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KATZ, J., dissenting. In the present case, the majority concludes that, although the testimony of the defendant's biological daughter regarding the defendant's alleged sexual misconduct against her improperly was admitted under the identity exception to the rule prohibiting the admission of prior misconduct evidence, the testimony properly was admitted under the common scheme exception because, in both the incident involving the defendant's daughter and the incident involving the victim in the present case, the defendant allegedly had: (1) sexually abused a young girl (victim); (2) maintained a close relationship with the victim's mother, but was not married to her; (3) had access to the victim because of his relationship with her; (4) had ample opportunity to be alone with the victim; and (5) committed the assault on the victim by digital or penile penetration. The majority reasons that the prior misconduct evidence properly was admitted under the common plan or scheme exception because, although not *so* similar as to constitute a ''signature''; see *State* v. *Figueroa*, 235 Conn. 145, 163, 665 A.2d 63 (1995); there are similarities between the offenses and the victims and the prior offense was not too remote in time to the charged offense. I reject this rationale because it reflects a further departure from the well established criteria for invoking the common scheme exception to which this court, until recently, has adhered. See C. Tait, Connecticut Evidence (3d Ed. 2001) § 4.19.9. Sexual assault is a brutal and emotionally damaging crime, especially when the victim is a minor. This fact does not, however, justify the adoption of special rules of evidence or the relaxation of well established standards in derogation of a defendant's rights whenever the state seeks to introduce evidence of prior sexual misconduct.[1] Therefore, I would conclude that, applying our well established criteria, which I set forth herein, the trial court in the present case improperly admitted the testimony of the defendant's daughter under the common scheme or plan exception. I would further conclude that the admission of this evidence was not harmless. Accordingly, I would reverse the judgment.

In *State* v. *Esposito*, 192 Conn. 166, 172, 471 A.2d 949 (1984), this court discussed, in detail, the requirements for the common scheme exception to the general rule prohibiting prior misconduct evidence: ''When evidence of other offenses is offered to show a common plan or design the marks which the uncharged and the charged offenses have in common must be such that it may be logically inferred that if the defendant is guilty of one he must be guilty of the other. . . . It is apparent that the indicated inference does not arise, however, from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the

marks in question are of such common occurrence that they are shared not only by the charged crime and [the] defendant's prior offenses, but also by numerous other crimes committed by persons other than [the] defendant." (Citation omitted; internal quotation marks omitted.)

Additionally, even when the alleged conduct perpetrated against one victim was more similar and therefore shared more in "common" with the alleged conduct for which the defendant has been charged, the evidence also must be probative that these acts were connected as part of an overall plan. See *State* v. *Shindell*, 195 Conn. 128, 135, 486 A.2d 637 (1985) ("evidence of other arsons, vandalism and false insurance claims [properly] admitted as probative of a common scheme to defraud insurance companies . . . that included the intentional destruction of property, by arson or vandalism, for profit, and the pressing of false claims for vandalism, theft and lost rents"); see also *State* v. *Murrell*, 7 Conn. App. 75, 90, 507 A.2d 1033 (1986) (noting absence of evidence, which, in combination with uncharged misconduct evidence, would "create the inference that these incidents were, in fact, parts of an overall plan, scheme or design"). The misconduct evidence can "only be connected to the charged crimes by showing a high degree of similarity in the modus operandi of their commission." *State* v. *Shindell*, supra, 135. As part of a continuing system of criminal activity, by design, there will be a substantial number of factors that serve to connect the offense for which the defendant is on trial and the misconduct evidence the state seeks to introduce. Id. Thus, to be admissible, the uncharged act of misconduct must be "so intertwined with the crime charged as to indicate that they are separate components of a general plan." *United States* v. *Dothard*, 666 F.2d 498, 504 (11th Cir. 1982); see also *State* v. *Conroy*, 194 Conn. 623, 626, 484 A.2d 448 (1984) ("It is well settled that evidence of similar but unconnected crimes is generally not admissible to prove a criminal defendant's guilt. Such evidence can show no more than the defendant's bad character or an abstract disposition to commit a crime; it provides no proof of guilt of the specific offense in question.").

In the recent past, however, this court, specifically in the context of sexual assault cases, has relaxed the requirements of the common scheme exception to the point that, as the majority's opinion in the present case essentially concedes, the exception has swallowed the rule precluding the admission of such misconduct evidence. In *State* v. *Kulmac*, 230 Conn. 43, 80, 644 A.2d 887 (1994), I dissented, expressing my concerns in this regard. Much of what I stated therein has equal application to the present case and bears repeating. I noted therein that Professor Edward Imwinkelried of the University of California at Davis, who, in his treatise on this issue, divides the case law that has developed under

the common plan exception into two categories: ''true plan'' cases, which he finds consistent with the prescribed exception; and ''spurious plan'' cases, which he rejects. Id., 82 (*Katz, J.*, dissenting). In his most recent treatise, Imwinkelried explains that, ''[i]n a true plan case, the courts hold that the prosecutor may prove any uncharged crime by the defendant which shows that the defendant in fact and in mind formed a plan including the charged and uncharged crimes as stages in the plan's execution. . . . [B]oth crimes must be inspired by the same impulse or purpose. Both crimes must be steps toward the accomplishment of the same final goal. They are different stages of the plan. It is not enough for the prosecution to show that the defendant had a plan including crimes similar to the charged crime; the prosecution must show that the plan included the specific crime the defendant is now charged with.'' 1 E. Imwinkelried, Uncharged Misconduct Evidence (Rev. Ed. 1999) § 3:22, pp. 117–19. Moreover, mere similarity between the crimes, standing alone, does not establish the existence of a true plan under another authoritative treatise. There must be a permissive inference that both crimes were related to an overall scheme in the defendant's mind. See 1 C. McCormick, Evidence (4th Ed. 1992) § 190, pp. 800–801 (to fall within common plan exception, ''[e]ach crime should be an integral part of an over-arching plan explicitly conceived and executed by the defendant'').

Imwinkelried is critical, however, of spurious plan cases, in which ''[the] courts are quite liberal in admitting uncharged misconduct . . . . If the proponent can show a series of similar acts, these courts admit the evidence on the theory that a pattern or systematic course of conduct is sufficient to establish a plan. Similarity or likeness between the crimes suffices. In effect, these courts convert the doctrine into a plan-to-commit-a-series-of-similar-crimes theory. . . . In reality, these courts are arguably permitting the proponent to introduce propensity evidence in violation of the prohibition [against the admission of misconduct evidence]. Proof of a number of similar [crimes] may be probative of the defendant's status as a professional criminal . . . . However, if . . . there is no inference of a true plan in the defendant's mind, the proponent is offering the evidence on a forbidden theory of logical relevance. It is immaterial that there are many instances of similar acts by the defendant; the large number of the acts increases the acts' probative value on the issue of the defendant's propensity, but standing alone the number of acts and similarities cannot change the propensity quality of the probative value. . . . The courts are illicitly allowing the proponent to prove the defendant's character, disposition, or propensity.'' 1 E. Imwinkelried, supra, § 3:24, pp. 128–29.

As I noted in my dissent in *Kulmac*, ''appellate courts have relied on Professor Imwinkelried's cogent analysis

to reverse trial court decisions admitting prior misconduct evidence in sexual assault cases. *Ali* v. *United States*, 520 A.2d 306 (D.C. 1987), is precisely on point. In *Ali*, the victim claimed that the defendant, who had been her mother's boyfriend, had molested her over a two year period starting when she was thirteen. The victim testified that the defendant had touched her breasts, and had engaged in vaginal and anal intercourse with her. Id., 308. Over the defendant's objection, the trial court allowed the government to introduce evidence under the common scheme or plan exception that on a few occasions, the defendant had touched the breasts of the victim's younger sister. Id., 309. The defendant was convicted.

"On appeal, the District of Columbia Court of Appeals held that the introduction of the evidence concerning the sister was reversible error, because that evidence 'is relevant to charges that [the] appellant engaged in sexual intercourse and sodomy with an entirely different individual on separate occasions only by means of one inference: because [the] appellant did so with [the sister], he did so with [the victim]. That is precisely the 'propensity' inference forbidden by [the rule against admitting uncharged misconduct evidence].' Id., 311. The court agreed with Professor Imwinkelried that '[t]he distinguishing characteristic of the common scheme or plan exception to inadmissibility is the existence of a true plan in the defendant's mind which includes the charged and uncharged crimes as stages in the plan's execution: the series of crimes must be mutually dependent.' Id., 312; see also *Government of the Virgin Islands* v. *Pinney*, 967 F.2d 912, 916 (3d Cir. 1992) (evidence of uncharged sexual misconduct inadmissible under common plan exception, because 'the government has been unable to articulate any theory that united these isolated events which occurred six years apart, without resorting to the kind of character-based inference prohibited by [the rule against admitting uncharged misconduct evidence]'); *People* v. *Engelman*, 434 Mich. 204, 221, 453 N.W.2d 656 (1990) (trial court erred in admitting evidence of uncharged sexual misconduct because the defendant 'did not have a single plan which encompassed both of these acts, and it does not appear on this record that the acts were in different stages of the same, comprehensive plan'); *State* v. *Eubank*, 60 Ohio St. 2d 183, 186, 398 N.E.2d 567 (1979) (trial court erred in admitting evidence of uncharged sexual misconduct under the common plan exception because the uncharged acts were not 'inextricably related' to the charged crime, but instead were 'chronologically and factually separate occurrences')." *State* v. *Kulmac*, supra, 230 Conn. 83–85 (*Katz, J.*, dissenting); see also *Becker* v. *ARCO Chemical Co.*, 207 F.3d 176, 197 (3d Cir. 2000) ("evidence [in employment discrimination case pertaining to termination of plaintiff's coworker] not admissible as proof of [the defendant's]

'plan' based on these principles, inasmuch as there was no evidence presented that the two terminations were connected, mutually dependent, or part of any larger goal of [the defendant's]''); *Commonwealth* v. *English,* 993 S.W.2d 941, 945 (Ky. 1999) (recognizing that common scheme or plan requires evidence that ''the charged offenses were part and parcel of a greater endeavor which included the prior acts of sexual misconduct'').

In the case before us, the evidence does not prove a common plan or scheme. First, the similarities on which the majority relies ''are of such common occurrence that they are shared not only by the charged crime and [the] defendant's prior [alleged offense], but also by numerous other crimes committed by persons other than [the] defendant.'' (Internal quotation marks omitted.) *State* v. *Esposito,* supra, 192 Conn. 172. Indeed, even when viewed together, these similarities are not in any way distinctive. Four of the five similarities—the ages of the victims,[2] the defendant's close relationship with the victims, their mothers or their families generally, his access to the victims—*because* of those relationships—and the opportunity to be alone with the victims—again, because of those relationships—are of such ''common occurrence'' that they generally apply to pedophiles. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th Ed. 1994) § 302.2, pp. 527–28. The fifth ''similarity''—the types of sexual activities alleged by the victims—is not really a similarity at all. In the present case, both the victim and the defendant's daughter accused the defendant of digital or penile penetration. Again, these activities, regrettably, are common to pedophiles generally; see id.; and, therefore, do not create the necessary '' 'distinctive combination' '' of actions that forms the modus operandi of the crime. *State* v. *Figueroa*, supra, 235 Conn. 164. Indeed, the trial court here found only that the prior misconduct evidence was ''sufficiently similar'' to justify its admission based on certain generic factors that are common to a class of sexual offenses. Cf. *State* v. *Murrell,* supra, 7 Conn. App. 81 (''law requires not only a high degree of similarity between the events and circumstances of the past and present incidents, it imposes the additional requirement that those common features be 'sufficiently unique' . . . to warrant the desired inference'' [citation omitted]).

Moreover, there is absolutely no evidence that there existed ''a true plan in the defendant's mind''; *Ali* v. *United States*, supra, 520 A.2d 312; that included the alleged assaults on his daughter and the victim as stages in its execution. Indeed, the majority does not claim that the charged and uncharged acts of misconduct in this case were connected by a true plan in the defendant's mind. ''[T]he only connection they claim between the charged and uncharged acts is the defendant's desire to sexually abuse young girls. Such a desire does

not amount to a plan: 'Characterizing a plan in terms of a general bad motive may be probative of an accused's *status* as a bad person, but if there is no inference of a specific plan in the accused's mind which interconnects the uncharged and charged acts, then the other crimes evidence is offered for nothing other than the accused's propensity to commit a series of similar but discrete bad acts.' . . . [Id., 311]; see also *United States* v. *Brown*, 880 F.2d 1012, 1015 (9th Cir. 1989) (to be admissible, a prior act of misconduct 'must establish a motive to commit the crime charged, not simply a propensity to engage in criminal activity')." (Emphasis in original.) *State* v. *Kulmac*, supra, 230 Conn. 86 (*Katz, J.*, dissenting). By failing to apply the second prong of the common plan or scheme exception, the majority permits the admission of minimally similar evidence through the back door of that exception when it would not be permitted through the front door of the identity exception. I would conclude, therefore, that the trial court improperly determined that the testimony of the defendant's daughter satisfied the common plan or scheme exception.

Because I would conclude that the trial court improperly determined that both the identity and common scheme exception applied, I next would reach the question of the harmfulness of the impropriety.[3] "The standard for determining whether a nonconstitutional error is harmless is [whether] . . . it is more probable than not that the erroneous action of the court affected the result."[4] (Internal quotation marks omitted.) *State* v. *Cavell*, 235 Conn. 711, 721–22, 670 A.2d 261 (1996). The burden to prove harmfulness is borne by the defendant. *State* v. *Pappas*, 256 Conn. 854, 892, 776 A.2d 1091 (2001).

It essentially is undisputed that the determinative issue at trial in the present case was the identity of the victim's assailant. The victim, although sixteen at the time of trial, was three years old when the abuse was discovered. Because she had no memory of the abuse, neither she, nor any other witness, could provide specific details of the alleged assault. In fact, the jury heard only from third party witnesses to whom the victim had made statements that, because of her tender years, lacked detail. By contrast, however, the defendant's daughter provided a precise account of what the defendant allegedly had done to her. This evidence undoubtedly posed a serious risk that the jury would engraft those details onto the victim's general allegations, details which the victim herself had been unable to provide. Moreover, this evidence clearly would tend to lead the jury in the present case to conclude that the defendant had a distinct propensity to assault young girls and that, therefore, he must have been the person responsible for the victim's injuries. This result is exactly what the general rule barring misconduct evidence is designed to avoid. Under these circumstances,

therefore, I would conclude that the defendant has established the requisite harmfulness to require reversal of the trial court's judgment.

Accordingly, I respectfully dissent.

[1] Indeed, I would suggest that creating exceptions to sound rules well ensconced in our jurisprudence based on the nature of the offense in question is reminiscent of other creatures of our common law that we have abandoned or abridged. See, e.g., *State* v. *Troupe*, 237 Conn. 284, 303, 677 A.2d 917 (1996) (scope of constancy of accusation held broader than necessary and limited accordingly).

[2] Nor are the ages of the victims of the charged and the uncharged offenses in the present case—three and nine years old—so similar as to be unique. See *State* v. *Murrell*, supra, 7 Conn. App. 81; cf. *State* v. *Kulmac*, supra, 230 Conn. 62–63 (similarity when three girls ranging in age from nine to eleven years old alleged misconduct by defendant).

[3] For the same reasons that I conclude herein that the trial court decision admitting the evidence was not harmless, I also would conclude that, whatever relevance the evidence may have had, its prejudicial effect far outweighed its probative value and, accordingly, that the trial court abused its discretion in admitting the evidence.

[4] In *State* v. *Meehan*, 260 Conn. 372, 397 n.13, 796 A.2d 1191 (2002), we recognized that this court previously had "noted, without resolving, that there appear to be two standards of review for establishing the existence of harmful error. One line of cases states that the defendant must establish that it is more probable than not that the erroneous action of the court affected the result. . . . A second line of cases indicates that the defendant must show that the prejudice resulting from the impropriety was so substantial as to undermine confidence in the fairness of the verdict." (Internal quotation marks omitted.) See *State* v. *Young*, 258 Conn. 79, 95, 779 A.2d 112 (2001). Because I would conclude that the evidence admitted in this case constitutes harmful error under either standard, I need not reach the question of the dual standards. See *State* v. *Meehan*, supra, 397 n.13.