PALMER, J., dissenting. In the sexual assault trial of the petitioner, Michael T., the state established that the then four year old child had contracted trichomonas, a disease that, as the state's experts testified, is sexually transmitted.[1] Defense counsel did not retain an expert to explain that trichomonas also can be transmitted nonsexually. Although recognizing that, in certain instances, counsel's failure to call an expert witness may constitute ineffective assistance of counsel, the majority concludes that, even assuming that counsel's performance was deficient in the present case because he failed to call such an expert, the petitioner was not prejudiced thereby. Because I agree with the habeas court and the Appellate Court that, under the facts of the present case, defense counsel's failure to retain an expert for the purpose of edifying the jury about the nonsexual transmission of trichomonas rendered defense counsel's performance ineffective[2] and prejudiced the petitioner; see *Michael T.* v. *Commissioner of Correction*, 122 Conn. App. 416, 417–18, 999 A.2d 818 (2010); I respectfully dissent.

As explained by the majority, under *Strickland* v. *Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), 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.) *Ham* v. *Commissioner of Correction*, 301 Conn. 697, 703–704, 23 A.3d 682 (2011).[3] In this context, a reasonable probability that the result of the trial would have been different "does not require the petitioner to show that 'counsel's deficient conduct more likely than not altered the outcome in the case.' . . . Rather, it merely requires the petitioner to establish 'a probability sufficient to undermine confidence in the outcome.' " (Citation omitted.) *Bunkley* v. *Commissioner of Correction*, 222 Conn. 444, 445–46, 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), quoting *Strickland* v. *Washington*, supra, 693–94. Regarding the performance prong, "[p]revailing norms of practice . . . are guides to determining what is reasonable . . . ." (Internal quotation marks omitted.) *Bryant* v. *Commissioner of Correction*, 290 Conn. 502,

512, 964 A.2d 1186, cert. denied sub nom. *Bryant* v. *Murphy*, U.S. , 130 S. Ct. 259, 175 L. Ed. 2d 242 (2009). The issue in the present case is whether defense counsel's performance in failing to call an expert to testify about the transmission of trichomonas by nonsexual means fell below the acceptable range of competence and that counsel's deficiencies prejudiced the petitioner by undermining confidence in the outcome of his trial. In support of his claim that competent defense counsel should have known that it was necessary to call an expert, the petitioner presented, and the habeas court found persuasive, the testimony of Michael Blanchard, an attorney. Blanchard explained that defense counsel should have retained an expert no later than upon learning that the petitioner wished to proceed to trial and that the state intended to call its own expert to prove sexual transmission. Blanchard further testified that, upon reviewing the record, he had found no indication that defense counsel had initiated any contact with a potential expert witness. In part on the basis of this testimony, the habeas court concluded that "it was deficient performance by [counsel] not to utilize an expert at all during the underlying proceedings, in particular during the criminal trial." This conclusion was predicated on the fact that the state planned to adduce expert testimony demonstrating that the trichomonas protozoa is sexually transmitted, and additional expert testimony, adduced by the petitioner at the habeas trial from a highly qualified physician, Suzanne M. Sgroi, that trichomonas can be and sometimes is transmitted nonsexually.

Consistent with the habeas court's conclusion, the United States Court of Appeals for the Second Circuit has observed 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.) *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). In the present case, except for the presence of trichomonas, the results of the child's physical examination were normal. The examination revealed no sign of vaginal penetration such as damage to the child's hymen. Hence, the state adduced no direct physical evidence of sexual abuse. Rather, the state relied on the child's testimony and the corroborative force of the indirect physical evidence that she had contracted trichomonas, albeit from an unknown source. Because the state's case rested in no small part on the expert testimony demonstrating that the child had contracted trichomonas through sexual

contact, the habeas court reasonably concluded that defense counsel should have retained his own expert to discuss alternative, nonsexual means of transmission.

Of course, "[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." (Internal quotation marks omitted.) *Johnson* v. *Commissioner of Correction*, 288 Conn. 53, 64, 951 A.2d 520 (2008). Before concluding that counsel was deficient in the present case, then, it is necessary to determine whether the petitioner adduced testimony at the habeas trial sufficient to cast real doubt on whether the child contracted trichomonas sexually, thereby undermining confidence in the outcome of his criminal trial. As I have indicated, the petitioner presented testimony from Sgroi that the habeas court reasonably found was so persuasive and material that had it been adduced at trial, there exists a reasonable probability that the outcome would have been different.

Specifically, Sgroi credibly testified that trichomonas can be transmitted in numerous bodily fluids, including urine, semen, and vaginal secretions. She further explained that, although it is "an organism that must get nutrients from the human body in order to survive," it may survive outside the human body, such as on a towel or a toilet seat, for as long as eight to ten hours.[4] She also testified that, in the course of her career, she has performed thousands of pelvic examinations and treated "at minimum ten to twelve" female patients who had contracted trichomonas as children. Although conceding that it was "within the realm of possibility that some of those ten to twelve children . . . might have been sexually abused and we simply missed it," she testified that she believed that most, if not all of them, had contracted the disease through nonsexual means. Sgroi also testified that, according to the Centers for Disease Control, *women*, not men, are "the primary reservoir for trichomonas infections in the United States," because the protozoa can survive much longer in women than it can in men.[5]

This testimony, if presented at the petitioner's criminal trial, no doubt would have undermined the state's claim that the child had contracted the disease from the petitioner through sexual contact. In casting such doubt, the testimony would have eroded the state's only corroboration of the child's testimony. This is especially significant in view of the fact that on several occasions prior to the trial, the child denied that she had been sexually abused.

The respondent, the commissioner of correction, asserts on appeal, however, and the majority agrees, that the petitioner failed to prove that he was prejudiced by counsel's deficient performance because "[Sgroi's] concerns with the transmission of trichomonas were

addressed in the direct and cross-examination of [the state's expert witnesses] . . . ." The respondent further asserts that even Sgroi acknowledged at the habeas trial that much of her testimony "merely mirror[ed] the testimony . . . of [Janet Murphy, a pediatric nurse practitioner]."[6] For the reasons that follow, I disagree that defense counsel's cross-examination of the state's experts effectively negated his failure to call Sgroi, or a similar expert, at the petitioner's criminal trial.

As explained by the majority, the state's first expert witness at the criminal trial was Sanjeev Rao, a physician, who testified on direct examination that trichomonas is a sexually transmitted disease. The respondent asserts that Rao agreed on cross-examination that there were nonsexual means of transmission and that this testimony was sufficient to establish the petitioner's defense at trial. Upon reviewing the testimony in its entirety, however, it is clear that Rao's reluctant acknowledgments regarding nonsexual transmission were wholly inadequate when compared to the testimony of Sgroi.

First, Rao testified that he had never treated children with trichomonas, whereas Sgroi personally had treated ten to twelve such patients. Furthermore, when asked about the disease in children, Rao stated definitively, "[i]t is only seen in children who have been abused." Sgroi, on the other hand, testified to the contrary, explaining that she did not believe that *any* of the ten to twelve children that she *personally* had treated for trichomonas had been sexually abused.

Second, in contrast to Sgroi's testimony about nonsexual means of transmission, Rao's testimony demonstrated that he had serious reservations as to whether trichomonas could in fact be spread nonsexually. On direct examination, Rao testified that "[t]he only known mode of transmission for trichomonas is sexually transmitted." When pressed on the matter, Rao conceded that "[i]n literature, it is seen in urine," but he voiced substantial skepticism about the viability of such theories while making this tepid acknowledgment. Although, as the respondent points out, Rao did acknowledge that trichomonas may be found in both urine and semen, he did not acknowledge that it could be transmitted through other bodily fluids, such as vaginal secretions. Specifically, when asked whether "there [are] any bodily fluids that [a woman] can secrete that could be passed on to another female . . . putting away men's sperm for a moment," Rao stated that that form of transmission had never been documented. In addition to being factually inaccurate based upon Sgroi's testimony, this statement by Rao is distinguishable from Sgroi's explanation that women, not men, are actually the primary carriers of the disease, given the greater length of time that the protozoa can survive in a woman's body if left untreated.

Another distinction between the testimony of the two witnesses is apparent in the following colloquy, which took place during defense counsel's cross-examination of Rao:

"[Defense Counsel]: There are nonsexual ways that a female can get trichomonas?

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

"[Defense Counsel]: All right. It can come from a toilet seat perhaps?

"[Rao]: It is . . . in the literature but, again, just because you see it in print, it doesn't mean it can happen. Okay. There are—it depends, again, on what is the quality of the journal you see it in. As you [know] in regular life, there [are] good journals and trashy journals, like the tabloids. There are good journals like [The Journal of the American Medical Association] and [there are] the throw away journals."

Rather than mirroring Sgroi's testimony in any way, this testimony by Rao actually was highly damaging to the petitioner. By indicating that he could not say that it was possible for a woman to contract trichomonas nonsexually, Rao made clear that, regardless of the conclusions reached in the relevant literature, he did not believe that trichomonas can be transmitted nonsexually. Then, by criticizing the literature discussing nonsexual transmission with an analogy to tabloid journalism, Rao completely extinguished any remote possibility that the jury might have considered his cross-examination testimony as suggesting that, in fact, the child could have contracted the disease through any means other than vaginal penetration. To conclude that Sgroi's testimony would have been superfluous to that of Rao is, I believe, to turn a blind eye to the clear import of his testimony.

The state's second expert witness was Murphy, a pediatric nurse practitioner. The respondent argues that, even if Rao's testimony was lacking in comparison to that of Sgroi, "Murphy's testimony was in direct contrast to Rao's testimony." Specifically, the respondent points out that Murphy agreed that trichomonas could be transmitted through any bodily fluid and could survive, at least for a limited time, on wet towels or toilet seats. 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 child contracted trichomonas sexually from the petitioner.[7]

First, as a general matter, I disagree with the respondent's assertion 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 hand. 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 practitioner who had examined and questioned the child.[8] She therefore was primarily a fact witness who also was asked some questions about trichomonas transmission generally. Under the circumstances, there is, at the least, a reasonable likelihood that the jury 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. Consequently, although Murphy's testimony, standing alone, might have helped reduce the harm to the petitioner caused by defense counsel's failure to call an expert on the subject of nonsexual transmission of trichomonas, I do not believe that it is reasonable to conclude that Murphy's testimony had any substantial mitigating effect in light of Rao's adverse—and unyielding—testimony. In any event, there was an obvious and significant risk that the jury would credit Rao's testimony—that is why, of course, the state called him to testify about the transmission of trichomonas notwithstanding Murphy's testimony—and Sgroi's testimony was necessary to rebut it. Moreover, the habeas court observed Sgroi's testimony first-hand and was well-positioned to evaluate it and its likely effect on a jury in light of the evidence that had been adduced at the petitioner's criminal trial.[9]

Second, although Murphy testified that "there are reports of [transmission] . . . from moist toilet seats," she qualified this statement by explaining that such transmission is thought to occur only within the elderly population, thus effectively eliminating any likelihood that the jury would have inferred that nonsexual transmission occurred in the present case. Murphy indicated that she had seen one other child with trichomonas whereas Sgroi had treated ten to twelve children for the disease, all of whom she believed had contracted the disease nonsexually.

In addition, although Murphy did testify that trichomonas can be transmitted in any kind of bodily fluid, including vaginal secretions she did not testify as to exactly how long the protozoa can survive outside the body, a fact that was crucial to the petitioner's defense. Sgroi's testimony that the disease can survive outside the body for as long as eight to ten hours would have been extremely important to the petitioner in substantiating the petitioner's contention that the child might well have contracted the disease after coming into contact with an infected towel or toilet seat.

Finally, 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 contracted it via sexual contact.*[10] 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. This is in marked contrast to the testimony of Rao and Murphy, who, so far as their testimony reveals, personally had never seen *anyone*, adult or child, who had contracted the disease nonsexually.

For all of these reasons, I believe that the Appellate Court was correct in affirming the judgment of the habeas court awarding the petitioner a new trial because of defense counsel's deficient and prejudicial conduct in failing to call an expert on the nonsexual transmission of trichomonas. Accordingly, I respectfully dissent.

[1] "Trichomonas is a protozoa that lives in the urinary tract or prostate of males and in the vagina or urinary tract of females." *State* v. *Michael T.*, 97 Conn. App. 478, 480, 905 A.2d 670, cert. denied, 280 Conn. 927, 909 A.2d 524 (2006).

[2] Of course, because "[t]here are countless ways to provide effective assistance in any given case"; *Strickland* v. *Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); "there is no per se rule that requires trial attorneys to seek out any expert." (Internal quotation marks omitted.) *Thompson* v. *Commissioner of Correction*, 131 Conn. App. 671, 696, 27 A.3d 86, cert. denied, 303 Conn. 902, 31 A.3d 1177 (2011). Accordingly, my conclusion that defense counsel was ineffective for failing to retain an expert is predicated on the particular facts of this case.

[3] Although the majority opinion relies solely upon the prejudice prong in reversing the judgment of the Appellate Court; see *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 832–33, 950 A.2d 1220 (2008) (reviewing court free to find against petitioner alleging ineffective assistance of counsel on either performance prong or prejudice prong, whichever is easier); I must analyze both prongs in light of my conclusion that the Appellate Court properly affirmed the judgment of the habeas court granting the petitioner's petition for a writ of habeas corpus.

[4] There was testimony at the habeas trial indicating that towels were routinely left out and around at the child's home.

[5] Specifically, Sgroi testified that the organism generally survives in women for "at least six to twelve months," whereas it generally survives in men for only ten to thirty days.

[6] The respondent and the majority opinion emphasize the fact that Sgroi testified that "a lot of the concerns [she] had . . . [were] basically brought out through the testimony of [Murphy] on direct and cross . . . ." I do not find this fact significant, however, because Sgroi's acknowledgment that "a lot" of her concerns had been raised in Murphy's testimony obviously was not a statement that *all* of them had been adequately addressed. It is not the similarities between the experts' testimony, but rather the differences, upon which we should be focusing when determining whether Sgroi's testimony provided evidence not presented at the criminal trial. To be sure, any testimony between opposing expert witnesses is likely to contain substantive overlap, but what is significant is whether there are any meaningful *differences* between the testimonies. Furthermore, although Sgroi's testimony about the similarities is not wholly irrelevant to the present appeal, the determination of whether the testimony was sufficiently similar to obviate a finding of prejudice is for the court to decide, not Sgroi.

[7] I note that the majority admonishes petitioner's appellate counsel for what it characterizes as a "misrepresentation of the factual record" in her response to a question from this court at oral argument as to whether Murphy essentially agreed with Sgroi concerning the transmission of trichomonas. Although counsel's response could have been more considered, it is clear to me that counsel did not intend to mislead the court, and I therefore do not believe that an admonition is in order. Indeed, in her brief to this court, counsel expressly states as follows: "Respondent asserts that . . . Sgroi 'agreed that her concerns with the transmission of trichomonas were addressed in the direct and cross-examination of Rao and Murphy.' . . . In fact Sgroi did not agree that her concerns were all brought out. Rather, she was asked if 'a lot' of her concerns about *how it could be transmitted and the types of environment it could survive in*' were 'basically brought out through the testimony of Janet Murphy' and . . . Sgroi responded affirma-

tively. . . . Sgroi never agreed that *all* of her concerns were brought out, and never agreed with . . . Rao." (Emphasis in original.) The foregoing belies any claim or suggestion that counsel's representation at oral argument was purposefully misleading.

[8] I note that Murphy's examination of the child revealed no physical manifestation of sexual abuse. In addition, the child did not acknowledge any such abuse upon questioning by Murphy.

[9] The majority attempts to minimize the likely impact of Sgroi's testimony, emphasizing that some of her testimony is based on her practice some decades ago. There is nothing in the record to suggest, however, that her testimony was not credible for that reason, and the respondent makes no such claim. On the contrary, Sgroi is a renowned expert in the field of child sexual abuse whose credentials, background and expertise were not challenged.

[10] Contrary to the assertion of the majority, I have not misstated Sgroi's testimony. In fact, Sgroi testified in relevant part as follows: "I accept that it's within the realm of possibility that some of those ten to twelve [female children] 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. *My impression during the same period when I was acutely concerned about [sexual transmission through] gonorrhea was that sexual transmission likely was not happening in those cases.*" (Emphasis added.)