PALMER, J., dissenting. Child victims of sexual abuse sometimes act in ways that, to a layperson, strongly suggest that no abuse actually occurred. In those circumstances, the state is permitted to adduce expert testimony for the purpose of explaining that such behavior is not uncommon and, therefore, that such conduct does not necessarily mean that the abuse did not occur.[1] E.g., *State* v. *Spigarolo*, 210 Conn. 359, 377–78, 556 A.2d 112 ("[When] the minor victim [of sexual abuse is subject to impeachment] based on inconsistencies, partial disclosures, or recantations relating to the alleged incidents, the state may present expert opinion evidence that such behavior by minor sexual abuse victims is common. . . . This variety of expert testimony is admissible because the consequences of the unique trauma experienced by minor victims of sexual abuse are matters beyond the understanding of the average person." [Citations omitted.]), cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989). The issue in the present case is whether that expert should be limited to identifying those behaviors generally, without reference to the complainant's actual conduct, or whether the expert should be allowed to opine more specifically that the complainant's conduct is similar to that of other child victims of sexual abuse. I agree with the majority that the better rule is to bar testimony expressly linking the complainant's conduct to that of other child sexual abuse victims and that the trial court in the present case should not have permitted the state to adduce such testimony from its expert, Lisa Melillo. In contrast to the majority, however, I do not believe that the testimony was harmful to the defendant, Anthony L. Favoccia, Jr., and, therefore, I would affirm the judgment of conviction. Accordingly, I dissent.

Two primary considerations lead me to conclude that the state should not be permitted to elicit expert testimony explaining that the complainant's particular conduct was consistent with the conduct of other such victims. First and foremost, there is a risk that the jury might view the testimony as suggesting that the expert personally believes that the complainant was, in fact, sexually abused. This risk exists for at least two related reasons. First, an expert's opinion that the conduct of the complainant is consistent with the conduct of other children who have been sexually abused may suggest to the jury that the expert, who undoubtedly will have had extensive experience with victims of sexual abuse, would not be opining on the similarity in conduct between the complainant and other known victims of sexual abuse unless the expert believed that the complainant also had been abused. Put differently, sometimes children falsely claim that they have been sexually abused, and, in those cases, behavior that seems to

belie the complaint of abuse, although consistent with the behavior of known victims of such abuse, actually is indicative of untruthfulness. When the state's expert expressly links the behavior of the complainant to the behavior of known victims, however, the jury may think that the highly trained and experienced expert personally believes that the complainant *was* abused. When the expert does not link the complainant's behavior to the conduct of other victims, the possibility that the jury will think that the expert credits the complainant's testimony is reduced. To the extent that such expert testimony could lead the jury to suppose that the expert believes the complainant's testimony, the expert appears to be improperly vouching for the complainant's credibility.

The second concern with the challenged testimony stems from the fact that there is a greater risk that the jury will treat the testimony as suggesting that, because the complainant's behavior is similar to the behavior of other child victims of sexual abuse, the conduct of the complainant constitutes affirmative evidence that the complainant, too, was so abused. Of course, the purpose of the expert testimony is not to demonstrate that the complainant was sexually abused; only if the complainant's behavior were *unique* to victims of sexual abuse—and there is no such claim in the present case—would the testimony be relevant to that end. Rather, the testimony is admissible for the limited purpose of rebutting any claim or inference that the complainant's behavior is inconsistent with sexual abuse. When an expert expressly links the complainant's behavior to the behavior of other child victims of sexual abuse, there is a greater likelihood that the jury will view this testimony as affirmative proof that the complainant was abused when, in fact, the sole basis for the testimony is to provide the jury with the state's explanation for conduct by the complainant that, in the absence of such testimony, would be difficult for the jury to reconcile with the complainant's claim of abuse.[2]

There is a second reason why an expert should not be permitted to testify with reference to the complainant's conduct: the state has absolutely no need for it. When an expert testifies generally that it is not uncommon for child sexual abuse victims to behave in a certain way, the jury is perfectly capable of determining whether the evidence establishes that the complainant in the case before it exhibited such behavior. Of course, if the prosecutor believes that it would be useful to underscore the expert testimony with express reference to the relevant conduct of the complainant, the prosecutor is free to do so in closing argument. Neither the state nor Justice Zarella in his dissent offers any reason why the prosecutor should be allowed to elicit expert testimony expressly linking the complainant's conduct to similar conduct of other child victims of sexual abuse, and I know of no such reason.[3] Consequently,

because there is reason to exclude expert testimony that refers expressly to the complainant's conduct and no countervailing reason justifying its admission, I agree with the majority that such testimony should be prohibited.

I disagree with the majority, however, that this result is compelled by *State* v. *Iban C.*, 275 Conn. 624, 635–36, 881 A.2d 1005 (2005), and *State* v. *Grenier*, 257 Conn. 797, 806, 778 A.2d 159 (2001), in which this court explained that indirect vouching for the complainant's credibility by an expert, no less than expert testimony expressly endorsing the complainant's credibility, is impermissible. In both *Iban C.* and *Grenier*, the state's expert witness in each case testified in such a way that the jury necessarily would have understood the expert as expressing the view that the complainant had been sexually abused, albeit without stating that view in so many words. See *State* v. *Iban C.*, supra 633; *State* v. *Grenier*, supra, 804. In other words, the testimony carried the necessary implication that the expert believed in the complainant's credibility. *State* v. *Iban C.*, supra, 633, 636–37 (explaining that pediatrician's written report "containing a diagnosis of '[c]hild [s]exual [a]buse' and her testimony affirmatively stating that same diagnosis, constituted an indirect assertion as to the truthfulness of the [complainant's] testimony" when there was no physical evidence of abuse); *State* v. *Grenier*, supra, 804–806 (concluding that trial court improperly admitted testimony of clinical psychologist that she had treated complainant "for the trauma of the abuse that [the complainant had] experienced" because it constituted "an indirect assertion that validated the truthfulness of [the complainant's] testimony," and that, although psychologist's testimony "was not a literal statement in her belief in [the complainant's] truthfulness, such testimony had the same substantive import" [internal quotation marks omitted]). In cases like the present one, although there is a risk that the jury might consider the challenged testimony as indicative of the expert's view that the complainant had been sexually abused, such expert testimony, in contrast to the testimony at issue in *Iban C.* and *Grenier*, contains no assertion of the expert's belief in the complainant's credibility, either expressly or by necessary implication of the testimony. That risk exists when, as in the present case, an expert is permitted to testify with reference to the complainant's conduct only because the jury might *wrongly* infer that the expert would not be testifying about the complainant's conduct if the expert did not believe in the truth of the complainant's allegations.[4]

With respect to the issue of harm, I am not convinced that the defendant in the present case can meet his burden of establishing that "the jury's verdict was substantially swayed by the error." (Internal quotation marks omitted.) *State* v. *Beavers*, 290 Conn. 386, 419, 963 A.2d 956 (2009).[5] Several considerations lead me

to conclude that the challenged testimony was not particularly prejudicial. First, although I acknowledge the risk that the jury *might* have perceived the challenged testimony as reflecting Melillo's belief in the complainant's credibility, it is impossible to determine whether the jury did, in fact, view Melillo's testimony in that manner. As I have explained, this is in contrast to the expert testimony at issue in *Iban C.* and *Grenier*, in which the experts had unequivocally expressed their endorsement of the veracity of the complainants' allegations. *State* v. *Iban C.*, supra, 275 Conn. 633, 636–37; *State* v. *Grenier*, supra, 257 Conn. 804–806. Although I see no legitimate reason for the trial court in the present case to have permitted Melillo to testify with specific reference to the complainant's behavior, that testimony carried no direct or indirect assertion of Melillo's belief in the complainant's credibility. Consequently, one can only speculate whether the jury perceived Melillo's testimony as reflecting her opinion concerning the credibility of the complainant's allegations.[6]

Indeed, the testimony at issue in the present case is not much different from expert testimony that *is* permitted under our evidentiary rules, namely, testimony in response to a hypothetical question. See Conn. Code Evid. § 7-4 (c).[7] This court allows the state to ask hypothetical questions of experts in child sexual abuse cases. See, e.g., *State* v. *Christiano*, 228 Conn. 456, 460–62, 637 A.2d 382, cert. denied, 513 U.S. 821, 115 S. Ct. 83, 130 L. Ed. 2d 36 (1994). Because such hypothetical questions invariably will track the facts adduced by the state with respect to the behavior of the complainant, the jury will know that the state's expert is of the view that the complainant's behavior is consistent with the behavior of known child victims of sexual abuse. This is especially true when a detailed, hypothetical question contains facts that mirror *exactly* the complainant's behavior, an approach that our courts expressly have approved. See, e.g., *State* v. *Dearing*, 133 Conn. App. 332, 345–47, 34 A.3d 1031, cert. denied, 304 Conn. 913, 40 A.3d 319 (2012); *State* v. *R.K.C.*, 113 Conn. App. 597, 604–605, 967 A.2d 115, cert. denied, 292 Conn. 902, 971 A.2d 689 (2009).

In the present case, moreover, Melillo did not treat or even interview the complainant. In fact, prior to her testimony, Melillo never spoke to the complainant. Rather, Melillo's testimony was based solely on her review of certain police reports and a video recording of a forensic interview of the complainant conducted by a third person, as well as conversations with the senior assistant state's attorney (prosecutor). Consequently, the jury could not have been swayed by the belief that Melillo had some special insight into the complainant's credibility on the basis of a professional relationship or through personal interaction. This reduces the possibility that the jury was influenced unduly by Melillo's improper testimony because "[t]he

risk of improper comparisons between any general behavioral characteristics of sexually abused children and a particular complaining child witness is most acute when the expert witness has examined or treated the child"; *Commonwealth* v. *Federico*, 425 Mass. 844, 849, 683 N.E.2d 1035 (1997); a point that the majority concedes. See part I of the majority opinion (observing that danger of expert witness vouching for complainant's credibility is greatest when expert has treated or evaluated complainant).

Finally, and perhaps most important, in closing argument to the jury, the prosecutor made no mention of the challenged testimony. In fact, the prosecutor said nothing at all about Melillo's testimony—or, for that matter, the behavior of the complainant that was the subject of Melillo's testimony—in his initial argument. Defense counsel then proceeded to deliver his closing argument, during which he underscored the fact that Melillo never had interviewed the complainant and had absolutely no idea whether the complainant was telling the truth.[8] In his rebuttal argument, the prosecutor made no attempt to contradict or challenge these remarks of defense counsel. The prosecutor made but two, extremely brief references to Melillo, stating, first: "You heard . . . Melillo testify in this case about behavior characteristics of children who claim to be sexually abused." The prosecutor did not follow up that statement with any further reference to Melillo or to her testimony. Thereafter, the prosecutor mentioned Melillo again: "[The complainant] indicated . . . that, on many occasions, when she would see the defendant, again, she would have, out of respect for him, [gone] over and greet[ed] him. . . . Melillo talked about . . . [the fact that] there are situations where somebody who would find themselves in the company of the person who abused them would engage in conversation with them because they did not want to draw attention to themselves."

It is readily apparent that the prosecutor's passing references to Melillo focused only on that aspect of her testimony that was perfectly proper, and contained no mention of the challenged testimony in this case. If the challenged testimony was so prejudicial to the defendant, as the majority asserts, it is hard to understand why the prosecutor would not have underscored it in arguing to the jury. It also is telling that the prosecutor devoted so little time to Melillo's testimony in his closing argument. In closing remarks that spanned more than thirty transcript pages, Melillo's testimony is the subject of only three brief, wholly unobjectionable sentences. In my view, the fact that the prosecutor's closing argument contains merely a fleeting reference to Melillo's testimony, and no reference to any improper testimony, strongly suggests that no aspect of her testimony was particularly important to the state's case. My conclusion in this regard is buttressed by defense counsel's

unrebutted assertion that Melillo had no knowledge as to whether the complainant was telling the truth about the defendant.

For all of the foregoing reasons, I do not believe that Melillo's testimony that the complainant's behavior was consistent with the behavior of other known child victims of sexual abuse had a bearing on the outcome of the trial. I therefore respectfully dissent.

[1] This conduct frequently consists of denying that the sexual abuse occurred before acknowledging it, delayed reporting of the abuse, and recantation of testimony implicating the abuser. In the present case, the complainant's conduct included accidental—as opposed to purposeful—disclosure of the abuse, delayed disclosure of the abuse, respectful behavior toward the defendant even after the alleged abuse, and efforts to make herself look unattractive to the defendant.

[2] In his dissenting opinion, Justice Zarella asserts that I provide "no authority for [the] proposition" that expert testimony, like that at issue in the present case, should be barred because of the risk that it may lead the jury to think that the expert personally believes in the truthfulness of the complainant's claim of abuse. Footnote 3 of Justice Zarella's dissenting opinion. Of course, I rely on the wealth of authority that the majority has previously cited at length. See part I of the majority opinion. There is no reason for me to recite that authority again here.

[3] Justice Zarella maintains that he has offered a reason or reasons why such testimony should be allowed, citing his reliance on *State* v. *Davis*, 422 N.W.2d 296 (Minn. App. 1988), in support of this contention. Contrary to Justice Zarella's assertion, *Davis* does *not* explain why testimony of the kind at issue in the present case is necessary to assist the jury. In *Davis*, the expert, Jean Mitchell, first testified about certain general behavioral characteristics of adolescent victims of sexual abuse. See id., 299. Mitchell then testified with specific reference to the complainant in the case. See id. As the court in *Davis* explained: "After describing the [aforementioned general] characteristics, Mitchell testified regarding the conduct she observed, specifically that [the complainant] wore heavy makeup, appeared to be older than she actually was, used her sexuality for attention getting, and was troubled by separation from her mother. Mitchell then testified that this behavior was common in sexual abuse victims of the same age." Id. The court continued: "These are characteristics that the jury had already observed and may have found peculiar. The expert testimony was helpful to the jury in that it provided relevant insight into the cause of some of [the complainant's] peculiar behavior . . . and assisted the jury in evaluating her credibility. Under these limited circumstances, the expert testimony [was admissible on the issue of child sexual abuse]." Id. *Davis* is *completely* inapposite, first, because there is nothing in *Davis* that even suggests that the court had been asked by the defendant in that case to consider the propriety of Mitchell's express references to the complainant as distinguished from Mitchell's observations generally about the behavioral characteristics of child victims of sexual abuse. But even if it is assumed, arguendo, that the court was focused on Mitchell's testimony insofar as it referred expressly to the complainant, *Davis* does not explain *why* it was necessary or helpful for Mitchell to testify with reference to the complainant. Rather, the court merely stated, in wholly conclusory terms, that the testimony was helpful, with no accompanying explanation. Furthermore, as the court stated, the behavioral characteristics exhibited by the complainant were "characteristics that the jury had already observed"; id.; and, therefore, there was no need for Mitchell to testify with reference to the complainant. *Davis*, therefore, provides no support for Justice Zarella's conclusion that an expert should be permitted to testify with express reference to the complainant because that testimony somehow enhances the jurors' understanding of the behavior of child victims of sexual abuse.

Justice Zarella also states that "there may be instances when expert testimony expressly linking the complainant's conduct with that of sexual abuse victims may be helpful in understanding the relevance of the expert's opinion. For example, such testimony may be relevant when the complainant has exhibited a wide range of confusing or complex behaviors." Footnote 6 of Justice Zarella's dissenting opinion. This rationale is entirely unpersuasive for several reasons. First, Justice Zarella's statement that "there may be instances" in which expert testimony that specifically refers to the com-

plainant "may be helpful in understanding the relevance of the expert's opinion"; id.; is an acknowledgement that such testimony is not generally relevant but may be relevant on occasion. With respect to how often such a case might present itself, Justice Zarella cites no case from any jurisdiction in which the complainant's behaviors were so "confusing or complex" that it was important for the jury to hear the expert testify with express reference to the complainant. Moreover, in the unlikely event that there was a case of the kind that Justice Zarella hypothesizes, I see no reason why the trial court would be barred from permitting such testimony, accompanied, I suggest, by an instruction advising the jury of the testimony's limited purpose. By contrast, Justice Zarella would adopt a rule broadly permitting expert testimony that expressly refers to the complainant merely to address the extremely rare case in which the jury might actually benefit from such testimony. Simply stated, there is no logical justification for such a rule; the only sound approach is to bar the testimony generally, allowing for the possibility that it may be admissible in the exceptional case. Finally, the present case most certainly is *not* that exceptional case, for there is nothing about the complainant's behavior that even arguably could be characterized as "confusing or complex" such that Melillo's testimony expressly linking the complainant's conduct to that of known child victims of sexual abuse was necessary to aid the jury in comprehending the relevance of Melillo's expert opinion.

[4] I therefore also take issue with the majority's assertion that experts "cross the line into impermissible vouching and ultimate issue testimony when they opine that a particular complainant has exhibited [the] general behavioral characteristics" of known child victims of sexual abuse. Although such testimony should be excluded because of the possibility that the jury will misunderstand its import, I do not agree that it constitutes "impermissible vouching and ultimate issue testimony . . . ." Indeed, it is because the testimony is *not* an opinion endorsing the complainant's credibility that the majority of jurisdictions permit it. The testimony nevertheless should be barred in light of the risk that the jury will read too much into it, and because it is wholly unnecessary to make the point that the state wishes to get across to the jury through its expert, namely, that the complainant's behavior is not inconsistent with the complainant's claim of sexual abuse.

[5] As the Appellate Court observed, Melillo's improper testimony was unnecessary to demonstrate to the jury that the complainant had exhibited behavior typical of child victims of sexual abuse. See *State* v. *Favoccia*, 119 Conn. App. 1, 24–25, 986 A.2d 1081 (2010). This is so because there is no reason to believe that, in the absence of such testimony, the jury would not have recognized that the complainant's conduct mirrored the several behavioral characteristics of sexual abuse victims that Melillo properly had identified in her testimony. Although this fact does not eliminate the possibility that the jury might have viewed Melillo's improper testimony as indicative of her belief in the complainant's credibility, it does mean that that testimony was not otherwise harmful to the defendant.

[6] The majority nevertheless insists that "expert testimony like that at issue in this case carries the same implications, and risks of indirect vouching, that we recognized in *Iban C.* and *Grenier*, and, to the extent that there is a difference, it is a matter of degree rather than kind." Footnote 39 of the majority opinion. The majority makes no attempt to explain this assertion, perhaps because there clearly *is* a difference in kind between the two types of testimony. In *Iban C.* and *Grenier*, the expert testimony at issue did not merely give rise to a *risk* that the jury *might* believe that the expert credited the complainant's testimony; rather, the jury *knew* from the expert testimony that the expert *did*, *in fact*, credit the complainant's allegations. See *State* v. *Iban C.*, supra, 275 Conn. 636–37; *State* v. *Grenier*, supra, 257 Conn. 806. By stark contrast, in the present case, there is *only a risk* that the jury *might* think, albeit without a basis in the record, that Melillo credited the complainant's claim of sexual abuse. This difference is both important and material, especially for purposes of evaluating whether the improper testimony was harmful. As I explain hereinafter, the majority's failure to come to grips with this distinction results in a skewed harmless error analysis.

[7] Section 7-4 (c) of the Connecticut Code of Evidence provides: "Hypothetical questions. An expert may give an opinion in response to a hypothetical question provided that the hypothetical question (1) presents the facts in such a manner that they bear a true and fair relationship to each other and to the evidence in the case, (2) is not worded so as to mislead or confuse the jury, and (3) is not so lacking in the essential facts as to be without value in the decision of the case. A hypothetical question need not contain

all of the facts in evidence."

[8] Defense counsel argued in relevant part: "Remember the delay in reporting. If this would have happened, you would have expected this to happen very soon thereafter. You remember [that] Melillo testified. Some was consistent with—when I crossed—consistent with somebody . . . who's had a problem. But when I asked her on cross, well, everything she mentioned about, is it consistent with—was also consistent with nothing happening because . . . Melillo wasn't there. You could have fifty . . . Melillos come in here and testify and all—they're testifying with some hypothetical. She's not testifying about [the complainant] because she never even interviewed [the complainant]. She doesn't know whether [the complainant] is telling the truth or not. She can't get up there and say [the complainant] is truthful. All she can do is get up there and say it is consistent or maybe it is not consistent. . . . Melillo didn't add anything to this allegation . . . ."