****

The “officially released” date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the “officially released” date appearing in the opinion. In no event will any such motions be accepted before the “officially released” date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

The syllabus and procedural history accompanying the opinion as it appears on the Commission on Official Legal Publications Electronic Bulletin Board Service and in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.

****

MICHAEL T.* v. COMMISSIONER OF CORRECTION
(SC 18676)

Rogers, C. J., and Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper, Js.**

*Argued February 10—officially released September 28, 2012****

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

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

Opinion

EVELEIGH, J. The respondent, the commissioner of correction,[1] appeals[2] from the judgment of the Appellate Court, which affirmed the judgment of the habeas court granting, in part, the amended petition of the petitioner, Michael T., for a writ of habeas corpus on the ground that his trial counsel had rendered ineffective assistance by failing, inter alia, to present expert testimony to challenge the state's presentation of incriminatory expert evidence on medical issues relating to the child victim's symptomatology. The dispositive issue in this appeal is whether failure of the petitioner's trial counsel to present expert evidence on this subject constituted deficient representation under the standard set forth in *Strickland* v. *Washington*, 466 U.S. 668, 687, 104. S. Ct. 2052, 80 L. Ed. 2d 674 (1984), for assessing ineffective assistance of counsel claims pursuant to the sixth amendment to the United States constitution. We conclude that the petitioner was not prejudiced by any alleged deficient performance of trial counsel and, accordingly, we reverse the judgment of the Appellate Court and remand the case to that court to consider the remaining issue that it did not reach.[3]

On February 9, 2007, the petitioner 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),[4] and risk of injury to a child in violation of General Statutes (Rev. to 2001) § 53-21 (a) (2).[5] The respondent 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 habeas court found that the petitioner's trial counsel had been ineffective in failing to present expert testimony to challenge both the state's presentation of incriminatory expert evidence on medical issues relating to the child's symtomatology and psychological issues relating to the child's credibility. The habeas court concluded that trial counsel's failure to present such expert evidence had been prejudicial to the petitioner and rendered judgment in favor of the petitioner. The respondent appealed to the Appellate Court. The Appellate Court affirmed the judgment of the habeas court insofar as it rested on trial counsel's failure to challenge effectively the state's inculpatory medical testimony. *Michael T.* v. *Commissioner of Correction*, 122 Conn. App. 416, 417–18, 999 A.2d 818 (2010). This appeal followed.

The factual basis for the criminal judgment against

the petitioner is described in the opinion of the Appellate Court affirming the habeas court's judgment. Id., 418–20. "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.[6]. . .

"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. . . .

"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. . . .

"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. . . .

"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.[7] 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. . . . 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." (Citations omitted.) Id.

The opinion of the Appellate Court sets forth the following additional facts and procedural history rele-

vant to the habeas trial. "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. . . . 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. . . .

"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. . . .

"The [habeas] 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." Id., 420–22. A majority of the Appellate Court agreed.[8] Additional facts will be set forth as necessary.

We begin by setting forth the standard of review applicable to the respondent's appeal. "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." (Internal quotation marks omitted.) *Taylor* v. *Commissioner of Correction*, 284 Conn. 433, 448, 936 A.2d 611 (2007). 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. See, e.g., *Copas* v. *Commissioner of Correction*, 234 Conn. 139, 152–53,

662 A.2d 718 (1995); see also *Strickland* v. *Washington*, supra, 466 U.S. 698.

"As enunciated in *Strickland* v. *Washington*, [supra, 466 U.S. 687] . . . [a] claim of ineffective assistance of counsel consists of two components: a performance prong and a prejudice prong. To satisfy the performance prong . . . the petitioner must demonstrate that his attorney's representation was not reasonably competent or within the range of competence displayed by lawyers with ordinary training and skill in the criminal law. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Fernandez* v. *Commissioner of Correction*, 291 Conn. 830, 835, 970 A.2d 721 (2009). A court can find against a petitioner, with respect to a claim of ineffective assistance of counsel, on either the performance prong or the prejudice prong, whichever is easier. *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 832–33, 950 A.2d 1220 (2008).

In the present case, the respondent asserts that there was no prejudice to the petitioner during the criminal trial because his counsel,[9] through cross-examination, was able to elicit testimony from the experts that trichomonas could be transmitted from other than sexual means. The petitioner, however, claims that his own expert would have provided the jury with important new information. The petitioner further claims that Sgroi's testimony at the habeas trial did not mirror the testimony of the experts at the criminal trial, and that such testimony would have been far more extensive. The petitioner further claims that the jury never learned how easy it would have been for the child to become infected by laundry and living conditions in her home. At the habeas trial, however, Sgroi testified that she had seen a number of cases of nonsexual transmission in young girls. Thus, the petitioner argues that there is more information that would have been important for the jury to consider in this case. We agree with the respondent.

In order to review this claim properly, it is necessary that we compare the testimony elicited at trial with the testimony of Sgroi at the habeas trial[10] in order to determine whether the petitioner proved that there is a reasonable probability that, had the additional evidence been presented at the criminal trial, the result would have been different. At the habeas trial, 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." At the habeas trial, Sgroi acknowledged that the petitioner's trial counsel had elicited testimony from the state's witnesses that trichomonas can be transmitted in nonsex-

ual ways.

First, at the criminal trial, the petitioner's trial counsel elicited this information in his cross-examination of Sanjeev Rao, a physician who testified as the state's expert. Rao testified on direct examination that trichomonas was a sexually transmitted disease and that the only known mode of transmission was through sexual means. On cross-examination by the petitioner's trial counsel, Rao qualified his opinion in the following exchange:

"[The Petitioner's Trial Counsel]: There are nonsexual ways that a female can get trichomonas?

"[Rao]: I can't say that.

"[The Petitioner's Trial Counsel]: All right. It can come from a toilet seat, perhaps?

"[Rao]: It is—

"[The Petitioner's Trial Counsel]: I know it—

"[Rao]:—in the literature but, again, just because you see it in print, it doesn't mean that it can happen. . . .

"[The Petitioner's Trial Counsel]: It's been found hours later in urine that's been exposed; is that correct?

"[Rao]: Urine and semen, yes.

"[The Petitioner's Trial Counsel]: 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?

"[Rao]: Yes.

"[The Petitioner's Trial Counsel]: How . . . does that effect—does the protozoa move? Locomotes?

"[Rao]: They have flagella which helps them move.

"[The Petitioner's Trial Counsel]: It would find its way into the vagina in that situation?

"[Rao]: It could.

"[The Petitioner's Trial Counsel]: 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?

"[Rao]: Yes.

"[The Petitioner's Trial Counsel]: And [in] wet towels, it could live a lot longer?

"[Rao]: It hasn't been documented, [in] 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 re-direct examination by the state, Rao further testified that the protozoa could live on a toilet seat for "a few hours" so long as the environment is moist.

Second, the petitioner's trial counsel also elicited testimony from Janet Murphy, a pediatric nurse practitioner, who had examined the victim shortly after her diagnosis of trichomonas and who testified on behalf of the state at the criminal trial. Murphy testified that trichomonas was primarily a sexually transmitted disease, but that it could also be transmitted by nonsexual means. On cross-examination, after establishing from Murphy that the physical examination of the victim was entirely normal,[11] the petitioner's trial counsel questioned Murphy as follows:

"[The Petitioner's Trial Counsel]: Okay. With regard to the trichomonas, and, now I'm jumping on the word that you used twice with regard to [the state'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?

"[Murphy]: 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.

"[The Petitioner's Trial Counsel]: And it can also be spread by [a] wet or a moist towel, can it not?

"[Murphy]: It's thought that to be possible, yes. . . .

"[The Petitioner's Trial Counsel]: . . . 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 person on their sexual organ; that could cause a transmission, then, even without the presence of semen or seminal fluid.

"[Murphy]: That's a possibility, although I think when hands get washed, it would wash away.

"[The Petitioner's Trial Counsel]: But it is a possibility—

"[Murphy]: I think—

"[The Petitioner's Trial Counsel]:—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?

"[Murphy]: It's a possibility.

"[That Petitioner's Trial Counsel]: And it—it could also—for instance, just say a woman has sex with a man and he ejaculates on some part of her body other than inside the vagina and that she might touch that and then transfer it to someone else within a short period of time. That can happen?

"[Murphy]: It's hard to know how long that organism would survive without the warmth.

"[The Petitioner's Trial Counsel]: I understand, but

there would be a time gap it would survive?

"[Murphy]: It would be, right.

"[The Petitioner's Trial Counsel]: So, it could be transferred that way?

"[Murphy]: It is a remote possibility. . . .

"[The Petitioner's Trial Counsel]: And also the female . . . might not know that she's infected and she could transfer it to another female accidentally?

"[Murphy]: That's a more unlikely situation. I think there are possible scenarios, but that's—

"[The Petitioner's Trial Counsel]: Right?

"[Murphy]: Not—we just—

"[The Petitioner's Trial Counsel]: But we talked about that earlier and you admitted it was a possibility?

"[Murphy]: That's right.

"[The Petitioner's Trial Counsel]: So, there are a number of ways nonsexually that this can be transmitted—

"[Murphy]: Yes."

Accordingly, as the previous testimony demonstrates, the petitioner's trial counsel elicited much of the same information from Murphy that Sgroi testified to at the habeas trial regarding the nonsexual transmission of trichomonas. Indeed, even the dissent acknowledges that "[a] review of Murphy's complete testimony reveals that Sgroi provided important additional information that would have been greatly beneficial to the petitioner in undermining the state's contention that the victim contracted trichomonas sexually from the petitioner."[12]

Indeed, contrary to the explicit assertion of the petitioner's appellate counsel at oral argument before this court, a review of the record confirms that Sgroi testified at the habeas trial as follows:

"[The Petitioner's Habeas Counsel]: And additionally, some of the testimony from . . . Murphy that had been elicited during the trial, you basically agreed with her testimony; is that a fair statement?

"[Sgroi]: I did. . . .

"[The Petitioner's Habeas Counsel]: And a lot of the concerns that you had with respect to trichomonas and how it could be transmitted and the types of environment it could survive in, that was basically brought out through the testimony of . . . Murphy both on direct and cross; is that a fair statement?

"[Sgroi]: Yes, I think so."[13]

Furthermore, in closing arguments to the jury, both the petitioner's trial counsel and the state suggested that transmission by other than sexual means was possible. The state argued that "the [petitioner] . . . is going

to present to you a scenario that the only way [the child] got this was because of her mom . . . .” The state went on to discuss weaknesses in the petitioner’s testimony and the strength, it claimed, of the child’s identification of the petitioner as the perpetrator.

The petitioner’s trial counsel, in closing arguments to the jury, 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 trichomonas can be gotten. These experts indicated that it is extremely rare for a four year old to get trichomonas.” Counsel went on to argue that “[t]here are ways, in the distinct minority, but there are ways that trichomonas can be transferred to others through activity other than sexual.”

Several witnesses at the habeas trial noted the similarities between the opinions offered by Sgroi and the evidence introduced at the criminal trial. Sgroi, herself, testified that many of her concerns had been raised in the direct and cross-examinations of Murphy and Rao. Sgroi testified that she “basically agreed” with Murphy and also agreed that in closing arguments the petitioner’s trial counsel had mentioned the evidence regarding nonsexual transmission of trichomonas. Indeed, Sgroi testified at the habeas trial that “[w]hen . . . Murphy testified . . . both on direct examination and on cross-examination, about transmission of trichomonas, her responses paralleled the responses that are found in information that is available on the Centers for Disease Control website about transmission of that organism. That is to say that it is primarily but not exclusively sexually transmitted, that it can be passed on from female to female, although that’s uncommon, [and] that it is thought to be possible that a person can contract a trichomonas infection from a moist toilet seat or from a wet or moist towel, presumably contaminated with genital secretions.” Sgroi testified at the habeas trial 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 . . . .”

This court has never adopted a bright line rule that an expert witness for the defense is necessary in every sexual assault case. 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). We decline to adopt such a rule in this case. Although we recognize that, in certain instances, the employment of an expert for the defense may be constitutionally mandated by the facts and surrounding circumstances

of the case, we do not find it mandated by the present case. Although an expert may have been helpful to the defense, there is always the possibility that an expert called by one party, upon cross-examination, may actually be more helpful to the other party. We will "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Strickland* v. *Washington*, supra, 466 U.S. 689. We emphasize, however, that the right to counsel is the right to effective assistance, and not the right to perfect representation. *Commissioner of Correction* v. *Rodriquez*, 222 Conn. 469, 478, 610 A.2d 631 (1992).

As we have previously indicated, to satisfy the prejudice prong—that his trial counsel's deficient performance prejudiced his defense—the petitioner must establish 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.) *Bunkley* v. *Commissioner of Correction*, 222 Conn. 444, 455, 610 A.2d 598 (1992), overruled in part on other grounds by *Small* v. *Commissioner of Correction*, 286 Conn. 707, 724, 946 A.2d 1203, cert. denied sub nom. *Small* v. *Lantz*, 555 U.S. 975, 129 S. Ct. 481, 172 L. Ed. 2d 336 (2008). The petitioner must establish that, as a result of his trial counsel's deficient performance, "there remains a probability sufficient to undermine confidence in the verdict that resulted in his appeal." Id., 454. "In order to demonstrate such a fundamental unfairness or miscarriage of justice, the petitioner should be required to show that he is burdened by an unreliable conviction." Id., 461. Where new evidence undermines the confidence in the result reached such that it can be said that an injustice was likely done and that it is probable that the new trial would produce a different result, relief must be available through habeas corpus proceedings. Cf. *Taborsky* v. *State*, 142 Conn. 619, 623, 116 A.2d 433 (1955).

A review of the record in the present case leads us to the conclusion that any alleged errors of the petitioner's trial counsel did not deprive the petitioner of a fair trial. Further, our confidence in the verdict is not undermined by the lack of an expert for the defense. On the basis of the evidence in the record, there does not exist a reasonable probability that the outcome of the criminal trial would have been different. It is obvious that the jury credited the testimony of the child and discredited the testimony of the petitioner. The essential point of presenting expert testimony would have been to establish that trichomonas could be contracted through nonsexual means and perhaps to offer examples of nonsexual transmissions. The petitioner's trial counsel established these points sufficiently through cross-

examination of the state's experts. Further, the petitioner's trial counsel argued these points in his closing argument to the jury. The state, in its closing argument, even conceded that nonsexual transmission was possible. Although it may be true than an expert could have elucidated the point of nonsexual transmission, it may also be true that the state, on cross-examination, may have been able to have a defense expert explain, on a percentage basis, the occurrence comparison of sexual versus nonsexual transmission of trichomonas. We do not require that the performance of the petitioner's trial counsel be perfect or mistake free. The essential point was conveyed to the jury: trichomonas infection can be spread through nonsexual means. If this fact had not been established through cross-examination, in the absence of an expert, our result may have been different. It is clear, however, that the petitioner's trial counsel established through cross-examination that the fact that the child had contracted the infection did not necessarily mean that the petitioner had had sexual contact with her. Even Blanchard, the attorney who testified at the habeas proceeding to the effect that an expert should have been employed, conceded that the petitioner's trial counsel had covered the main points on cross-examination of the state's witnesses. On the basis of the record before us, we cannot conclude that there is a reasonable probability that the outcome of the criminal trial would have been different if additional testimony on the same topic had been presented. We conclude, therefore, that the petitioner was not prejudiced by any alleged deficient performance of his trial counsel. In view of our decision on the prejudice prong, it is not necessary that we discuss the performance prong. See *Strickland* v. *Washington*, supra, 466 U.S. 668. Accordingly, we reverse the judgment of the Appellate Court as it pertains to the issue of expert testimony on trichomonas.

The Appellate Court did not, however, reach the respondent's challenge to the habeas court's conclusion that the petitioner's trial counsel had provided ineffective assistance by failing to call an expert to testify to the suggestibility of young children and the reliability of a child's recollection one year after the alleged event. Because we reverse the judgment of the Appellate Court on the issue of the need for expert testimony on the transmission of trichomonas, we must remand this case to the Appellate Court to consider that issue.

The judgment of the Appellate Court is reversed with respect to the issue of expert testimony on the transmission of trichomonas and the case is remanded to that court for further proceedings in accordance with the preceding paragraph of this opinion.

In this opinion ROGERS, C. J., and NORCOTT, ZARELLA, McLACHLAN and HARPER, Js., concurred.

* 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.

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

This case was originally scheduled to be argued before a panel of this court consisting of Chief Justice Rogers and Justices Norcott, Palmer, Zarella, McLachlan, Eveleigh and Harper. Although Justice Norcott was not present when the case was argued before the court, he read the record and briefs and listened to the oral argument prior to participating in this decision.

*** September 28, 2012, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] At the time the petition was filed, the commissioner of correction was Theresa C. Lantz.

[2] We granted the respondent's petition for certification to appeal from the Appellate Court limited to the following issue: "Whether the Appellate Court properly held that trial counsel rendered deficient performance by failing to present expert testimony?" *Michael T.* v. *Commissioner of Correction*, 298 Conn. 911, 4 A.3d 832 (2010).

[3] In light of its conclusion, the Appellate Court did not reach the respondent's challenge to the habeas court's conclusion that the petitioner had received ineffective assistance due to counsel's failure to use an expert at any point in the proceedings on the ability of improper interviewing techniques to taint children's recollections and statements concerning sexual abuse.

[4] General Statutes (Rev. to 2001) § 53a-70 (a) provides in relevant: "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 . . . ."

[5] General Statutes (Rev. to 2001) § 53-21 (a) provides in relevant part: "Any 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."

[6] "Trichomonas is a parasitic protozoa that can infect the urinary tract or prostate of males and the vagina or urinary tract of females." *Michael T.* v. *Commissioner of Correction*, supra, 122 Conn. App. 419 n.5.

[7] "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." *Michael T.* v. *Commissioner of Correction*, supra, 122 Conn. App. 419 n.6.

[8] Judge Beach authored a dissenting opinion in which he concluded that the failure of the petitioner's trial counsel to present expert evidence regarding trichomonas did not constitute ineffective assistance of counsel because the petitioner was not prejudiced by such failure. *Michael T.* v. *Commissioner of Correction*, supra, 122 Conn. App. 425.

[9] At the time of the criminal trial, the petitioner was represented by Attorney David M. Abbamonte. Unfortunately, Abbamonte had passed away prior to the habeas trial.

[10] The record does not reflect, and the parties have not claimed, that between the time of the criminal trial and the habeas trial, there was any change in the medical literature or new empirical evidence on the manner in which trichomonas could be transmitted.

[11] The dissent seems to rely on the fact that the physical examination of the child was normal. At the criminal trial, Murphy testified, however, that it is not unusual for a child victim of sexual assault to have a normal physical examination, and that, in her experience, less than 10 percent of such children actually have an abnormal physical examination.

[12] The dissent asserts, however, that it disagrees "that Murphy's testimony, even to the extent it was consistent with Sgroi's testimony, likely resolved the significant differences in the testimony of Rao, on the one hand, and Sgroi, on the other. Rao is a physician whose only role in the case was to testify as an expert with respect to the sexual transmission of trichomonas. Murphy is a pediatric nurse who had examined and questioned the child. She therefore was primarily a fact witness who also was asked some questions about trichomonas transmissions generally. Under the circumstances, there is, at the least, a reasonable likelihood that the jury likely would resolve any significant differences in the testimony of those two witnesses in favor of Rao, both because he is a physician and because he was the state's primary expert on trichomonas." We disagree. First, Murphy is a pediatric nurse practitioner who had worked with the child sexual abuse evaluation program for approximately sixteen years at the time of trial, had

obtained specific training in child sexual abuse and had lectured on the topic of child sexual abuse. Second, at trial, Murphy testified that she had seen approximately 2500 children for concerns of sexual abuse. On the basis of her qualifications, it is not reasonable to presume that the jury would be inclined to resolve any differences in the testimony of Rao and Murphy in favor of Rao, merely because he was a physician and Murphy was a nurse practitioner. It is well settled that "[t]he determination of the credibility of a witness is solely the function of the jury. . . . It is the trier of fact which determines the credibility of witnesses and the weight to be accorded their testimony." *State* v. *Beavers*, 290 Conn. 386, 414, 963 A.2d 956 (2009). Therefore, we cannot, on appeal, presume that the jury would believe one witness over the other.

Moreover, the dissent asserts that "it is impossible to overstate the independent import of Sgroi's testimony that she had treated approximately one dozen children for the trichomonas infection, none of whom she believed had likely had contracted it via sexual contact. This testimony would have been very significant because it is powerful evidence that when a child contracts trichomonas, it generally if not invariably was transmitted to that child through nonsexual means." We disagree.

First, this is not an accurate representation of Sgroi's testimony. Sgroi testified that she was in the private practice of medicine from 1973 to 1989, and from 1975 to 1980, she worked in the child abuse and neglect demonstration center at Mount Sinai Hospital. Sgroi testified as follows: "Beginning in 1974 and 1975, I was one of the very few people in the professional community who was saying we should look for the possibility of sexual abuse in [children with gonorrhea]. I was seeing children with trichomonas during the same period. I did not have the same impression about children with trichomonas infections. Why? Because very often, there were what I considered to be plausible reasons for the child to have the infection. The child was 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. I accept that it's within the realm of possibility that some of those ten to twelve children females that I treated might have been sexually abused and we simply missed it. That is, of course, a possibility. I don't believe for a minute that they all were." Sgroi also testified as follows: "[O]ver the course of the years in which I treated children and adults medically, I came across at least ten to twelve children who I treated for trichomonas infections. I am sure that without exception, all of these children were females. I would think that I must have seen them from various sources, either the [sexually transmitted diseases] clinic or the emergency room or my private practice. During that period, I can say with all honesty that when a child was brought in, there never was [a] particular reason to suspect that this child was sexually abused. We did not approach the case in that way, and I don't think that there was ever a time that we called child protective services to report suspected sexual abuse of a child because we found out that the child had a symptomatic trichomonas infection." Therefore, contrary to the dissent's assertion, Sgroi did not testify that these ten to twelve children did not contract trichomonas through sexual contact, only that when she saw these children, between twenty-four and thirty years prior to the criminal trial in the present case, the presence of a trichomonas infection did not cause her to believe that a child had been sexually abused. In other words, contrary to the dissent's claim, Sgroi did not testify that these children were not sexually abused, only that at the time she was practicing, the presence of trichomonas did not cause her to suspect sexual abuse.

Second, the dissent contends that Sgroi's testimony "would have been very significant because it is powerful evidence that when a child contracts trichomonas, it generally if not invariably was transmitted to that child through nonsexual means." We disagree. Sgroi confirmed that Murphy's testimony was consistent with the guidelines of the Centers for Disease Control on trichomonas, which were current to the time of trial. As we have explained previously herein, Murphy testified that trichomonas was primarily a sexually transmitted disease, but that there was some possibility of nonsexual transmission, which was consistent with medical information available at the time of the criminal trial. Contrary to the dissent's assertion, there is absolutely nothing in the record of this case that allows us to conclude that Rao's and Murphy's testimony was incorrect and that when a child contracts trichomonas, "it generally if not invariably was transmitted

to that child through nonsexual means." The dissent posits this claim without any citation to the record at all.

Third, reviewing the testimony of Rao and Murphy that was presented at the criminal trial, in comparison to the testimony of Sgroi, we disagree that Sgroi's testimony would have been crucial to the petitioner's defense. Indeed, Sgroi's testimony involved her experience from approximately twenty-four to thirty years prior to trial, whereas, at the time of trial, Murphy was a current practitioner in the field of child sexual abuse. Although, as we have acknowledged previously herein, credibility determinations are strictly in the province of the jury, we disagree with the dissent's assertion that Sgroi's testimony was powerful enough to make its absence prejudicial to the petitioner.

[13] At oral argument before this court, the petitioner's appellate counsel was asked: "Do you disagree when the Appellate Court dissent says 'Sgroi testified that many of her concerns were addressed in the direct and cross-examination of Murphy and Sgroi agreed that she basically agreed with Murphy?' " The petitioner's counsel replied: "Yes, I disagree." Such a statement by appellate counsel before this court constitutes a misrepresentation of the factual record, and we admonish counsel not to make such misrepresentations in the future.