conn. App. 788, 796, 981 A.2d 517 (2009), cert. denied, 294 Conn. 926, 986 A.2d 1053 (2010).

"The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . The application of historical facts to questions of law that is necessary to determine whether the petitioner has demonstrated prejudice under *Strickland*, however, is a mixed question of law and fact subject to our plenary review." (Citation omitted; internal quotation marks omitted.) *Small* v. *Commissioner of Correction*, 286 Conn. 707, 717, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, U.S. , 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008).

I begin my analysis of *Strickland*'s prejudice prong by comparing the evidence elicited at the habeas trial with the evidence actually presented at the petitioner's criminal trial to determine whether the petitioner has proved that there is a reasonable probability that, had the additional evidence been presented at the criminal trial, the result would have been different. As stated by the majority, the habeas court determined that Suzanne M. Sgroi, an expert witness in child sexual abuse and venereal disease who testified for the petitioner, was credible and factually accurate. For the purpose of analyzing prejudice, then, I accept and apply the court's findings in that regard. Sgroi summarized her opinion as to the means of transmission of trichomonas: "Although

trichomonas is *primarily* sexually transmitted, in my opinion, there are also nonsexual ways for a child to acquire the infection." (Emphasis added.) She stated that the leading authoritative source for the guidance of professionals was the set of guidelines published by the American Academy of Pediatrics. The 1999 publication stated that if one found trichomonas in a child, the treater should be "highly suspicious" of sexual abuse and that a report to authorities was mandated. The presence of one of several other sexually transmitted diseases, gonorrhea, syphilis, human immunodeficiency virus and chlamydia, was considered "diagnostic" or, apparently, conclusive of sexual abuse. She said that she agreed with the testimony of Janet Murphy, a witness for the state in the criminal prosecution, regarding information from the Centers for Disease Control. Murphy had testified at the criminal trial that trichomonas was "primarily" a sexually transmitted disease but that it could also be transmitted by nonsexual means.

The habeas court found Sgroi to be credible and implicitly seems to have found that her opinion, or a very similar opinion, would have been able to have been produced by defense counsel at the criminal trial in 2004.[1] A scouring of the transcript of the criminal trial reveals that very similar information was elicited by David M. Abbamonte, the petitioner's attorney in the criminal trial. The habeas court referred to the testimony of Sanjeev Rao, who was produced by the state in the criminal trial for the sole purpose of providing expert testimony. Rao testified on direct examination that trichomonas was a sexually transmitted disease, and stated that the only known mode of transmission was through sexual means.

On cross-examination by Abbamonte, Rao qualified his opinion to a degree. The following transpired:

"Q. There are nonsexual ways that a female can get trichomonas?

"A. I can't say that.

"Q. All right. It can come from a toilet seat, perhaps?

"A. It is—

"Q. I know it—

"A. —in the literature but, again, just because you see it in print, it doesn't mean it can happen. . . .

"Q. It's been found hours later in urine that's been exposed; is that correct?

"A. Urine and semen, yes.

"Q. And the way it could be transferred, for instance, by toilet seat, if urine was on it, that urine was infected, and a female sitting on the toilet seat could get it; is that correct, within a short time, within a few hours?

"A. Yes.

"Q. How . . . does that affect—does the protozoa move? Locomotes?

"A. They have flagella which helps them move.

"Q. It would find its way into the vagina in that situation?

"A. It could.

"Q. And also says that this protozoa can't live long in a dry environment, so presumably [in] urine or certain waters it can live a lot longer; is that correct?

"A. Yes.

"Q. And wet towels, it could live a lot longer?

"A. It hasn't been documented, wet towels. It's seen in semen, it's seen in urine, but it's never been documented in wet towels as a mode of transmission."

On redirect examination by the state, Rao testified that the protozoa could live on a toilet seat for "a few hours" so long as the environment is moist.

Murphy also testified for the state in the criminal trial. She was a pediatric nurse practitioner who worked with the Yale-New Haven Hospital child sexual abuse evaluation program, among other responsibilities. She had a master's degree in nursing from Yale University and had lectured in the field. She examined the victim shortly after she had been diagnosed with trichomonas; the victim at that time denied any inappropriate touching. Murphy was concerned because trichomonas was "primarily" a sexually transmitted disease.

On cross-examination, after establishing that the physical examination of the victim had showed that the victim was entirely normal, Abbamonte questioned Murphy as follows:

"Q. Okay. With regard to trichomonas, and, now I'm jumping on the word you used twice with regard to [the prosecutor's] question, and, that is, primarily, there are ways of a nonsexual nature, are there not, that trichomonas can be passed on to a female?

"A. It's very uncommon, but there are reports of—from moist toilet seats. It's thought to be in the elderly population where occasionally it is diagnosed, which is where we have that kind of information, but primarily it's a sexually transmitted disease.

"Q. And it can also be spread by wet or a moist towel, can it not?

"A. It's thought that to be possible, yes.

* * *

"Q. . . . Let's say a female is infected with trichomonas, and maybe she touches herself, for whatever reason, not a male involved, just touching her own fluids, and then touching, for instance, a child or another per-

son on their sexual organ; that could cause a transmission, then, even without the presence of semen or seminal fluid?

"A. That's a possibility, although I think when hands get washed, it would wash it away.

"Q. But it is a possibility—

"A. I think—

"Q. —that it can come directly from a female? Whether she's had sex with a male or not, it can come directly from a female?

"A. It's a possibility."

Abbamonte then inquired about different hypothetical situations, and the concluding question and answer were:

"Q. So, there are a number of ways nonsexually that this can be transmitted—

"A. Yes.

"Q. —to the female? Okay."

In closing arguments to the jury, both sides suggested that transmission by other than sexual means was possible. Both sides appeared to accept the same general proposition that trichomonas was "primarily" transmitted sexually but that there were other means of transmission. The state argued that "the [petitioner] . . . is going to present to you a scenario that the only way [the victim] got this was because of her mom . . . ." The prosecutor went on to discuss weaknesses in the petitioner's testimony and the strength, he claimed, of the victim's identification of the petitioner as the culprit. Later, the prosecutor asserted that doctors and other witnesses said that "the only way you see this in a child who is four years of age is through sexual intercourse.[2] And scenarios were presented to the doctors and some of the experts here, I suppose that's possible, but the literature—I haven't come across anything in the literature that suggested that that could take place in that fashion. . . . Possibilities were thrown out to explain how you could possibly get this, and those are just possibilities and mere speculation." The prosecutor did not focus at length on the medical opinions.

Abbamonte, however, stressed that it was medically possible for the victim to contract trichomonas without sexual contact. He argued that "[t]here's evidence from medical specialists that either semen or urine that's contaminated with the protozoa trichomonas can be transferred by hand either in a sexual or nonsexual way. . . . These are the nonsexual ways that trichomonas can be gotten. These experts also indicated that it is extremely rare for a four year old to get trichomonas." He discussed the idea that the protozoa can live for two hours "in a moisture environment" and that they can move. He argued: "There is no question that most

of the time trichomonas means sexual transmission, but this is a four year old, which is extremely rare for them to get. It's a four year old that was in a house with the mom, as it turned out, having trichomonas. A mom who admittedly . . . you still have to dress them, bathe them, groom them, etc., etc. It's not unusual for a four year old to be naked in the household. There's a bathroom in the household. Doctors say—say it can be transferred by hand. So, obviously, no one sets out to give this poor little girl this disease. So, it is obviously an accidental transmission of people who don't know that they're—that they're infected. . . . Again, there is no question. [The prosecutor] said it's speculation. It's not speculation. It's just inferences you could make from the evidence. There are ways, in the distinct minority, but there are ways that trichomonas can be transferred to others through activity other than sexual." Abbamonte went on to urge that there was at least reasonable doubt, based on the science and that the victim's testimony was not reliable.

The prosecutor began his rebuttal by arguing that nonsexual transmission was unlikely but never argued that it was impossible. He continued: "The most important thing I think you have to worry about is—the trichomonas situation, that is almost like a side issue here. It is almost like a tag on." He stressed the credibility of the victim. In closing, he said: "[S]ome of the arguments that [Abbamonte] makes may raise a little bit of doubt in your mind; well, you know, that's a possibility. Dr. Rao said that. Janet Murphy said that's a possibility. Dr. [Joel] Allen, who treated the woman, said that's a possibility. We're not dealing with possibilities here. We're dealing with proving the case beyond a reasonable doubt . . . ."

Several witnesses at the habeas trial noted the similarities between the opinions offered by Sgroi and the evidence actually introduced at the criminal trial. Sgroi testified that many of her concerns had been raised in the direct and cross-examination of Murphy and Sgroi agreed that she "basically agreed" with Murphy. Sgroi also agreed that in closing argument Abbamonte had mentioned the opinions. Her conclusion was that an expert witness should have been presented "to help clarify all of these things or to provide, first of all, a more accurate interpretation about how trichomonas can be transmitted nonsexually . . . ."

In order to determine whether the petitioner was prejudiced by the failure of his trial counsel to produce at his criminal trial an expert opinion similar to that expressed by Sgroi at his habeas trial, we, as a reviewing court, are to compare the omitted evidence with the evidence actually produced at trial. We then make a *de novo* determination as to the effect the omitted evidence would have had on the outcome of the criminal trial had it been produced. The petitioner has the burden to

show that there is a reasonable probability that, absent the unprofessional errors, the result of the criminal proceeding would have been different. A "reasonable probability" is one that undermines one's confidence in the outcome. *Strickland* v. *Washington*, supra, 466 U.S. 694.

It is true, as the expert witness Michael Blanchard testified in the habeas trial, that an expert for the defense may have been useful in the presentation of the petitioner's criminal trial and may have presented the issues with somewhat more clarity.[3] I agree that an expert conceivably may have had some effect on the outcome of the trial. But because the essential points of Sgroi's opinion were raised by Abbamonte in his cross-examinations of the witnesses presented by the state, the jury already had the essential information on the topic. The effect that more testimony, subject, of course, to cross-examination, would have had on the outcome of the criminal trial is quite speculative.[4] There does not exist a *reasonable probability* that the outcome of the criminal trial would have been different if additional testimony on the same topic had been presented. During the criminal trial, both sides suggested during closing arguments that trichomonas was primarily transmitted sexually, and both sides suggested that nonsexual transmission was possible. This was the essence of Sgroi's opinion. Accordingly, I do not believe that one's confidence in the verdict is undermined by the lack of a defense expert. I would, therefore, conclude that the petitioner's burden to prove the prejudice prong of *Strickland* has not been sustained.

Although it is not necessary for me to analyze the performance prong of *Strickland* because I have already concluded that the petitioner's ineffective assistance claim fails under the prejudice prong, I will discuss it briefly because I have reservations as to whether this prong has been satisfied.[5] Because the factual findings of the habeas court are not clearly erroneous, and no such claim was raised on appeal, I accept the court's historical findings that Abbamonte did not consult an expert and, of course, did not present an expert at trial. As noted by the habeas court, pretrial decisions regarding hiring an expert are inextricably related to the conduct of trial, and, because Abbamonte died prior to the habeas trial and his file apparently could not be found or reproduced, pretrial decisions and trial strategy in general were difficult to determine. We simply do not know the extent to which Abbamonte educated himself or sought the assistance of others; we do know that his questions on cross-examination presaged to a significant extent the opinion expressed by Sgroi.

In order to prove the performance prong, the petitioner must show that counsel made "errors so serious that [he] was not functioning as the counsel guaranteed the [petitioner] by the Sixth Amendment . . . The peti-

tioner must thus show that counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. . . . We will indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The petitioner must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Citations omitted; internal quotation marks omitted.) *Siano* v. *Warden*, 31 Conn. App. 94, 97, 623 A.2d 1035, cert. denied, 226 Conn. 910, 628 A.2d 984 (1993).

Abbamonte's performance was significantly less egregious, even assuming the historical facts as found by the habeas court, than that found lacking in the cases relied upon by the habeas court. In *Siano* v. *Warden*, supra, 31 Conn. App. 99–105, the petitioner had been convicted of a burglary in which he allegedly had broken into a house with an accomplice, ascended to the second floor and took "heavy" computer equipment, which the petitioner carried at one point. The petitioner had broken his leg and his wrist about one month before the accident; the fractures were displaced and the wrist had been pinned. Defense counsel had announced to the jury that the petitioner's orthopedist would testify, but he failed to talk to or to subpoena the physician. During the criminal trial, counsel tried to call the orthopedist, despite the lack of a subpoena, but the orthopedist did not testify at the criminal trial because he was in surgery at the time. The petitioner was convicted. At the habeas hearing, the orthopedist testified about the injury and stated that it would have been very difficult for the petitioner to have carried the equipment at the time in question. In this situation, counsel was held to have provided ineffective assistance.

In *Lindstadt* v. *Keane*, 239 F.3d 191 (2d Cir. 2001), the United States Court of Appeals for the Second Circuit found that a defense attorney provided ineffective assistance in a trial in which the petitioner was found guilty of sexual abuse. At the criminal trial, a physician testifying for the state said that the victim had physical signs of abuse, and based his testimony on a study that was never introduced into evidence or "produced or usefully identified" at any time later. Id., 194. At the habeas trial, a study diametrically opposed to the state's position was introduced. Id., 201. Trial counsel had done nothing to contradict the state's expert, had conducted no relevant research, had not requested the studies the state's witness purportedly relied on and was unable to cross-examine effectively. In these circumstances, performance was deficient. Other cases have a similar tenor. See *Gersten* v. *Senkowski*, 426 F.3d 588, 608 (2d Cir. 2005) (defense counsel simply conceded medical evidence without consultation with expert), cert. denied sub nom. *Artus* v. *Gersten*, 547 U.S. 1191, 126 S. Ct. 2882, 165 L. Ed. 2d 894 (2006).

The facts in the present case do not appear to fall into quite the same category as cases such as *Siano* v. *Warden*, supra, 31 Conn. App. 94, *Lindstadt* v. *Keane*, supra, 239 F.3d 191, and *Gersten* v. *Senkowski*, 426 F.3d 588. Abbamonte appeared to be generally familiar with the subject matter and forced the state to concede that his theories were possible. We should take care to note that "[t]here is no *per se* rule that requires trial attorneys to seek out an expert." (Emphasis in original; internal quotation marks omitted.) *Gersten* v. *Senkowski*, supra, 609. I am reluctant to suggest that failure to call an expert witness constitutes *constitutional* ineffectiveness where the jury was informed of the substance of the opinion. From the perspective of a trial lawyer, the presentation of an expert witness can be dangerous, as, among other considerations, it leaves the expert exposed to potentially damaging cross-examination. Expert testimony should not be considered to be constitutionally required in all sexual abuse cases. In some cases, of course, expert testimony may be constitutionally required, but, in light of the testimony that was presented to the jury in this trial, this is not such a case.

I would reverse the judgment of the habeas court and direct that judgment be rendered in favor of the respondent, the commissioner of correction.

[1] Sgroi referenced the 1999 guidelines published by the American Academy of Pediatrics and a web site of the Centers for Disease Control.

[2] As noted previously, this assertion was not uncontested.

[3] Blanchard also agreed, however, that Abbamonte had covered the main points on cross-examination of the prosecution's witnesses.

[4] It is noted in *Peruccio* v. *Commissioner of Correction*, 107 Conn. App. 66, 77 n.8, 943 A.2d 1148, cert. denied, 287 Conn. 920, 951 A.2d 569 (2008), that "[t]he Constitution does not entitle a criminal defendant to the effective assistance of an expert witness. To entertain such claims would immerse federal judges in an endless battle of the experts . . . . *Wilson* v. *Green*, 155 F.3d 396, 401 (4th Cir.), cert. denied sub nom. *Wilson* v. *Taylor*, 525 U.S. 1012, 119 S. Ct. 536, 142 L. Ed. 2d 441 (1998)." (Internal quotation marks omitted.)

[5] One consideration regarding the performance prong is whether an expert opinion should have been presented regarding the reliability of the victim's testimony. The majority did not need to reach this issue, and I consider it only briefly. Part of Sgroi's testimony at the habeas trial made the point that investigators for the department of children and families, misled by assertions of medical personnel that trichomonas could be transmitted only by sexual means, jumped to that conclusion and influenced the victim's accusation of the petitioner. The victim, because of her age and developmental factors, was susceptible to suggestion. The state produced an expert witness, Lisa Melillo-Bush, to explain delayed disclosure and other characteristics of children who have been the victims of sexual abuse. Abbamonte cross-examined Melillo-Bush and broached the concept of suggestiveness. Both counsel mentioned suggestiveness in closing arguments to the jury.

The habeas court alluded to Sgroi's opinion regarding suggestiveness and held that Abbamonte's representation was defective in not producing *any* expert witness, but the habeas court did not analyze independently the suggestiveness claim in depth. Sgroi's opinion is critical of the investigative procedure, in that the investigators leaped to the conclusion of sexual abuse. Sgroi suggests that the conclusion was communicated in some fashion to the victim. It is difficult to imagine how an expert would testify about suggestiveness, in that witnesses are forbidden to comment on the credibility of another witness. *State* v. *Singh*, 259 Conn. 693, 708, 712, 793 A.2d 226 (2002) (improper to ask witness to comment on another witness' veracity; credibility determinations solely within province of jury). Counsel are of course free to argue suggestiveness from facts presented in evidence, and

suggestiveness is not necessarily a subject which is beyond the ken of the average juror and, thus, requiring expert testimony. *State* v. *Arline*, 223 Conn. 52, 58, 612 A.2d 755 (1992) (counsel has right to argue in final argument any reasonable inferences from facts elicited); *State* v. *Calabrese*, 116 Conn. App. 112, 124, 975 A.2d 126 (jury may draw inferences from evidence presented based on its common knowledge and experience), cert. denied, 293 Conn. 933, 981 A.2d 1076 (2009). Such witnesses do not seem to be presented with any frequency in the trial courts. I would not conclude, on the record before us, that counsel rendered constitutionally deficient performance in this regard, especially in light of the presumption of competent representation, or that the defense was prejudiced to the degree required by *Strickland*.