STATE OF CONNECTICUT *v.* ANTHONY L. FAVOCCIA, JR.
(SC 18559)

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

*Argued December 1, 2011—officially released September 21, 2012***

Adam E. Mattei, special deputy assistant state's attorney, with whom, on the brief, were *John C. Smriga*, state's attorney, and *Cornelius P. Kelly*, senior assistant state's attorney, for the appellant (state).

Gary A. Mastronardi, for the appellee (defendant).

Opinion

NORCOTT, J. In this certified appeal, we consider whether an expert witness' testimony that the complainant has exhibited behaviors, which were identified as those characteristic of minor sexual assault victims, constitutes inadmissible vouching for the credibility of the complainant or opinion as to the ultimate issue of whether the complainant had been sexually assaulted, in violation of, for example, *State* v. *Spigarolo*, 210 Conn. 359, 379–80, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989), and *State* v. *Iban C.*, 275 Conn. 624, 635–36, 881 A.2d 1005 (2005). The state appeals, upon our grant of its petition for certification,[1] from the judgment of the Appellate Court reversing the trial court's judgment, rendered after a jury trial, convicting the defendant, Anthony L. Favoccia, Jr., of two counts of risk of injury to a child in violation of General Statutes § 53-21 (a) (2).[2] *State* v. *Favoccia*, 119 Conn. App. 1, 30, 986 A.2d 1081 (2010). On appeal, the state claims that the Appellate Court improperly concluded that: (1) the trial court had abused its discretion in admitting into evidence four statements by an expert witness, each to the effect that the complainant exhibited behaviors consistent with those of sexual abuse victims; and (2) reversal was required because these improper evidentiary rulings were not harmless error. We conclude that the four statements at issue were improperly admitted into evidence, and that we do not have a fair assurance that those improprieties did not substantially sway the jury's verdict. Accordingly, we affirm the judgment of the Appellate Court.

The Appellate Court's opinion aptly sets forth the following facts that the jury reasonably could have found based on the allegations of the complainant and the procedural history: "The events underlying the defendant's conviction occurred in the fall of 2005 and the summer of 2006. At that time [the complainant] was under sixteen years of age.[3] Following the divorce of her parents when she was three years old, the [complainant] resided with her mother, S. The [complainant] regularly spent weekends with her father, R, pursuant to a court approved visitation schedule.

"The defendant was a longtime friend of R, whom the [complainant] had known since early childhood as 'Uncle Tony.' During one of her weekend visits with R in the fall of 2005, the defendant spent the night at R's residence. R worked an overnight shift as a 911 operator that evening." Id., 3. The jury then credited the complainant's testimony that, "[a]fter R departed the residence and his girlfriend, M, had gone to bed, the defendant entered the [complainant's] bedroom and lay next to her. The defendant kissed her neck and touched her back, stomach, upper legs and buttocks. The encounter ended abruptly after approximately fifteen

minutes, and the defendant told the [complainant] that he would '[s]ee [her] tomorrow . . . .' The [complainant] thereafter did not report that incident to her parents. She did, however, inform two classmates and close friends, J and B, of her encounter with the defendant. Although the [complainant] instructed J and B to keep the matter secret, they encouraged the victim to report the incident to her mother.

"A second incident involving the defendant and the [complainant] occurred in the summer of 2006, during another weekend visit at R's residence. On that particular evening, the defendant was present when R, a volunteer firefighter, left the residence to respond to a fire. At that time, the [complainant] took a shower and then retreated to her bedroom robed in a towel. After she closed the door, the defendant suddenly entered the room. As the [complainant] testified, 'he [got] on top of me and started kissing me on my neck . . . well, first it was on the lips and then my neck. . . . [H]e was on top of me, my towel had started to come off . . . I guess because of being on top of me, and it was not a relatively big towel, and he was . . . touching on my sides and everything and then . . . after maybe five, ten minutes, I told him that I needed to get dressed and that he needed to leave, so he had to get off of me.' The defendant complied with her request. The [complainant] did not report the incident to her parents but did inform J and B of the encounter, who again encouraged the [complainant] to report the incident to her mother. The [complainant] falsely assured her friends that she had done so.

"One year later, S finally learned of the incidents involving her daughter and the defendant. On that evening in late June or early July, 2007, S overheard the [complainant], J and B talking about a recent incident in which the defendant attempted to '[look] down [the complainant's] shirt . . . .' J then recounted to S the details of the [complainant's] two encounters with the defendant in the fall of 2005 and summer of 2006, and the [complainant] began to cry. Shocked, S took the [complainant], J and B to the Stratford police department to report the incidents.

"The defendant thereafter was arrested and charged, by amended information dated May 29, 2008, with one count of sexual assault in the second degree in violation of General Statutes (Rev. to 2005) § 53a-71 (a) (1),[4] one count of sexual assault in the fourth degree in violation of General Statutes (Rev. to 2005) § 53a-73a (a) (1),[5] and two counts of risk of injury to a child in violation of § 53-21 (a) (2). A jury trial followed. The state's case included testimony from the [complainant], J and B, and two exhibits. In addition, the state presented the expert testimony of [school] psychologist Lisa Melillo. The defense consisted of testimony from R, M and E, the [complainant's] high school color guard coach, as

well as four exhibits. Following the close of evidence, the defendant moved for a judgment of acquittal. The court granted that motion as to the sexual assault in the fourth degree count only, concluding that the state had not proven beyond a reasonable doubt that the victim was under the age of fifteen at the time of the alleged incidents. The matter was submitted to the jury, which found the defendant guilty on both counts of risk of injury to a child. The jury further informed the court that it was 'deadlocked on the issue of sexual assault in the second degree' and saw 'no possibility of unanimity on this issue.'[6] The court thus declared a mistrial on that count. The court rendered judgment accordingly and sentenced the defendant to a total effective term of twenty years incarceration, execution suspended after ten years, with twenty-five years of probation."[7] Id., 3–5.

The defendant appealed from the judgment of conviction to the Appellate Court, contending that the trial court "abused its discretion in permitting the state to offer certain expert testimony that vouched for and bolstered the credibility of the [complainant]" on four occasions while Melillo testified. Id., 5–6. Relying on, inter alia, *State* v. *Iban C.*, supra, 275 Conn. 624, *State* v. *Freeney*, 228 Conn. 582, 637 A.2d 1088 (1994), and *State* v. *Spigarolo*, supra, 210 Conn. 359, the Appellate Court agreed with the defendant,[8] concluding specifically that portions of four challenged colloquies between the prosecutor and Melillo, which discussed only the "general behavioral characteristic[s] of sexually abused children"; *State* v. *Favoccia*, supra, 119 Conn. App. 20; were permissible and properly "served to assist the jury in evaluating the [complainant's] conduct and whether it was generally consistent with that of a sexually abused child." Id., 21. The Appellate Court, however, then concluded that, when "Melillo went beyond a general discussion of characteristics of sexual abuse victims and offered opinions, based on her review of the videotaped forensic interview [of the complainant] and other documentation, as to whether this particular [complainant] in fact exhibited the specified behaviors, her testimony crossed the line of permissible expert opinion." Id., 23. The court noted specifically: "Melillo opined on whether the [complainant], as mechanisms of coping with sexual abuse, attempted to make herself unattractive to the defendant and remained polite and respectful toward him. During her testimony at trial and in her forensic interview that was before the jury, the [complainant] made such allegations. As a result, Melillo's expert opinion confirming those allegations 'necessarily endorsed the [complainant's] credibility, and functioned as an opinion as to whether the [complainant's] claims were truthful.' . . . Given Melillo's extensive qualifications and expertise as a forensic interviewer, the jury easily could perceive her testimony 'as a conclusive opinion that [the complainant] had

testified truthfully.' " (Citation omitted.) Id., 23–24; see *State* v. *Iban C.*, supra, 636; *State* v. *Grenier*, 257 Conn. 797, 806, 778 A.2d 159 (2001).

Relying on our analysis in *State* v. *Grenier*, supra, 257 Conn. 807–808, which, like this case, depended entirely on the jury's assessment of the complainant's credibility because of a lack of physical, medical or eyewitness evidence, the Appellate Court then concluded that it did not have the requisite "fair assurance" that the error did not "substantially affect the jury's verdict," thus requiring reversal under *State* v. *Sawyer*, 279 Conn. 331, 904 A.2d 101 (2006), overruled in part on other grounds by *State* v. *DeJesus*, 288 Conn. 418, 454 n.23, 953 A.2d 45 (2008). See *State* v. *Favoccia*, supra, 119 Conn. App. 27–29. In particular, the Appellate Court relied on *State* v. *Angel T.*, 292 Conn. 262, 294, 973 A.2d 1207 (2009), to determine that the report of jury deadlock in this case indicated that the case against the defendant was not particularly strong, and agreed with the defendant's argument that "any improperly admitted evidence could very well have been sufficient to swing the balance of the jury's deliberations in favor of conviction."[9] *State* v. *Favoccia*, supra, 28; see also id., 29 ("Melillo's endorsement of the [complainant's] credibility very possibly was the deciding factor in the jury's finding of guilt on the risk of injury to a child counts"). Thus, the Appellate Court reversed the judgment of conviction and remanded the case for a new trial. Id., 30. This certified appeal followed. See footnote 1 of this opinion. Additional facts will be set forth where necessary.

On appeal, the state contends that the Appellate Court improperly determined that: (1) the challenged portions of Melillo's testimony exceeded the scope of permissible expert testimony about the behavioral characteristics of sexual assault victims; and (2) the evidentiary improprieties required reversal of the conviction. We address each claim in turn.

I

We begin with the state's contention that Melillo's testimony was within the scope of expert testimony about the general behavioral characteristics of sexual assault victims previously held admissible in *State* v. *Spigarolo*, supra, 210 Conn. 379–80. The state contends more specifically that, because Melillo did not vouch directly for the complainant's credibility or the truthfulness of her allegations, Melillo's testimony that the complainant had exhibited behaviors typical of sexual assault victims generally was admissible pursuant to dicta in *State* v. *Butler*, 36 Conn. App. 525, 651 A.2d 1306 (1995), which followed this court's decisions in *State* v. *Borrelli*, 227 Conn. 153, 629 A.2d 1105 (1993), and *State* v. *Freeney*, supra, 228 Conn. 582, and also is analogous to a physician's testimony about the import of the absence of physical trauma held admissible in

State v. *Esposito*, 192 Conn. 166, 471 A.2d 949 (1984). The state also contends that the "syllog[ism]" of improper vouching posited by the Appellate Court[10] is belied by the Connecticut Code of Evidence, which permits an expert to form an opinion based on facts made known at the proceeding, and in fact requires such linking between the complainant's behavior and those of sexual assault victims in general in order to create the predicate foundation for Melillo's expert testimony.

In response, the defendant, acknowledging the admissibility under *State* v. *Spigarolo*, supra, 210 Conn. 379–80, of expert testimony about the behaviors of sexual assault victims generally, argues that this court has never specifically permitted an expert witness to connect those behaviors to a particular complainant. Adopting the Appellate Court's syllogistic reasoning, the defendant posits that permitting an expert witness to make that connection, but not opine directly on a complainant's credibility or diagnosis, is the logical equivalent of permitting an expert to testify that the bird acts, walks and quacks like a duck, but then precluding that expert from opining that a particular bird is, in fact, a duck. See also footnote 10 of this opinion. The defendant then cites case law from sister state jurisdictions, such as *Wheat* v. *State*, 527 A.2d 269 (Del. 1987), and *Commonwealth* v. *Brouillard*, 40 Mass. App. 448, 665 N.E.2d 113 (1996), and contends that expert testimony linking a specific complainant to those general characteristics goes beyond the information necessary to educate a jury about how sexual assault victims behave, which amounts to bolstering and making an indirect assertion on the ultimate issue in the case, both of which are forbidden under Connecticut law. We agree with the defendant, and conclude that, although expert witnesses may testify about the general behavioral characteristics of sexual abuse victims, they cross the line into impermissible vouching and ultimate issue testimony when they opine that a particular complainant has exhibited those general behavioral characteristics.

We note that the Appellate Court's opinion and the record set forth the following additional relevant facts and procedural history. During pretrial proceedings, the state disclosed a list of potential witnesses, which included Melillo, who was to "testify as to characteristics of children who claim they were sexually abused." At trial, Melillo reviewed her extensive experience and training as a school psychologist[11] and forensic interviewer with the multidisciplinary investigative team at the Center for Women and Families of Greater Bridgeport.[12] Melillo then "testified that she had not interviewed or spoken with the [complainant] . . . . Rather, she reviewed certain police reports and a report prepared by Donna Vitulano, her colleague at the Center for Women and Families of Greater Bridgeport, who

had conducted a forensic interview[13] with the [complainant].[14] Melillo testified that she watched the video of that forensic interview twice.[15] In addition, Melillo testified that she had spoken with the prosecutor about the case prior to the commencement of the trial. She opined that her testimony at trial was predicated on her review of 'the documents, [her] discussions [with the prosecutor] and the DVD [of the forensic interview].' " *State* v. *Favoccia*, supra, 119 Conn. App. 7–8.

As the Appellate Court noted, this appeal centers on "the admission of opinions expressed by Melillo in four separate colloquies with the prosecutor." Id., 8. The defendant objected to all of these opinions on the ground that they constituted improper statements about the credibility of the " 'particular alleged [complainant]' "—amounting to " 'putting some kind of stamp of approval' " on her conduct in violation of *State* v. *Grenier*, supra, 257 Conn. 797, and cases cited therein. See *State* v. *Favoccia*, supra, 119 Conn. App. 9–13. The trial court overruled the objections, concluding in detail with respect to the first challenged question that Melillo "is absolutely not allowed to testify as to [the complainant's] credibility, but she is an expert and can render an opinion, and the jury is entitled to give it whatever weight they deem appropriate based on her expertise."

Melillo gave her first challenged opinion after she explained in general terms the concepts of "accidental disclosure" and "purposeful disclosure" of sexual abuse,[16] and the prosecutor asked her: "Upon your review of the documents in this case and the video that you reviewed . . . would you state for us whether this was an accidental or purposeful disclosure on the part of [the complainant]?" The trial then court overruled the defendant's objection to this question. Later, the following colloquy occurred between the prosecutor and Melillo: "Q. *With respect to your formal review of the documents, and . . . [the complainant's] interview, can you render an opinion about whether her disclosure was an accidental disclosure or a purposeful disclosure*?

"A. I can render an opinion.

"Q. And what is that based upon?

"A. *Based upon my viewing.*

"Q. *And what is your opinion? Was it accidental or purposeful*?

"A. *My opinion is [that] it was an accidental disclosure.*

"Q. Why is that?

"A. Okay. *When I was reviewing the [DVD] of [the complainant], it was my understanding that she had not wanted to tell someone in a position of authority, a parent, parental figure, what was happening.* She had shared it with some girlfriends in confidence, and

they said they wouldn't say anything, which we all know teenagers do . . . . It was my opinion, as I said before, that *it was my understanding that* [*the complainant*] *did not intend to tell, make a purposeful disclosure*, and so she shared it with some friends and it came out by accident." (Emphasis added.)

In the next challenged colloquy, pertaining to the concept of delayed disclosure, Melillo began by explaining that the concept generally reflects the fact that it is "more typical" for child sexual abuse victims, out of shame or fear, "not to share it with somebody who can intervene," particularly when the abuser is a family member or someone close to them.[17] The prosecutor then asked Melillo: "[I]n this particular case, upon reviewing the documentation, as well as the DVD, what is your opinion with respect to whether or not [the complainant] engaged in this process that you're talking about, delaying her disclosure? . . . . *Again, what is your opinion with respect to* [*the complainant's*] *disclosure here? Did she fit the characteristics of a delayed disclosure*?" (Emphasis added.) Melillo responded, "*My opinion is* [*that*] *she did fit the characteristics of a delayed disclosure*." (Emphasis added.)

Next, Melillo testified that her training and experience, and the literature in the field, indicated that "it is very possible" for a child to continue to show signs of respect toward the abuser after the abuse has occurred, which was consistent with the concept of delayed disclosure.[18] The prosecutor then asked Melillo: "[D]id you see any evidence of that in your review of the documentation and, or, the DVD?" After the trial court overruled the defendant's objection to this question, Melillo testified that, "*as I viewed the videotape, again . . . I saw her talk about how she, you know, was raised to be polite and respectful and wasn't going to change that behavior . . . in a situation like that.*" (Emphasis added.)

The final opinion at issue concerns Melillo's testimony that female sexual abuse victims would, as a coping mechanism in an attempt to exert control, make themselves look unattractive to their abusers.[19] Over the defendant's objection, Melillo then answered in the affirmative to the prosecutor's question: "*Did you note* [*the complainant's*] *examples of that in the documentation or the DVD*?" (Emphasis added.)

We now turn to the applicable background principles as reflected in § 7-3 of the Connecticut Code of Evidence.[20] "The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . The trial court has wide discretion in ruling on the qualification of expert witnesses and the admissibility of their opinions. . . . The court's decision is not to be disturbed unless [its] discretion has been abused, or the error is clear and involves a misconception of the law. . . . Generally, expert tes-

timony is admissible if (1) the witness has a special skill or knowledge directly applicable to a matter in issue, (2) that skill or knowledge is not common to the average person, and (3) the testimony would be helpful to the court or jury in considering the issues. . . .

"The 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. . . . Expert witnesses cannot be permitted to invade the province of the jury by testifying as to the credibility of a particular witness or the truthfulness of a particular witness' claims. . . . An expert witness ordinarily may not express an opinion on an ultimate issue of fact, which must be decided by the trier of fact. . . . Experts can [however] sometimes give an opinion on an ultimate issue where the trier, in order to make intelligent findings, needs expert assistance on the precise question on which it must pass." (Citations omitted; internal quotation marks omitted.) *State* v. *Iban C.*, supra, 275 Conn. 634–35. "[A]n ultimate issue [is] one that cannot reasonably be separated from the essence of the matter to be decided [by the trier of fact]." (Internal quotation marks omitted.) *State* v. *Beavers*, 290 Conn. 386, 415, 963 A.2d 956 (2009). In a sexual assault case wherein the subject of the perpetrator's identity is not a matter of dispute, and the defense focuses on the credibility of the complainant, "the ultimate issue . . . [is] whether the [complainant] had been sexually abused"; *State* v. *Iban C.*, supra, 638 n.10; and expert testimony vouching for the complainant's credibility is "not helpful to the jury in deciding [that] precise question . . . ." Id., 637.

Connecticut's leading case on this topic is *State* v. *Spigarolo*, supra, 210 Conn. 359, wherein this court concluded that, "where defense counsel has sought to impeach the credibility of a complaining minor witness in a sexual abuse case, based on inconsistency, incompleteness or recantation of the victim's disclosures pertaining to the alleged incidents, *the state may offer expert testimony that seeks to demonstrate or explain in general terms the behavioral characteristics of child abuse victims in disclosing alleged incidents*."[21] (Emphasis added.) Id., 380. Such "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. . . . Consequently, expert testimony that minor victims typically fail to provide complete or consistent disclosures of the alleged sexual abuse is of valuable assistance to the trier in assessing the minor victim's credibility." (Citations omitted.) Id., 378. In upholding the admission of direct examination expert testimony by a hospital clinical social worker "that it is not unusual for alleged [child sexual] abuse victims to give apparently inconsistent stories";[22] id., 376; the

court in *Spigarolo* rejected the defendant's argument that such testimony " 'usurped' the jury's function of assessing the credibility of witnesses," emphasizing that the expert "was not asked about the credibility of the particular victims in this case, nor did she testify as to their credibility. The cases that have considered this issue have noted the critical distinction between admissible expert testimony on general or typical behavior patterns of minor victims and inadmissible testimony directly concerning the particular victim's credibility." Id., 378–79.

Our cases following *Spigarolo* continue to recognize the value of generalized expert testimony to explain to the jury what might seem to the layperson to be atypical behavior exhibited by victims of various kinds of assaults, so long as that opinion testimony does not directly vouch for their credibility or veracity. See *State* v. *Ali*, 233 Conn. 403, 431–33, 660 A.2d 337 (1995) (rape trauma syndrome and adult sexual assault victims); *State* v. *Freeney*, supra, 228 Conn. 589–93 (common behaviors of adult sexual assault victims with respect to reporting and recall of events); *State* v. *Borrelli*, supra, 227 Conn. 168–69 (battered woman's syndrome to explain recanting and returns to relationship).

Subsequent case law has, however, emphasized the danger of an expert witness, particularly one who has treated or evaluated a complainant, vouching *indirectly* for that complainant's credibility as well. In *State* v. *Grenier*, supra, 257 Conn. 805–806, we concluded that the trial court had improperly admitted testimony from a clinical psychologist stating that she had treated the then six year old victim "for the trauma of the abuse that [she] experienced," reasoning that it constituted "an indirect assertion that validated the truthfulness of [the victim's] testimony." (Internal quotation marks omitted.) Following *State* v. *Ali*, supra, 233 Conn. 432, *State* v. *Freeney*, supra, 228 Conn. 592, and *State* v. *Borrelli*, supra, 227 Conn. 173–74, we determined that this indirect assertion ran afoul of the rule that an "expert may not testify regarding the credibility of a particular victim" because, although it "was not a literal statement of her belief in [the victim's] truthfulness, such testimony had the same substantive import and could be perceived as a conclusive opinion that [the victim] had testified truthfully."[23] (Internal quotation marks omitted.) *State* v. *Grenier*, supra, 806.

Similarly, in *State* v. *Iban C.*, supra, 275 Conn. 627–29, our most recent decision addressing this point comprehensively, the five year old victim had alleged that the defendant had fondled and kissed her inappropriately on two occasions; a physical examination revealed no injury. The victim subsequently was examined by a pediatrician, who included both in her written report, admitted into evidence at trial, and in her trial testimony a "diagnosis of '[c]hild [s]exual [a]buse' based both on her

physical examination and the victim's history developed by the investigation team."[24] Id., 629. Following, inter alia, *State* v. *Grenier*, supra, 257 Conn. 806, we concluded that "the trial court abused its discretion by admitting into evidence [the pediatrician's] diagnosis of '[c]hild [s]exual [a]buse' via her unredacted written report and her direct testimony. First, because [the pediatrician] did not find any physical evidence of a sexual assault, in order for the jury to find the defendant guilty . . . it had to find the victim's account of both . . . incidents to be credible. In short, the victim's credibility was central to the state's case. Indeed, by [the pediatrician's] own admission, her diagnosis depended on a belief in this same credibility because her ultimate assessment was based almost entirely on the history provided by the victim and the victim's mother to the investigation team. [The pediatrician's] diagnosis of child sexual abuse, therefore, necessarily endorsed the victim's credibility, and functioned as an opinion as to whether the victim's claims were truthful." *State* v. *Iban C.*, supra, 636; see id., 637 ("in the present case [the 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 victim's testimony"). Further, we noted that this evidence "was not helpful to the jury in deciding the precise question on which it had to pass"; id., 637; and distinguished *Iban C.* from cases upholding the admission of testimony to the effect that a lack of physical injury is consistent with allegations of sexual assault, noting that those cases did not implicate specific and definitive diagnoses. See id., 638–39.

The facts of the present case present a delicate middle ground between the generalized behavioral testimony held admissible in *Spigarolo* and the more pointed diagnoses held inadmissible in *Grenier* and *Iban C.* Inasmuch as this is an issue of first impression for this court,[25] we turn for guidance to cases from the federal courts and our sister states, which are divided with respect to the admissibility of expert testimony that compares or links observations of the complainant to the behaviors of sexual assault victims generally. Our research indicates that a persuasive minority[26] of eleven states specifically preclude or have disapproved of the admission of such evidence,[27] including our immediate neighbor to the north. In *Commonwealth* v. *Trowbridge*, 419 Mass. 750, 647 N.E.2d 413 (1995), which, like this case, involved allegations of sexual abuse without evidence of physical injury, and thus rested entirely on the credibility of the victim; see id., 752–53; a pediatric gynecologist who had examined the victim also testified as an expert witness, first "outlining the behavioral characteristics of sexually abused children. She then described the child's behavior during a gynecological visit. The [physician] testified that the child clung to

her mother and avoided eye contact. When asked whether this behavior was consistent with that of a sexually abused child, the [physician] agreed that it was 'a common reaction to a child who has been sexually abused.' " Id., 758–59. The Massachusetts Supreme Judicial Court concluded that the expert's testimony was improper because "[a]lthough expert testimony on the general behavioral characteristics of sexually abused children is permissible, an expert may not refer or compare the child to those general characteristics. . . . Such testimony impermissibly intrudes on the jury's province to assess the credibility of the witness." (Citation omitted.) Id., 759; see id., 760 ("Although the [physician's] opinion fell short of rendering an opinion on the credibility of the child witness, this testimony came impermissibly close to an endorsement of the child's credibility. Such testimony could substantially influence the jury's decision about whom to believe." [Internal quotation marks omitted.]); see also *Commonwealth* v. *Federico*, 425 Mass. 844, 849 n.9, 683 N.E.2d 1035 (1997) ("unrealistic to allow [comparative] expert testimony and then expect jurors to ignore it when evaluating the credibility of the complaining child" [internal quotation marks omitted]); *Commonwealth* v. *Brouillard*, supra, 40 Mass. App. 452 (The court concluded that the expert witness "far exceeded permissible testimonial boundaries. He explicitly connected the complainants to general syndromes associated with sexual abuse, thereby impermissibly vouching for the complainants and invading the jury's province of assessing witness credibility."). As the Massachusetts Appeals Court has noted: "It is one thing to educate the jury to understand that child abuse victims may act in counterintuitive ways, and that excessive weight should not be given to factors such as failure to disclose when the child victim's credibility is weighed. . . . It is quite another to suggest to the jury that the events and feelings expressed by the child witnesses are the same as those experienced by other victims of abuse. That this has the effect of buttressing the witnesses' credibility seems impossible to deny."[28] (Citations omitted.) *Commonwealth* v. *Deloney*, 59 Mass. App. 47, 59, 794 N.E.2d 613, review denied, 440 Mass. 1105, 798 N.E.2d 286 (2003).

Similarly, in applying this court's decision in *State* v. *Spigarolo*, supra, 210 Conn. 359, the Vermont Supreme Court emphasized in dicta that the "conduct of a child who has been sexually abused, and the emotional antecedents underlying this conduct, can be effectively explained to the jury through testimony relating to the class of victims in general. . . . *Expert testimony concerning the particular complainant must be approached with caution, as it too often slips into impermissible comment on the complainant's credibility.*"[29] (Citations omitted; emphasis added.) *State* v. *Sims*, 158 Vt. 173, 181, 608 A.2d 1149 (1991). Indeed,

even the Michigan Supreme Court, which, as a balancing measure *permits* for rehabilitation purposes the admission of expert testimony linking general behavioral characteristics of sexual assault victims to particular complainants, nevertheless acknowledges that such testimony "comes too close to testifying that the particular child is a victim of sexual abuse." *People* v. *Peterson*, 450 Mich. 349, 374–75, 537 N.W.2d 857, amended on other grounds, 450 Mich. 1212, 548 N.W.2d 625 (1995). The Michigan court further recognizes that the risk of experts vouching for the complainants' credibility in child sexual assault cases is heightened by "the nature of the offense and the terrible consequences of a miscalculation" given that, "[t]o a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat."[30] (Internal quotation marks omitted.) Id., 374, quoting *People* v. *Beckley*, 434 Mich. 691, 721–22, 465 N.W.2d 391 (1990).

Other courts have aptly observed that testimony linking a specific complainant to the general behavioral characteristics of sexual assault victims poses the risk of the jury improperly using those behaviors offensively as substantive proof that the complainant was sexually assaulted, rather than properly to respond defensively to impeachment by explaining behaviors that might otherwise impact her credibility, as we contemplated in *State* v. *Spigarolo*, supra, 210 Conn. 379–80. As noted by the Indiana Supreme Court, "[w]here a jury is confronted with evidence of an alleged child victim's behaviors, paired with expert testimony concerning similar syndrome behaviors, the invited inference—that the child was sexually abused because he or she fits the syndrome profile—will be as potentially misleading and equally as unreliable as expert testimony applying the syndrome to the facts of the case and stating outright the conclusion that a given child was abused."[31] *Steward* v. *State*, 652 N.E.2d 490, 499 (Ind. 1995); see *Haakanson* v. *State*, 760 P.2d 1030, 1036 (Alaska App. 1988) (Decisions of the Alaska Court of Appeals have "permit[ted] expert testimony that responds to a defense claim that a complaining witness' conduct is inconsistent with being sexually abused by showing that similar conduct is exhibited by those who are sexually abused. These decisions do not permit testimony offered to prove that the complaining witness is sexually abused by showing that the complaining witness exhibits behavior similar to that exhibited by sexually abused children."); *People* v. *Roscoe*, 168 Cal. App. 3d 1093, 1100, 215 Cal. Rptr. 45 (1985) ("the expert testimony . . . to permit rehabilitation of a complainant's credibility is limited to discussion of victims as a class, supported by references to literature and experience [such as an expert normally relies upon] and does not extend to discussion and diagnosis of the witness in the case at hand"); *State* v.

Sargent, 148 N.H. 571, 576, 813 A.2d 402 (2002) (after attack on complainant's credibility, "expert testimony on the general characteristics or tendencies of abused children or other abuse victims [is] admissible, while testimony about specific details based upon the individual facts or psychological analysis of any victim is not"); *State* v. *W.B.*, 205 N.J. 588, 611, 17 A.3d 187 (2011) (The New Jersey Supreme Court concluded that testimony regarding child sexual abuse accommodation syndrome "cannot be used as probative testimony of the existence of sexual abuse in a particular case. . . . Therefore, introduction of such testimony will be upheld so long as the expert does not attempt to 'connect the dots' between the particular child's behavior and the syndrome, or opine whether the particular child was abused." [Citation omitted.]); *People* v. *Mercado*, 188 App. Div. 2d 941, 942–43, 592 N.Y.S.2d 75 (1992) (social worker's testimony that " 'show[ed] the manifestations of sexual abuse that the youngsters exhibit' " was "impermissible" because it went "beyond merely serving to explain what would otherwise be viewed by the jury as evidence tending to exculpate the person charged, such as a failure to timely report either the abuse or the name of the family member who was the abuser, and constitutes an impermissible comparison of the complainants' behavior with that commonly associated with victims of these crimes").[32]

Finally, courts have observed that expert testimony linking the specific complainants to the generalized behaviors is simply unnecessary "[o]nce the jury has learned the victim's behavior from the evidence and has heard experts explain why sexual abuse may cause delayed reporting, inconsistency, or recantation," meaning that the jury does not "[need] an expert to explain that the victim's behavior is consistent or inconsistent with the crime having occurred."[33] *State* v. *Moran*, 151 Ariz. 378, 385, 728 P.2d 248 (1986); see *State* v. *Batangan*, 71 Haw. 552, 558, 799 P.2d 48 (1990) (following *Moran* because "jury is fully capable, on its own, of making the connections to the facts of the particular case before them and drawing inferences and conclusions therefrom"); *People* v. *Beckley*, supra, 434 Mich. 748 (Archer, J., dissenting) ("Once an expert witness presents evidence disabusing the specific misconception at hand, such as delayed disclosure, syndrome evidence has served its proper function. This function can be accomplished just as effectively without reference to the complainant before the court.").[34]

Citing our decision in *State* v. *Iban C.*, supra, 275 Conn. 635, and dicta from the Appellate Court's decision in *State* v. *Butler*, supra, 36 Conn. App. 525, the state argues, however, that expert testimony that a specific complainant has exhibited certain behaviors that are characteristic of sexual assault victims in general is admissible under Connecticut law. We begin with the relevant language from *Iban C.*, namely: "[W]e have

found expert testimony stating that a victim's behavior was generally *consistent with* that of a victim of sexual or physical abuse to be admissible, and have distinguished such statements from expert testimony providing an opinion as to whether a particular victim had *in fact* suffered sexual abuse. See *State* v. *Freeney*, supra, 228 Conn. 592–93 (court admitted expert testimony regarding consistency of victim's behavior stating that 'neither expert gave an opinion as to whether this particular victim had . . . in fact suffered physical or sexual abuse')." (Emphasis in original.) *State* v. *Iban C.*, supra, 635; see also id., 636 (The court concluded that the pediatrician's report and testimony were improperly admitted because, inter alia, they "were not limited to the conclusion that the physical evidence and the victim's behavior were consistent with that of other victims of sexual abuse. Rather, they provided the jury with an opinion that the victim had suffered sexual abuse in the present case."). This passage from *Iban C.* is not dispositive of this appeal because it was dicta. First, *Iban C.* required us to consider only the distinct issue of the admissibility of a behaviorally based diagnosis of "[c]hild [s]exual [a]buse," rather than the more nuanced testimony at issue in this appeal, which stops short of an actual diagnosis or conclusion and instead states that a complainant's behavior was consistent with that of a sexual abuse victim. See id., 632–33. Thus, the legal and policy considerations that we consider in this appeal simply were not before us in that case.

Second, *Iban C.*'s reliance on *State* v. *Freeney*, supra, 228 Conn. 592–93, in support of the proposition that an expert may link a specific complainant's behavior to identified general characteristics of sexual assault victims, is overbroad. Although *Freeney*, which involved an adult sexual assault and kidnapping victim, did consider the admissibility of behavioral testimony that was at least partially comparative in nature as a factual matter,[35] the comparative nature of the testimony was not directly at issue therein, as *Freeney* considered only the broader topic of general behaviors of adult assault victims. See id. Thus, we conclude that this language in *Iban C.* is dicta and does not represent a holding of this court that is dispositive precedent with respect to this appeal.[36]

The state accurately notes that, in *State* v. *Butler*, supra, 36 Conn. App. 525, the Appellate Court, in providing guidance with respect to issues likely to arise at a new trial,[37] rejected the defendant's claim that the trial court improperly allowed a child psychologist "to testify to consistencies in the behavior of the victim with sexually abused children in general"[38] because that "testimony interfered with the jury's duty to assess the credibility of the victim and went to an ultimate issue of fact to be determined by the jury." Id., 536–37. Relying on *State* v. *Freeney*, supra, 228 Conn. 592, as standing for the proposition that "our Supreme Court upheld the

admission of expert testimony that the victim's behavior was consistent with that of victims of sexual assault," the Appellate Court concluded that a child psychologist properly had testified that "the victim exhibited three responses that were typical of victims of sexual abuse . . . ." *State* v. *Butler*, supra, 537. In our view, the Appellate Court's reliance in *Butler* on *Freeney* suffers from the same flaw as our discussion of *Freeney* in *State* v. *Iban C.*, supra, 275 Conn. 635. *Butler* also preceded, and therefore does not reflect, the import of *State* v. *Grenier*, supra, 257 Conn. 806, holding inadmissible even "indirect assertions" vis-á-vis the truthfulness of the victim's testimony.

Reconciling the well reasoned sister state decisions with our own case law, we conclude that our concerns about indirect vouching expressed in *State* v. *Grenier*, supra, 257 Conn. 806, and *State* v. *Iban C.*, supra, 275 Conn. 635–36, require us to limit expert testimony about the behavioral characteristics of child sexual assault victims admitted under *State* v. *Spigarolo*, supra, 210 Conn. 378–80, to that which is stated in general or hypothetical terms, and to preclude opinion testimony about whether the specific complainant has exhibited such behaviors.[39] Consistent with the syllogism noted by the Appellate Court; see *State* v. *Favoccia*, supra, 119 Conn. App. 19 n.9;[40] "there is no material distinction between express testimony that the child has been sexually abused, and implicit testimony that outlines the unreliable behavioral reactions found with sexually abused victims, followed by a list of the complainant's own behavioral reactions, that points out that the two are consistent, and then invites the jury to add up the points to conclude that the child has been sexually abused." *People* v. *Peterson*, supra, 450 Mich. 386 (Cavanagh, J., dissenting); accord *Steward* v. *State*, supra, 652 N.E.2d 499. Generalized testimony is sufficient to provide the jury with the valuable knowledge, which it is unlikely to have otherwise, specifically that "minor victims typically fail to provide complete or consistent disclosures of the alleged sexual abuse . . . ." *State* v. *Spigarolo*, supra, 377–78. Tellingly, neither the state nor Justice Zarella in his dissenting opinion articulates any practical reasons in support of why expert testimony tailored to the specific complainant is necessary to dispel myths or mistaken beliefs about how sexual assault victims are "supposed to act,"[41] and we cannot conceive of any. Thus, we agree with those authorities observing that more specific testimony yields returns that increase in prejudice to the defendant as they diminish in value with respect to the edification of the jury as to behaviors that might affect the complainant's credibility. See, e.g., *State* v. *Moran*, supra, 151 Ariz. 385; *Commonwealth* v. *Trowbridge*, supra, 419 Mass. 759–60. Accordingly, we overrule the dicta in the Appellate Court's decision in *State* v. *Butler*, supra, 36 Conn. App. 537, to the contrary,[42] and conclude that, although an expert witness

may testify generally about the behavioral characteristics of child sexual assault victims, an expert witness may not opine about whether the specific complainant has exhibited such behaviors.

Having reviewed the four challenged opinions in this case, we agree with the Appellate Court that, with respect to each, "[w]hen Melillo went beyond a general discussion of characteristics of sexual abuse victims and offered opinions, based on her review of the videotaped forensic interview and other documentation, as to whether this particular [complainant] in fact exhibited the specified behaviors, her testimony crossed the line of permissible expert opinion." *State* v. *Favoccia*, supra, 119 Conn. App. 23. In each of the four challenged opinions, Melillo identified a behavior characteristic of a sexual assault victim, including the nature of her disclosure, remaining polite and respectful toward her abuser, and making herself unattractive as a coping mechanism, and then opined specifically, based on her viewing of the DVD, that the complainant had exhibited such behaviors. This testimony created a significant risk that the jury would consider Melillo's testimony as an imprimatur on the complainant's allegations, particularly because her testimony was based directly on observations of the complainant's videotaped interview, which renders this case distinct from those wherein the expert disclaims any familiarity with the specific facts of the case or testifies only in terms of generalities or hypotheticals, such as *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), and *State* v. *R.K.C.*, 113 Conn. App. 597, 605, 967 A.2d 115, cert. denied, 292 Conn. 902, 971 A.2d 689 (2009).[43]

Moreover, we agree with the Appellate Court that the offered opinions were "improper in that they were not beyond the ken of the average juror." *State* v. *Favoccia*, supra, 119 Conn. App. 24. "When inferences or conclusions are so obvious that they could be as easily drawn by the jury as the expert from the evidence, expert testimony regarding such inferences is inadmissible." *State* v. *Iban C.*, supra, 275 Conn. 639. The comparative portions of Melillo's testimony, which essentially told the jury how to interpret the behaviors of the complainant as evinced in the videotaped interview, did not tell the jury anything that they could not observe by watching or listening to the complainant after considering Melillo's more generalized testimony, thus becoming "an indirect assertion on the [complainant's] credibility, which Connecticut law forbids." *State* v. *Favoccia*, supra, 26. Accordingly, we agree with the Appellate Court that the trial court abused its discretion in permitting Melillo to testify about the complainant's behaviors being consistent with those generally characteristic of sexual assault victims. See id., 25–26.

II

Reversal of the defendant's conviction is not required, however, unless the defendant demonstrates that the improperly admitted expert opinion testimony was harmful error. See, e.g., *State* v. *Beavers*, supra, 290 Conn. 419. The state contends that the improper admission of Melillo's testimony was harmless error because the complainant's testimony and her videotaped interview were sufficient evidence to support her allegations, and: (1) the defendant had the opportunity to impeach Melillo through an extensive cross-examination, during which she conceded that she could not determine whether the complainant had in fact been sexually abused; (2) the defendant assailed the complainant's credibility through an extensive cross-examination, as well as through the testimony of R, the complainant's father, and M, who is R's long-term girlfriend and is employed as a psychiatric nurse; (3) the trial court instructed the jury that it was not bound by Melillo's opinions; and (4) the fact that the jury deadlocked on the charge of sexual assault in the second degree indicates that it was not swayed by the improper portions of Melillo's testimony. The state also posits that the evidentiary impropriety in this case was not as egregious as that in *State* v. *Iban C.*, supra, 275 Conn. 635, because it was not a conclusion or diagnosis of sexual abuse.

In response, the defendant follows the Appellate Court's analysis in this case; see *State* v. *Favoccia*, supra, 119 Conn. App. 26–27; and relies on *State* v. *Grenier*, supra, 257 Conn. 811–12, in support of his contention that Melillo's expert testimony substantially swayed the verdict. The defendant emphasizes that: (1) Melillo refused to concede on cross-examination that the behaviors at issue might also be consistent with a finding of no abuse at all; (2) the curative instruction by itself could not cure the prejudice; (3) under *State* v. *Angel T.*, supra, 292 Conn. 294, the report of jury deadlock indicated that the jury did not view the prosecution's case as particularly strong; and (4) for bolstering purposes, there is no meaningful distinction under Connecticut law between direct and indirect vouching. We agree with the defendant and conclude that we do not have a fair assurance that the improper expert testimony did not substantially sway the jury's verdict in this case.

"When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [the improper admission of a witness' testimony] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination

otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the [improperly admitted] evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Citations omitted; internal quotation marks omitted.) *State* v. *Beavers*, supra, 290 Conn. 419, quoting *State* v. *Sawyer*, supra, 279 Conn. 352, 357–58.

Having reviewed the record in this case, we do not have the requisite "fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Beavers*, supra, 290 Conn. 419. We first note that the importance of Melillo's testimony, and the improprieties attendant thereto, cannot be assessed without reference to the overall strength and nature of the prosecution's case—a most significant factor not addressed by Justice Palmer in the harm analysis in his dissenting opinion. It is undisputed that this sexual assault case, which lacked physical evidence, turned entirely on the credibility of the complainant. We repeatedly have described such cases as, although "not automatically . . . weak," also "not particularly strong . . . ." (Internal quotation marks omitted.) *State* v. *Sawyer*, supra, 279 Conn. 358–59; compare, e.g., *State* v. *Grenier*, supra, 257 Conn. 807–808 (case with no physical evidence that relied entirely on child complainant's testimony, supported by constancy testimony and expert witnesses was "not particularly strong" for state) with *State* v. *Beavers*, supra, 418–20 (improper expert testimony that fire was intentionally set, which was based on "assessment of the defendant's credibility," was harmless because of "enormity of the circumstantial evidence against the defendant, namely, the evidence of his motive, his opportunity, his knowledge that the fire started in the basement, his possession of fire starting supplies on the morning of the fire, his intent as shown through his prior bad acts, and the uncontroverted and properly admitted expert evidence that refuted his attempt to blame the fire on [his son's] smoking"), and *State* v. *Iban C.*, supra, 275 Conn. 641–45 (improper expert bolstering was harmful as to one count of risk of injury to child wherein "state's case rested almost entirely on the victim's credibility" with no physical or medical evidence, but harmless with respect to second count of risk of injury to child, to which defendant had confessed).

Given the nature of the evidence against him, it is not surprising, then, that the defendant made concerted efforts at trial to discredit the complainant's veracity in conjunction with a defense theory that the allegations were a fabrication by S arising from a contemporaneous

bitter custody and visitation dispute with R, intended to disrupt the complainant's scheduled weekend visitation with R. To this end, the defendant battered the teenage complainant's veracity with evidence that would give any reasonable juror pause—including testimony by R, *the teenage complainant's own father*, that he "did not know whether to believe" her allegations against the defendant. Indeed, R's testimony went beyond what he deemed to be the complainant's untruthful nature generally, and, corroborated by M,[44] he testified in detail that her allegations could not be true because: (1) contrary to her trial testimony, she never visited his home without her sister present; (2) the defendant had never once slept over at R's home in 2005 or 2006; and (3) the defendant had never slept there at the same time as the complainant. The complainant's credibility underwent further attack as R contradicted the feasibility of her testimony with respect to the events surrounding her disclosure, which was precipitated by S overhearing J remarking about how the defendant had peered down the complainant's shirt while at a marching band field show; R testified that the complainant's shirt at that event would have been the neck-high color guard uniform of the PAL Buccaneers Drum & Bugle Corps (Buccaneers).[45]

Thus, given the import of the complainant's credibility and the defendant's substantial attacks upon it, Melillo's testimony, the substance of which was unshaken on cross-examination,[46] became extremely significant to the state's otherwise "not particularly strong" case, particularly insofar as it had the effect of bolstering the complainant's credibility by explaining behaviors that she exhibited, some of which might otherwise be viewed by laypersons as belying the truth of her accusations—a matter of critical importance given the age and heavily impugned veracity of the teenage complainant in this case when viewed in comparison to the very young complainants in *Grenier* and *Iban C.*[47] See *State* v. *Grenier*, supra, 257 Conn. 808 (concluding that expert testimony that had effect of improperly vouching for victim "struck at the heart of the central—indeed, the only—issue in the case, namely, the relative credibility of [the victim] and the defendant"); see also *State* v. *Ritrovato*, 280 Conn. 36, 57–58, 905 A.2d 1079 (2006) (The court concluded that improperly excluded evidence with respect to the victim's prior sexual conduct was harmful error because "there was no independent physical evidence of the assault and no other witnesses to corroborate [her] testimony, [such that] her credibility was crucial to successful prosecution of the case. As a result, any evidence suggesting that [the victim] might not have been truthful was extremely significant."). Indeed, several times in his rebuttal summation, the prosecutor relied on Melillo's testimony juxtaposed with the video of the interview with the complainant, using her explanation of the "behavior characteristics

of children who claim to be sexually abused" to put in context how people react differently to situations, as well as to explain the complainant's seemingly odd behavior of continuing to treat her assailant respectfully.[48] See, e.g., *State* v. *Osimanti*, 299 Conn. 1, 20–21, 6 A.3d 790 (2010) (reviewing summations to discern significant factual issues in case and import thereto of trial court's restriction of testimony about victim's acts of domestic violence).

With respect to the import of the improperly admitted evidence on the trier of fact, and the result of the trial, it is highly significant that, after reporting a deadlock and receiving a "Chip Smith" charge, the jury subsequently was unable to reach a verdict on the charge of sexual assault in the second degree, but found the defendant guilty of two counts of risk of injury. That circumstance alone indicates that the case was a close one in the eyes of the jury, making it more likely that the improper evidence might have tipped the balance.[49] See *State* v. *Angel T.*, supra, 292 Conn. 294 (concluding that split verdict, rendered after report of deadlock "suggests that the jury had doubts concerning the victim's credibility as a general matter, as it failed to credit her testimony about the defendant's earlier attempts to molest"); see also *State* v. *David N.J.*, 301 Conn. 122, 154, 19 A.3d 646 (2011) (noting that in "the absence of reports of deadlock, which did not occur in this case, our cases have relied on split verdicts as evidence that a jury was not so prejudiced by prosecutorial impropriety that it could not treat the defendant fairly" [internal quotation marks omitted]).

Moreover, the state's argument that the split in the verdict, failing to reach a verdict on the second degree sexual assault charge alleging penetration, indicates that Melillo's testimony did not substantially sway the verdict by bolstering the complainant's credibility is belied by *State* v. *Iban C.*, supra, 275 Conn. 644–45, wherein we rejected a similar argument, concluding that "merely because the jury did not find, beyond a reasonable doubt, that the defendant had penetrated the victim's vagina as part of the two sexual assaults, does not establish that the jury failed to be influenced by [the pediatrician's] diagnosis of '[c]hild [s]exual [a]buse' in reaching guilty verdicts on the risk of injury counts. At a minimum, [the pediatrician's] diagnosis endorsed and provided credibility to the victim's claim that some type of inappropriate contact had taken place between the victim and the defendant in the bathroom and bedroom of his home." The import of Melillo's testimony, to the extent that it improperly vouched for the complainant's testimony, is identical in this case wherein the verdict indicates that the jury had to have credited the complainant's testimony that the defendant had engaged in some sexual conduct—albeit falling short of penetration—with her.

Finally, we disagree with the state's argument that the trial court's instructions to the jury had the effect of mitigating the harm from the improper portions of Melillo's testimony. This is because the trial court's instructions to the jury that it was not bound by Melillo's opinions were given in the context of the omnibus charge at the end of the trial,[50] rather than contemporaneously and specifically to guide the jurors' consideration of her testimony.[51] Our harmless error case law, while acknowledging the value of curative instructions and presuming that jurors follow them; see, e.g., *State* v. *Cutler*, 293 Conn. 303, 314, 977 A.2d 209 (2009); also emphasizes that such instructions are far more effective in mitigating the harm of potentially improper evidence when delivered contemporaneously with the admission of that evidence, and addressed specifically thereto. See *State* v. *Iban C.*, supra, 275 Conn. 643–44 (curative instructions insufficient to address harm caused by improper admission of "sexual abuse" diagnosis when not given "immediately following the admission of the written report and the improper testimony," at which time jury also heard court "[overrule] the defendant's objection to the admission of the unredacted written report into evidence," and instruction at close of evidence "simply permitted the jury to accept or reject [the pediatrician's] opinion and did not instruct the jury to disregard her diagnosis of '[c]hild [s]exual [a]buse' "); *State* v. *Grenier*, supra, 257 Conn. 810 ("the jurors not only heard the highly damaging testimony, but also had no reason to believe that it was improper until after the close of evidence and closing arguments of counsel"). We, therefore, lack the requisite fair assurance that the admission of the improper aspects of Melillo's testimony did not substantially sway the jury's verdict in this "credibility contest characterized by equivocal evidence," which is "a category of cases that [we have acknowledged] is far more prone to harmful error." *State* v. *Beavers*, supra, 290 Conn. 420. Accordingly, we conclude that the Appellate Court properly ordered a new trial in this case.[52]

The judgment of the Appellate Court is affirmed.

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

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

** September 21, 2012, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] We granted the state's petition for certification to appeal limited to the following issue: "Did the Appellate Court properly determine that the trial court abused its discretion by admitting four statements of an expert into evidence and, if so, did the Appellate Court properly determine that the error in admitting those statements was harmful?" *State* v. *Favoccia*, 295 Conn. 909, 989 A.2d 604 (2010).

[2] General Statutes § 53-21 (a) provides in relevant part: "Any person who . . . (2) has contact with the intimate parts . . . of a child under the age of sixteen years or subjects a child under sixteen years of age to contact with the intimate parts of such person, in a sexual and indecent manner likely to impair the health or morals of such child . . . shall be guilty of

. . . a class B felony . . . .”

[3] In accordance with our policy of protecting the privacy interests of the victims of the crime of risk of injury to a child, we decline to identify the complainant or others through whom the complainant's identity may be ascertained. See General Statutes § 54-86e.

[4] General Statutes (Rev. to 2005) § 53a-71 (a) provides in relevant part: “A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than two years older than such person . . . .”

[5] General Statutes (Rev. to 2005) § 53a-73a (a) provides in relevant part: “A person is guilty of sexual assault in the fourth degree when: (1) Such person intentionally subjects another person to sexual contact who is (A) under fifteen years of age . . . .”

[6] We note that the charge of sexual assault in the second degree was founded on the complainant's claim, and subsequent testimony at trial, that the defendant had penetrated her vaginally during the incident that was alleged to have occurred in 2005.

[7] “The defendant's probation was subject to numerous special conditions, including registration as a sexual offender.” *State* v. *Favoccia*, supra, 119 Conn. App. 5 n.5.

[8] Before turning to the merits of the defendant's claims, the Appellate Court rejected the state's contention that they were not adequately preserved for appellate review. See *State* v. *Favoccia*, supra, 119 Conn. App. 14–17. The state does not renew its preservation arguments in this certified appeal.

[9] The Appellate Court rejected the state's reliance on the fact that the jury did not find the defendant guilty of sexual assault in the second degree, concluding that “merely because the jury did not find, beyond a reasonable doubt, that the defendant had penetrated the [complainant's] vagina as part of the two sexual assaults, does not establish that the jury failed to be influenced by [the improper expert opinion] in reaching guilty verdicts on the risk of injury counts.” (Internal quotation marks omitted.) *State* v. *Favoccia*, supra, 119 Conn. App. 29, quoting *State* v. *Iban C.*, supra, 275 Conn. 644–45.

[10] In describing the defendant's arguments, the Appellate Court stated: “Put another way, the defendant reasons that the prosecutor purposefully employed a syllogistic approach that began with a major premise—that sexual abuse victims exhibit a certain behavioral characteristic. He then proceeded to a minor premise, in which Melillo opined that she observed that characteristic in this particular [complainant]. Left unstated is the conclusion that the [complainant] in fact suffered sexual abuse.” *State* v. *Favoccia*, supra, 119 Conn. App. 19 n.9.

[11] Melillo is “a nationally certified school psychologist, which is the highest level of certification in the practice of school psychology.” She testified that she had practiced for her entire twenty-one year career at Masuk High School in Monroe, where she evaluated and counseled students in grades nine through twelve.

[12] As the Appellate Court noted, Melillo testified that she “had seven years of experience as a forensic interviewer, during which she has conducted ‘between 150 and 160 interviews . . . .’ ” *State* v. *Favoccia*, supra, 119 Conn. App. 6. She then “attested to her ample training as a forensic interviewer, which involved instruction with respect to behavioral characteristics of children who claimed to have been sexually abused. Her professional training included participation in the CornerHouse model in Minneapolis, Minnesota, the Beyond Finding Words program in Indianapolis, Indiana, and a related program in Huntsville, Alabama, as well as ‘various trainings’ in Connecticut.” Id., 6–7.

[13] Melillo explained that “a forensic interview ‘is a structured or semistructured interview process that is neutral, objective and fact-finding’ ” wherein the “ ‘child or adolescent, sit[s] down with an interviewer who is trained to ask nonleading questions to be able to report their experiences or abuse.’ ” *State* v. *Favoccia*, supra, 119 Conn. App. 6 n.6.

[14] “Vitulano's report was not offered into evidence at trial.” *State* v. *Favoccia*, supra, 119 Conn. App. 7 n.7.

[15] The state introduced the DVD of the forensic interview of the complainant into evidence, without objection, following the defendant's objection that Melillo's testimony was based on an exhibit that was not in evidence. Following Melillo's testimony, the jury viewed the video on that DVD as the concluding part of the state's case-in-chief.

[16] Melillo testified generally that the “term ‘disclosure’ . . . refers to a

child making a report, okay. Disclosure is the act of making a report to someone who can do something about it. . . . Typically . . . an adult who is in a position of authority who can intervene in some manner, who has the ability to intervene." She then explained that there are "accidental disclosures" and "purposeful disclosures." Melillo defined an "accidental disclosure [as] a situation where a child has decided never to talk about their experiences for various reasons, but, despite the efforts of that child to keep this . . . to themselves, it has come out by an accident, by a discovery process outside of themselves." She then defined a "purposeful disclosure" as occurring when "[t]he child has made a conscious decision to tell someone who can stop [the abuse] or do something about it." In response to a request by the prosecutor for an example of a purposeful disclosure, Melillo stated that, in her "experience interviewing kids, I find sometimes . . . an older child who has been a victim and is worried about the welfare of a younger sibling [will] say, I don't want this to happen to my sister and, therefore, I needed to come out and say something."

[17] Melillo elaborated further during her background testimony, observing that, "we talk about the word 'disclosure,' about it being a report or statement from . . . the child. Oftentimes, we believe that kids just automatically tell, but what we found is, it's just the opposite. They . . . either delay in reporting it or they never tell at all. So, the process of disclosure . . . is not one event. It's a process. And delayed disclosures are also found out, people report things that have happened in the past to them."

Melillo explained that "many factors" are involved with delayed disclosure, including "shame [and] embarrassment. We're asking kids to make public the most shameful types of experience regarding their genitalia or having to do something to somebody else. It is very shaming. Can you imagine the embarrassment of the child?

"Another factor is fear. They are fearful that they are not going to be believed. We socialize our kids that adults are authority figures and who is ever going to believe a kid over an adult's word. Typically, as to the subject of sexual abuse, they believe their word is not going to be heard, so they keep it to themselves.

"The other factor is the fear of the consequences of that. Kids can appraise what's going to happen, what are the ramifications . . . if this comes out. Am I going to get blamed? Am I going to get punished? Am I going to get, you know—the family is going to fall apart. There's an impact for them, the people they care about. You know . . . also sometimes [there are] threats that are made. You know, if you tell, this is what is going to happen. Sometimes threats are even implied. There are many factors that keep a child from not telling . . . what has happened to them . . . ."

Melillo then emphasized that, "if the abuser is known to the child or known to the child in some capacity, whether it be a family member or someone close to them, all the more that, again, they're not going to confront that adult in that situation."

[18] Melillo testified specifically that: "Oftentimes, if a child has made a decision not to tell anybody and wants to keep this within themselves, they have to cope somehow to maintain that, and if they either act differently than what they are typically doing or don't act in a certain way, that can bring, you know, some suspicion. So, if a person's conduct, a child's conduct, is typically respectful and polite to someone, if they should suddenly change, that might arouse suspicion and then being asked questions, sending a flag to somebody, saying, what's the matter, why aren't you nice to that person anymore. That is a coping method to accommodate keeping that inside them."

[19] Melillo testified: "There are many ways that a child or teen can cope. Typically, if a child feels kind of powerless and trapped, they might—particularly with some of the females that I work with at the high school level, have told me, I really just made myself look unattractive." Melillo explained further that "one of the things they can control is how they present themselves, their appearance. So, oftentimes, they might try to make themselves look unattractive, hoping that would turn somebody away. Yes, that is a coping mechanism. That is the way of accommodating something, to be able to control a situation that they really can't control. Similar to what I have said before about changing or not changing a certain behavior to try to cope and survive in a situation."

[20] Section 7-3 of the Connecticut Code of Evidence provides: "Opinion on Ultimate Issue

"(a) General rule. Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that,

other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue.

"(b) Mental state or condition of defendant in a criminal case. 'No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto, except that such expert witness may state his diagnosis of the mental state or condition of the defendant. The ultimate issue as to whether the defendant was criminally responsible for the crime charged is a matter for the trier of fact alone.' General Statutes § 54-86i."

[21] The state need not wait until its rebuttal case to introduce the type of evidence regarding the general behavioral characteristics of minor sexual assault victims that was recognized in *Spigarolo*; it may do so in its case-in-chief "once the victim has testified and there has been testimony introducing the alleged dates of abuse and reporting." *State* v. *Cardany*, 35 Conn. App. 728, 731, 646 A.2d 291, cert. denied, 231 Conn. 942, 653 A.2d 823 (1994).

[22] The court noted that the defendant had attempted to impeach the testimony of the victims by questioning them on cross-examination about the inconsistencies and omissions in their various disclosures of abuse to the police and other parties investigating the allegations. See *State* v. *Spigarolo*, supra, 210 Conn. 377.

[23] We also concluded in *State* v. *Grenier*, supra, 257 Conn. 805–806, that separate testimony by a child counselor, who had interviewed the victim, that she found " 'very credible' " the victim's allegations of sexual abuse constituted an improper "direct assertion that validated the truthfulness of [the victim's] testimony." (Internal quotation marks omitted.)

[24] Specifically, the pediatrician testified on direct examination that because genital injuries heal quickly, "the majority of the examinations of children who have been sexually abused yield normal results"; *State* v. *Iban C.*, supra, 275 Conn. 632; and then "acknowledged [on cross-examination] that such a result was also consistent with a child who had not been sexually abused." Id., 632–33.

[25] See, however, our discussion of *State* v. *Iban C.*, supra, 275 Conn. 635–37, in the text accompanying footnotes 35 and 36 of this opinion. Cf. *State* v. *Borrelli*, supra, 227 Conn. 173–74; id., 173 n.16 ("By noting that [the expert] did not testify that the victim was a battered spouse, we do not imply that such testimony would have implicitly commented on her credibility. Rather, in the context of this case, we need not decide whether an expert witness may offer his or her opinion as to whether a spouse is a battered spouse, nor decide whether such an opinion would implicitly comment on the credibility of the spouse.").

[26] Researching the precise contours of this issue, both independently and with the aid of citations from the parties' briefs, has been complicated by the unfortunate myriad of cases that involve child sexual assault, and the fact that many use language that does not reflect precisely the nature of the testimony at issue. We note then, that a majority of the jurisdictions to have considered this question, twenty-one federal and state courts, deem admissible expert testimony that a particular complainant has exhibited behavioral characteristics identified as those of sexual assault victims—so long as the expert does not offer an ultimate conclusion on the issue of sexual abuse or opine directly on the complainant's veracity. See *United States* v. *Charley*, 189 F.3d 1251, 1268–69 (10th Cir. 1999); *United States* v. *Johns*, 15 F.3d 740, 743 (8th Cir. 1994); *People* v. *Rojas*, 181 P.3d 1216, 1221 (Colo. App. 2008), review denied, 2008 Colo. LEXIS 1032 (November 10, 2008); *Brownlow* v. *State*, 248 Ga. App. 366, 368, 544 S.E.2d 472 (2001), cert. denied, 2001 Ga. LEXIS 539 (June 25, 2001); *People* v. *Pollard*, 225 Ill. App. 3d 970, 978, 589 N.E.2d 175, appeal denied, 145 Ill. 2d 641, 596 N.E.2d 635 (1992); *State* v. *Tonn*, 441 N.W.2d 403, 405 (Iowa App. 1989); *State* v. *McIntosh*, 274 Kan. 939, 959–60, 58 P.3d 716 (2002); *People* v. *Peterson*, 450 Mich. 349, 373–74, 537 N.W.2d 857 (1995); *State* v. *Davis*, 422 N.W.2d 296, 299 (Minn. App. 1988); *Bishop* v. *State*, 982 So. 2d 371, 381 (Miss. 2008); *State* v. *Silvey*, 894 S.W.2d 662, 671 (Mo. 1995); *State* v. *Stancil*, 355 N.C. 266, 266–67, 559 S.E.2d 788 (2002); *State* v. *Tibor*, 738 N.W.2d 492, 496–98 (N.D. 2007); *State* v. *Stowers*, 81 Ohio St. 3d 260, 262–63, 690 N.E.2d 881 (1998); *State* v. *Lupoli*, 348 Or. 346, 362, 234 P.3d 117 (2010); *State* v. *Edelman*, 593 N.W.2d 419, 423–24 (S.D. 1999); *Schutz* v. *State*, 957 S.W.2d 52, 73–74 (Tex. Crim. App. 1997); *State* v. *Jones*, 71 Wn. App. 798, 819–20, 863 P.2d 85 (1993); *State* v. *Jensen*, 147 Wis. 2d 240, 256–57, 432 N.W.2d 913 (1988); *Frenzel* v.

State, 849 P.2d 741, 746 (Wyo. 1993); see also *Wittrock* v. *State*, Docket No. 373, 1993 Del. LEXIS 308 (Del. July 27, 1993) (expert's testimony was permissible under *Wheat* v. *State*, supra, 527 A.2d 274, because she "explained the significance of both the victim's and her mother's actions and statements without passing judgment on the credibility of either witness' testimony"); cf. *Lickey* v. *State*, 108 Nev. 191, 196, 827 P.2d 824 (1992) (noting that Nev. Rev. Stat. § 50.345 expressly permits expert testimony "to [show] that the victim's behavior or [mental or physical] condition is consistent with that of a sexual assault victim," but it remains "improper for an expert to comment directly on whether the victim's testimony was truthful, because that would invade the prerogative of the jury").

Our research has revealed that four other states permit experts to draw behavioral comparisons between complainants and victims in general; their decisions are not instructive with respect to the development of Connecticut law because they are decisions from courts that also permit experts to opine directly about whether a victim has been sexually abused—a holding directly at odds with our decision in *State* v. *Iban C.*, supra, 275 Conn. 636–37—so long as they do not vouch directly for the credibility of the complainant's trial testimony or allegations vis-á-vis the defendant. See *Tingle* v. *State*, 536 So. 2d 202, 205 (Fla. 1988); *State* v. *Ransom*, 124 Idaho 703, 709–10, 864 P.2d 149 (1993); *State* v. *Schumpert*, 312 S.C. 502, 506, 435 S.E.2d 859 (1993); *State* v. *Edward Charles L.*, 183 W. Va. 641, 659, 398 S.E.2d 123 (1990).

[27] We note that three jurisdictions, Kentucky, Pennsylvania and Tennessee, go further and prohibit even generalized expert testimony about behaviors of child sexual assault victims, considering it to be a scientifically unfounded incursion into the jury's role of determining the credibility of witnesses. See *Sanderson* v. *Commonwealth*, 291 S.W.3d 610, 614 (Ky. 2009); *Commonwealth* v. *Dunkle*, 529 Pa. 168, 183, 602 A.2d 830 (1992); *State* v. *Bolin*, 922 S.W.2d 870, 873–74 (Tenn. 1996); see also *Commonwealth* v. *Dunkle*, supra, 183 (concluding that rehabilitation concern is best addressed through "an instruction to the jury that they should consider the reasons why the child did not come forward, including the age and circumstances of the child in the case").

[28] Indeed, the Massachusetts courts view expert testimony linking the specific complainant to general behaviors of sexual abuse victims as so prejudicial that they even prohibit the use of detailed hypothetical questions that closely track the facts of the actual case. See *Commonwealth* v. *Federico*, supra, 425 Mass. 850–51; see also *Commonwealth* v. *Deloney*, supra, 59 Mass. App. 58 ("[t]he vivid portrait of the child who does not disclose was, in essence, a portrait of [the complainant]").

[29] The Vermont Supreme Court determined that the particular questions to the counselor at issue were improper, but further concluded that the defendant's claims were not preserved and that the improprieties did not rise to the level of plain error requiring reversal. See *State* v. *Sims*, supra, 158 Vt. 181–82.

[30] We discuss in detail *People* v. *Peterson*, supra, 450 Mich. 349, because it is the only case in the majority revealed by our research; see footnote 26 of this opinion; that provides more than a perfunctory explanation in support of the admission of expert testimony that links specific complainants with the general behavioral characteristics of sexual assault victims. In *Peterson*, the Michigan Supreme Court concluded that "the prosecution may present evidence, if relevant and helpful, to generally explain the common postincident behavior of children who are victims of sexual abuse. The prosecution may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn from the expert's testimony and compare the expert testimony to the facts of the case. *Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child.*" (Emphasis added.) *People* v. *Peterson*, supra, 373–74. In limiting consistency or comparison testimony to postimpeachment of the victim, the court "reiterate[d] the concerns about such testimony" previously raised in its decision in *People* v. *Beckley*, 434 Mich. 691, 456 N.W.2d 391 (1990), namely, that linking testimony is "improper because it comes too close to testifying that the particular child is a victim of sexual abuse." *People* v. *Peterson*, supra, 374. In its earlier decision in *Beckley*, followed in *Peterson*, though, the court had observed a "meaningful distinction between expert testimony that a particular child was sexually abused, and expert testimony that a child demonstrates behaviors commonly observed in the class of sexually abused children. *In the latter case, the expert does not offer a direct opinion on the ultimate*

question of whether abuse occurred." (Emphasis added; internal quotation marks omitted.) *People* v. *Beckley*, supra, 727–28.

We decline to follow the Michigan Supreme Court's analysis of this issue in *Peterson* and *Beckley* because the distinction between direct and indirect vouching, upon which the court apparently relies, is at odds with our decisions that consistently have held that an expert may not vouch for a witness' credibility either directly *or* indirectly. See *State* v. *Iban C.*, supra, 275 Conn. 637; *State* v. *Grenier*, supra, 257 Conn. 806. Indeed, the analytical importance to the linking inquiry of acceptance of the concept of indirect vouching is borne out in *United States* v. *Charley*, 189 F.3d 1251, 1269 n.25 (10th Cir. 1999), wherein the United States Court of Appeals for the Tenth Circuit, in, inter alia, rejecting a vouching challenge to expert testimony that a complainant's behaviors were consistent with those of child sexual abuse victims, specifically criticized the decisions of the "courts [that] have held that a counselor's testimony that [the alleged victim] was referred to me for sexual abuse recovery counseling constitutes impermissible vouching and is therefore inadmissible." (Internal quotation marks omitted.) Id., quoting *State* v. *Haslam*, 663 A.2d 902, 905–906 (R.I. 1995). This, of course, was the very testimony that we held inadmissible in *Grenier*.

Moreover, the majority in *Peterson* does not explain, beyond a conclusory mention of "balancing" interests, how allowing the admission of comparative or linking testimony only *after* the complainant's credibility has been attacked; see *People* v. *Peterson*, supra, 450 Mich. 374; renders it any less prejudicial, and we agree with the observation to that effect by the dissenting justice, who also stated that, "[o]nce the expert has given testimony disabusing the seemingly inconsistent behavioral reaction, the jury has all of the information that it needs to assess the complainant's credibility. The marginal probative value of allowing the expert to further testify with respect to the particular complainant is substantially outweighed by the danger of unfair prejudice that the jury will misuse the testimony. It invades the province of the jury to assess credibility. It invites the jury to give undue weight to testimony that is foundationally and fundamentally unreliable merely because it is cloaked with the expertise of an expert. It also invites the jury to believe that the expert knows more than he is telling, by letting the jurors infer that the expert, who works with sexually abused children every day, must believe this child's story or else the expert would not be testifying." Id., 391 (Cavanagh, J., dissenting).

[31] Justice Zarella, in his dissenting opinion, states that "[t]he jury will need to be apprised of *both* the general behavioral characteristics of sexual abuse victims *and* whether the behavior of the alleged victim in a particular case is demonstrably similar," noting that "[f]ailure to demonstrate that consistency—or inconsistency—will render the expert's testimony irrelevant and unhelpful, particularly in cases in which the behavioral traits are not common or readily understood by the average juror." (Emphasis in original.) We disagree. First, from a relevance perspective, the foundation for the expert's testimony about the general behaviors of sexual assault victims is laid by the evidence admitted concerning the complainant's conduct; further comparison is not necessary to establish the relevance of the expert's testimony. See authorities cited in footnotes 32 and 33 of this opinion and accompanying text. Second, Justice Zarella's approach appears to go well beyond the defensive use of such expert testimony envisioned in *State* v. *Spigarolo*, supra, 210 Conn. 377–80, insofar as it allows the admissibility of expert testimony to introduce the *existence* of victim behavior that is not "readily understood by the average juror." Rather, *Spigarolo* contemplates that such expert testimony is admissible only to explain behaviors, like initial denial or partial disclosures, that are apparent from the evidence, but might otherwise reflect adversely on the complainant's credibility if not explained by the expert. Put differently, Justice Zarella appears to permit such behavioral evidence to be used offensively to prove the very occurrence of sexual abuse—a purpose not yet recognized under Connecticut case law—rather than defensively by the prosecution to address behaviorally-oriented attacks on a complainant's credibility. See *State* v. *Spigarolo*, supra, 380 ("where defense counsel has sought to impeach the credibility of a complaining minor witness in a sexual abuse case, based on inconsistency, incompleteness or recantation of the victim's disclosures pertaining to the alleged incidents, the state may offer expert testimony that seeks to demonstrate or explain in general terms the behavioral characteristics of child abuse victims in disclosing alleged incidents").

[32] We note that subsequent cases from the New York Court of Appeals have cited *People* v. *Mercado*, supra, 188 App. Div. 2d 941, with approval in

upholding the admission of expert testimony that describes assault victims' general behavioral characteristics, but does not compare or link those characteristics to the specific complainant. See *People* v. *Spicola*, 16 N.Y.3d 441, 462–65, 947 N.E.2d 620, 922 N.Y.S.2d 846 (2011) (distinguishing cases with linking testimony and concluding that trial court properly admitted testimony about behaviors when expert testified that he had not interviewed victim and was not familiar with allegations, despite fact that hypothetical questions very closely mirrored facts of case); *People* v. *Carroll*, 95 N.Y.2d 375, 387, 740 N.E.2d 1084, 718 N.Y.S.2d 10 (2000) (upholding admission of expert testimony about child sexual abuse accommodation syndrome "for the purpose of instructing the jury about possible reasons why a child might not immediately report incidents of sexual abuse" and emphasizing that expert "never opined that defendant committed the crimes, that defendant's stepdaughter was sexually abused, *or even that her specific actions and behavior were consistent with such abuse*" [emphasis added]).

[33] Although we agree with the observations of both Justice Palmer and Justice Zarella in their dissenting opinions that expert testimony is relevant to explain otherwise peculiar behavior by sexual assault victims that a layperson might interpret incorrectly and adversely to a complainant's credibility, we observe that neither Justice Zarella nor the authority that he cites for the point that "an expert is needed to explain the behaviors associated with sexual abuse victims *and opine on whether the alleged victim exhibited these unusual behaviors*"; (emphasis added) *State* v. *Davis*, 422 N.W.2d 296, 299 (Minn. App. 1988); explains why expert testimony is necessary to inform the jury factually "whether the alleged victim exhibited these unusual behaviors," or the relative value of such testimony. This is particularly so where the reason for permitting the introduction of the expert testimony is to explain behaviors that have been made apparent to the jurors from the evidence.

[34] See also *Mindombe* v. *United States*, 795 A.2d 39, 45 n.9 (D.C. 2002) (criticizing holding of *People* v. *Peterson*, supra, 450 Mich. 373–74, as "probably go[ing] too far"), cert. denied, 537 U.S. 1234, 123 S. Ct. 1355, 155 L. Ed. 2d 200 (2003); *State* v. *St. Marie*, 801 So. 2d 424, 429–30 (La. App. 2001) (testimony that victims' affect and behavior was " 'consistent with the pattern of behavior of children who report sexually assaultive behavior' " violated *State* v. *Foret*, 628 So. 2d 1116 [La. 1993], which had adopted "general behavioral characteristics" rule enunciated in *State* v. *Spigarolo*, supra, 210 Conn. 379–80).

[35] See *State* v. *Freeney*, supra, 228 Conn. 590 n.7 (social worker answered affirmatively to question of whether "it [is] common to have someone in the early stages of their admission to your hospital, *as was this victim* . . . not to be able to tell you all the details of the event that brought them there" [emphasis added; internal quotation marks omitted]).

[36] The state also likens the testimony at issue in this case linking the complainant to behaviors of sexual assault victims generally to expert testimony that a victim's physical injuries, or lack thereof, are consistent with sexually assaultive acts, which has been held admissible in Connecticut as not a usurpation of the jury's fact-finding function. Compare, e.g., *State* v. *Rodgers*, 207 Conn. 646, 652, 542 A.2d 1136 (1988) (physician's testimony that victim's "injury was consistent with rape by rectal penetration") with, e.g., *State* v. *Esposito*, supra, 192 Conn. 175 (physician properly testified that "absence of vaginal trauma in [the victim's] case was consistent with her findings in the cases of other rape complainants"). We reject the state's contention, and instead agree with those authorities that have held distinct, for purposes of determining whether an expert is improperly opining as to the ultimate issue, testimony about behaviors versus physical injuries, particularly given the heightened risk of vouching when an expert's testimony concerns purely behavioral issues. See *State* v. *Moran*, supra, 151 Ariz. 383 n.4; see also *Commonwealth* v. *Colon*, 64 Mass. App. 303, 311–12, 832 N.E.2d 1154 (expert testimony that child's vaginal injuries were likely result of "intentional act" and would be " 'exceedingly rare' " if accidental is distinguishable from cases that "involve expert testimony in the absence of physical injury, and the impermissible linking of general behavior characteristics of abused children to the victim"), review denied, 445 Mass. 1103, 835 N.E.2d 254 (2005).

[37] The Appellate Court had ordered a new trial because of a hospital social worker's improper testimony that she believed that the complainant was telling the truth about, and had not fabricated, her allegations about having been sexually abused by her grandfather. See *State* v. *Butler*, supra, 36 Conn. App. 528–29, 532.

[38] In *Butler*, after describing characteristics of victims of child sexual abuse generally, such as "depression, moodiness, sleep and appetite problems, bedwetting, difficulty concentrating, and low self-esteem," the psychologist was asked, over the defendant's objection, "whether his review of the police report and arrest warrant in this case disclosed information that was characteristically common to many victims of sexual abuse. . . . [The psychologist then] testified that there were three elements in this case that were consistent with reactions of child victims of sexual abuse: (1) the victim revealed the abuse after a personal safety course given at school; (2) the victim was involved in self-injurious behavior such as the suicide attempt; and (3) the victim had difficulty describing the details of what had happened to her." *State* v. *Butler*, supra, 36 Conn. App. 533–34; see also id., 534–36 (relying on *State* v. *Spigarolo*, supra, 210 Conn. 378–79, and rejecting challenge to psychologist's generalized testimony about "common behavioral responses of victims of sexual abuse").

[39] In his dissenting opinion, Justice Palmer disagrees with our reliance on the concerns about indirect vouching expressed in *State* v. *Grenier*, supra, 257 Conn. 806, and *State* v. *Iban C.*, supra, 275 Conn. 635–36, noting that "[i]n 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." In our view, such 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.

[40] See also footnote 10 of this opinion.

[41] The state posits that the aspects of Melillo's testimony linking general behaviors to this specific complainant were necessary to establish its relevance and lay a foundation for its admission. The need for an adequate foundation for expert testimony; see, e.g., *State* v. *Carpenter*, 275 Conn. 785, 805–806, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); however, does not render admissible such opinion testimony linking the complainant to generalized behaviors, given that the behaviors sought to be explained by the expert testimony admitted pursuant to *State* v. *Spigarolo*, supra, 210 Conn. 378–80, would have been readily observable by the jury following the impeachment of the complainant. Cf. *State* v. *Carpenter*, supra, 811–13 (trial court did not abuse its discretion excluding expert testimony about codependent relationships in absence of foundation established through psychological examinations because "evidence of the psychological characteristics that define codependent personalities . . . may not always be expressed in distinctive or pathological conduct that readily is observed"). Moreover, as was discussed at oral argument before this court, should a foundational issue arise with respect to the relevance of expert testimony under *Spigarolo*, it can properly be addressed at sidebar out of the hearing of the jury—without the need to undertake a line of questioning that runs the risk of improper vouching for the complainant's accusations.

[42] We note further that a subsequent decision of the Appellate Court, *State* v. *Robles*, 103 Conn. App. 383, 930 A.2d 27, cert. denied, 284 Conn. 928, 934 A.2d 244 (2007), seems to conflict with the reasoning of *Butler*. In *Robles*, the Appellate Court rejected a defendant's vouching challenge to expert testimony by a school psychologist who "had acted previously as a forensic interviewer and counselor to the victim . . . ." Id., 401. Emphasizing that the psychologist's testimony "regarding the general traits of a victim of sexual abuse," thus permitting an inference that the victim had acted consistently therewith, was admissible under, inter alia, *State* v. *Freeney*, supra, 228 Conn. 592–93, the Appellate Court cited *State* v. *Iban C.*, supra, 275 Conn. 635–36, and *State* v. *Grenier*, supra, 257 Conn. 806, and observed that the "defendant has cited no authority to support the proposition that the expert's testimony was improper because the expert had prior knowledge of the facts of the victim's particular case and had interviewed the victim in a capacity as a forensic examiner. *Because the expert made no reference to the victim or her statement during her direct testimony or indirectly vouched for the victim's credibility during her testimony*, we conclude that the admission of the expert testimony was within the trial court's discretion." (Emphasis added.) *State* v. *Robles*, supra, 404–405; see also id., 405 n.18 ("[a]lthough [the expert witness] acknowledged that she had interviewed the victim during cross-examination, such acknowledgement

was in response to a direct question posited by defense counsel, and her testimony was limited to the date and duration of the interview, without vouching for the credibility of the victim in any way").

[43] Justice Zarella, in his dissenting opinion, criticizes our approach as "elevat[ing] form over substance" because, as he correctly notes, under the Connecticut Code of Evidence, an expert witness may testify "us[ing] a hypothetical that tracks the facts of the case." See, e.g., *State* v. *Christiano*, supra, 228 Conn. 460–62 (upholding admission of testimony by expert who had not examined victim and made clear that testimony did not concern her specific case, about adolescents' delays in reporting sexual abuse that was framed in form of hypothetical questions); *State* v. *Crespo*, 114 Conn. App. 346, 375, 969 A.2d 231 (2009) (concluding that expert testimony based on "hypothetical questions that tracked the facts of this case does not lead us to conclude that [the expert witness] opined that the victim was credible"), aff'd, 303 Conn. 589, 35 A.3d 243 (2012). Justice Palmer makes a similar observation in his dissenting opinion, likening Melillo's testimony to that of a detailed hypothetical closely tracking the facts of the case. We disagree. The important qualitative difference between hypothetical questions, even those that closely track the facts of a case, and questions asking for a direct opinion about the actual evidence in the case is borne out in the California Supreme Court's recent decision in *People* v. *Xue Vang*, 52 Cal. 4th 1038, 262 P.3d 581, 132 Cal. Rptr. 3d 373 (2011). In rejecting a challenge by a defendant to hypothetical questions to an expert witness reflecting whether a particular assault was gang motivated, the court observed that when a question is phrased hypothetically, in addition to determining whether to credit an expert's testimony at all, the jury *also* "must determine whether the facts stated in the hypothetical questions are the actual facts, and the significance of any difference between the actual facts and the facts stated in the questions." Id., 1050. Direct questions like those at issue in this case simply do not require the jury to take that important second inferential step.

[44] M, who owned the ranch style home in which she lived with R, testified that, to her knowledge, the defendant was never alone with the complainant in her home. M also testified that, at the time the alleged assaults occurred in the complainant's bedroom, M was sleeping across the hallway in the bedroom that she shared with R. M further testified that she did not hear any noises coming from the complainant's bedroom, and that even if the bedroom door was closed, it was "hollow core" and she was such a light sleeper that even the squeaking of doors and the sound of her dog's tags would wake her up.

[45] We note that other credibility issues arose from the complainant's membership on two color guard teams. First, a disputed factual matter at trial concerned whether the complainant had falsely told her high school color guard teammates that she had leukemia. On cross-examination, the complainant denied having told her teammates that she had leukemia. She did, however, admit that she had to speak with her coach, E, about that particular incident, and R testified that E had raised the issue to him and M. The trial court did not permit E to testify about what other team members had related to her with respect to statements by the complainant, deeming it inadmissible hearsay.

Second, other issues arose with respect to whether the complainant was, as she testified at trial, the captain of a color guard team, namely, the Buccaneers. E, who coached the complainant's high school team, testified that the complainant was never named a captain of that team, and did not know whether the complainant had participated in the color guard of the Buccaneers. J testified, however, that the complainant was not the color guard captain of the Buccaneers at the time of the incident, but subsequently became their captain.

[46] During cross-examination, Melillo conceded that it was "possible" that a person could make a false complaint about sexual assault, but stated that she would "be hesitant to say that a person would bring out a complaint of sexual assault as a way of getting attention. That's not my experience." She emphasized that inconsistency does not mean that the allegations never happened, conceding only that "anything is possible."

[47] The state argues that the testimony of R and M, and the defendant's thorough cross-examination of the complainant, "abrogated [the] harm" of the improper portions of Melillo's testimony that constituted improper vouching for the complainant's testimony. We disagree. In our view, the attacks on the complainant's credibility from an ordinarily unlikely quarter—namely, her own father—rendered Melillo's testimony, including its improper portions, that much more significant to rehabilitating the complain-

ant's veracity in the eyes of the jury.

[48] As Justice Palmer notes in his dissenting opinion, the prosecutor did not, however, expressly rely on the linking aspect of Melillo's testimony, but did engage in some comparative analysis in his argument, positing that in "a lot of those clips that were presented to you, they were presented to you in a light that [the complainant] says one thing and then moments later she corrects herself. And if you recall, on one occasion when she was being addressed by [Vitulano] . . . Vitulano said something and then [the complainant] corrected her. So you have to look at the total experience in what occurred here. She indicated as well that on many occasions when she would see the defendant, again, she would have, out of respect for him, gone over to greet him. [Melillo] talked about, yes, there are situations where somebody who would find themselves in the company of the person who abused them would engage in a conversation with them because they did not want to draw attention to themselves."

[49] We recognize that the jury reported that it had reached a verdict on the risk of injury counts and was deadlocked only on the sexual assault charge. Nevertheless, given that all of the charges were dependent on the jury's assessment of the complainant's credibility, we view the existence of any deadlock as indicative of the closeness of the case.

[50] The trial court instructed the jury as follows: "I'm going to talk a little bit about expert testimony or opinion evidence. In this case . . . Melillo took the stand and she gave her opinions as an expert. An expert witness may give an opinion even though that opinion is not expressed in terms of certainty so long as the opinion is expressed in terms of reasonable probability, in terms of what is reasonably probable.

"No matter what may be the expertise of a particular witness who states to you an opinion upon fact in the case, that opinion is subject to review by you, the jury. It is in no way binding upon you, the jury. It is for you to consider, along with the other circumstances in the case, and using your best judgment determine whether or not you will give it any weight and, if so, what weight you will give to it. In weighing and considering the testimony of an expert, you should apply to them the same considerations of credibility . . . that you would apply to other witnesses, such as her appearance and demeanor on the stand, her conduct on the stand, her interest or lack of interest in the outcome of the case, her ability to recall and relate facts to you, and all the other considerations you use in judging the credibility of any witness.

"In deciding the weight to be accorded to the testimony of an expert witness, you should also consider her education, her experience, her ability in the particular field of knowledge, and any other material matters of the sort developed in the course of her testifying in front of you. You should also consider the proof or lack of proof and the completeness or lack of completeness of any facts considered by the expert in forming her opinions or in reaching her conclusions. You should recall the testimony of the expert witness in this case in light of the principles that I have just stated to you.

"Also, where an expert witness has given an opinion based upon what we call a hypothetical question, that is where they are asked to assume certain facts and then give an opinion based on those facts, the value of the opinion depends on the truth and completeness of those facts. You should consider whether those facts were proven or not, and you should consider whether or not her opinions were based on all the relevant facts or whether some relevant facts were omitted."

[51] The state also relies on what it considers to be the mitigating effect of the trial court's decision, at the time of overruling the defendant's objection to the linking aspect of Melillo's testimony, namely, that: "The witness is absolutely not allowed to testify as to credibility . . . ." We disagree. First, even if we were to assume that the jury was following the evidentiary discussion as closely as it would an instruction being directed at it specifically, the state's argument is belied by the full ruling in context, namely: "The objection is overruled. The witness is absolutely not allowed to testify as to credibility, but she is an expert and can render an opinion and *the jury is entitled to give it whatever weight they deem appropriate based on her expertise.*" (Emphasis added.) This ruling did not specifically instruct the jury how to consider the import of the linking aspects of Melillo's testimony, and in fact gave the jury otherwise unfettered freedom to give her testimony "whatever weight they deem appropriate based on her expertise."

[52] The Appellate Court, in conducting its harmless error analysis, described our decision in *State* v. *Grenier*, supra, 257 Conn. 807–808, as considering seven "factors in conducting its harmlessness analysis," such as that the

"state's case rested entirely on [the complainant's] credibility," "the improper expert testimony struck at the heart of the central—indeed, the only—issue in the case, namely, the relative credibility of [the complainant] and the defendant," and "inasmuch as [the complainant's] version of the events provided the only evidence of the defendant's guilt, the state's case was not particularly strong . . . ." (Internal quotation marks omitted.) *State* v. *Favoccia*, supra, 119 Conn. App. 26–27, quoting *State* v. *Grenier*, supra, 807–808. In determining that the admission of the improper portions of Melillo's testimony was harmful, the Appellate Court further observed that "[o]ther than the fact that the defendant did not testify at trial, the *Grenier* factors all are met in the present case." *State* v. *Favoccia*, supra, 27. We note that we do not read *Grenier* as articulating an independent set of "factors" for determining whether an evidentiary error is harmful in a sexual assault case, but rather, read that case as consistent with, and instructive as to, the application of the more general considerations attendant to the harmless error inquiry pursuant to the line of cases following *State* v. *Sawyer*, supra, 279 Conn. 357–58.