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KATZ, J., concurring and dissenting. I maintain my belief that the death penalty fails to comport with contemporary standards of decency and thereby violates our state constitution's prohibition against cruel and unusual punishment. See Conn. Const., art. I, §§ 8 and 9. Nevertheless, I concur in the judgment reached by the majority because I have an obligation, consistent with my oath and responsibilities as a justice of this court, to decide the issue before the court, despite the fact that, by agreeing with the majority on the merits, I thereby enable the state to proceed with a penalty phase hearing, pursuant to General Statutes (Rev. to 1997) § 53a-46a, under a diminished burden of proof.[1] I appreciate the tension that exists between my belief regarding the death penalty and my resolution of the issue on appeal. I am mindful, however, that because of the unique posture of this case, other challenges by the defendant to the application of the death penalty may arise and, accordingly, can be addressed at another time, if and when those issues become pertinent.

The defendant claims that, when a person is convicted of a capital felony for the murder of two or more persons in violation of General Statutes (Rev. to 1997) § 53a-54b (8), as amended by No. 98-126, § 1, of the 1998 Public Acts (P.A. 98-126),[2] the state must prove that at least two of those victims died in an especially heinous, cruel or depraved manner in order to satisfy the requisite aggravating factor set forth in General Statutes § 53a-46a (i) (4) to allow the imposition of the death penalty ([i] [4] aggravating factor).[3] The defendant advances several arguments in support of his position. Although these arguments have superficial appeal, I, like the majority, reject them. I agree with the majority's determination of the process by which we interpret statutes; see part II of the majority opinion; and likewise conclude that proof that the defendant committed at least one of the murders in the specified aggravated manner satisfies the requirements of § 53a-46a (i) (4).

At the time of the commission of the crimes here, § 53a-54b (8) defined a capital felony as the ''murder of two or more persons at the same time or in the course of a single transaction . . . .'' See footnote 2 of this concurring and dissenting opinion. The defendant claims that the rules of statutory construction and lenity compel the conclusion that the state must prove the aggravating factor with respect to at least two victims. In support of this position, the defendant relies on the plain language of the § 53a-54b (8) itself, the overall statutory scheme and the policy behind both.

The defendant first contends that the plain language of § 53a-54b (8), namely, the phrases ''two or more persons'' and ''at the same time or in the course of a

single transaction,'' supports his interpretation of that provision's meaning. Specifically, he claims that the ''essential gravamen'' of the offense set forth in that subdivision, to which the (i) (4) aggravating factor applies, is the ''murder of two or more persons . . . .'' General Statutes (Rev. to 1997) § 53a-54b (8), as amended by P.A. 98-126. The defendant contends, therefore, that the murders of a minimum of two persons, in a multiple murder scenario, must be ''aggravated,'' or committed in an especially heinous, cruel or depraved manner, in order for the death penalty to be imposed. Moreover, he contends that the phrase ''at the same time or in the course of a single transaction'' in § 53a-54b (8) supports this construction. In particular, he points out that, if the legislature had intended the essential gravamen to have been only that of a multiple murder, it would have selected different phraseology to convey that meaning, for example, that it is a capital felony to commit a murder *during the commission of another murder*. Because the legislature did not do so, however, opting instead for the phrase, ''at the same time or in the course of a single transaction,'' the defendant contends that it is not the murder of an *additional* person in the same transaction that triggers the offense provided for in § 53a-54b (8), but, rather, the murder of *at least two* people. Therefore, in the defendant's view, the underlying ''offense'' to which the (i) (4) aggravating factor applies is the murder of at least two people. Accordingly, because the (i) (4) aggravating factor calls for the underlying ''offense'' to have been committed in an especially heinous, cruel or depraved manner, the defendant concludes that at least two people must have been murdered in such a manner to support a finding that the aggravating factor exists in the commission of an offense pursuant to § 53a-54b (8).

The defendant further contends that his construction is consistent with the overall scheme of § 53a-54b. In particular, the defendant notes that each of the offenses enumerated in the nine subdivisions of that statute that was in effect at the time of the commission of the crimes here is comprised of a murder and an additional substantive element that the legislature deemed worthy of separating out from the general murder scheme as a death eligible murder. According to the defendant, the (i) (4) aggravating factor applies to both the murder and the additional substantive element. To illustrate his contention, the defendant directs us to the eight subdivisions of the statute that are not applicable in the present case, which subdivisions establish that murder is a capital offense when: the victim is a police officer; the murder is for hire; the person who commits the murder already has been convicted either of an intentional murder or a murder in the course of committing a felony; the person who commits the murder is serving a life sentence; the murder is committed in the course of a kidnapping; the person who commits the

murder sells to the victim illegal narcotics that are the direct cause of the death; the murder occurs in the course of a sexual assault; General Statutes (Rev. to 1997) § 53a-54b (1) through (7), as amended by P.A. 98-126; or the victim is under sixteen years of age. General Statutes (Rev. to 1997) § 53a-54b (9), as amended by P.A. 98-126. According to the defendant, in each of those instances, the two elements constitute the offense, and the (i) (4) aggravating factor applies to each element. Therefore, the defendant posits as an example of his interpretation that, when a person kidnaps and murders a victim, the murder *and* the kidnapping must be committed in an especially heinous, cruel or depraved manner in order to support a finding of the presence of the (i) (4) aggravating factor. The defendant contends, therefore, that, consistent with this scheme, in the present case, the murder plus the additional substantive element that the legislature deemed death eligible under § 53a-54b (8) is the murder of at least two persons. In other words, the defendant claims that, in order for the (i) (4) aggravating factor to apply to the entire offense under § 53a-54b (8), which is the murder of ''two or more persons,'' the murders of at least two people must have been committed in a heinous, cruel or depraved manner.

Finally, the defendant claims that his interpretation is consistent with the legislature's purpose in enacting § 53a-54b, in general, and subdivision (8), in particular. The defendant points out that the legislature enacted a very narrow capital punishment scheme by setting aside a discrete and specific number of death eligible murders, and by further narrowing the number of those murders for which a defendant actually can receive the death penalty to require that certain aggravating factors must outweigh any present mitigating factors. The defendant additionally notes that discussion surrounding the enactment of § 53a-54b (8) centered on the legislature's reaction to recent multiple murders and the role of the capital punishment scheme as a deterrent to certain kinds of murders. Reading § 53a-54b (8) such that the (i) (4) aggravating factor must apply to at least two murders, the defendant claims, furthers both of these legislative purposes: it confines the class of multiple murders that are death eligible, yet its potential as a death eligible offense dissuades individuals from committing multiple murders.

It is well established that this court eschews statutory interpretations that yield bizarre or irrational results. *Hartford* v. *Hartford Municipal Employees Assn.*, 259 Conn. 251, 274, 788 A.2d 60 (2002). While the defendant's arguments regarding the plain language of § 53a-54b (8) are, at first blush, intuitively seductive, his interpretation, in practice, would lead to bizarre results. First, with respect to his contention regarding the capital punishment scheme, the defendant's argument that each offense to which the (i) (4) aggravating factor

applies is composed of two substantive elements and that the (i) (4) aggravating factor applies to both of the two elements misreads our prior case law and is inconsistent with the legislative purpose behind the creation of, and the amendments to, the capital punishment scheme. The defendant is correct that our case law *implicitly* has applied the (i) (4) aggravating factor to both substantive elements of an offense pursuant to § 53a-54b, but only in that we never have applied it, *explicitly*, solely to one of the two elements. See, e.g., *State* v. *Ross*, 230 Conn. 183, 264, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995) (defendant could not prevail on sufficiency claim because ''state presented ample evidence . . . [that] there were aggravating circumstances beyond the elements of the crimes charged''); *State* v. *Breton*, 212 Conn. 258, 265, 270, 562 A.2d 1060 (1989) (aggravating factor envisions ''intentional infliction of extreme pain or torture above and beyond that necessarily accompanying the underlying killing''). It does not follow, however, that because we never *expressly* have applied the (i) (4) aggravating factor to only one of the two substantive elements, we, therefore, *necessarily* have construed the (i) (4) aggravating factor as applying to both substantive elements.

Indeed, the language of § 53a-54b itself contradicts such an application. In subdivisions (1) through (4) and (9) of § 53a-54b, which, together, constitute more than one half of the statute, the (i) (4) aggravating factor *cannot*, in practice, be applied to both substantive elements of the offense enumerated. For example, while the murder of a police officer pursuant to § 53a-54b (1) certainly can be committed in an especially heinous, cruel or depraved manner, it defies logic to construe the statute to mean that *both* substantive elements of that offense, namely, the murder *and the police officer*, were ''committed . . . in an especially heinous, cruel or depraved manner . . . .'' General Statutes § 53a-46a (i) (4). Likewise, both elements of a murder (element one) for hire (element two) pursuant to § 53a-54b (2) cannot be committed in an especially heinous, cruel or depraved manner.

The defendant cites subdivisions (5) and (7) to support his contention that the statutory scheme calls for the application of the (i) (4) aggravating factor to each element of the offenses enumerated in § 53a-54b. His construction admittedly works, in theory, with respect to those subdivisions. The elements of kidnapping (element one) and murder (element two) under § 53a-54b (5) both *can* be committed in an especially heinous, cruel or depraved manner, as can the elements of sexual assault (element one) and murder (element two) under § 53a-54b (7). It does not follow, however, from the fact that, because two of the eight other subdivisions of § 53a-54b have two elements that *can* be committed in an especially heinous, cruel or depraved manner, the

statutory scheme thereby should be interpreted such that the two elements in each subdivision *must* be committed in such a manner to satisfy the (i) (4) aggravating factor. Indeed, because the defendant's theory is impossible to apply with regard to six of the eight other death eligible offenses enumerated in the statute, the logical conclusion must be that the defendant's argument in this regard does not advance his claim.

Furthermore, the defendant's interpretation contradicts the apparent intent of the legislature in enacting the capital punishment scheme. The legislative history illustrates that the purpose of the legislature in enacting the capital sentencing scheme, in general, and the multiple murder amendment, in particular, was deterrence. See 23 S. Proc., Pt. 8, 1980 Sess., pp. 2312–13, remarks of Senator Salvatore C. DePiano (questioning whether life imprisonment has same deterrent value as death penalty); id., pp. 2326–27, remarks of Senator Howard T. Owens, Jr. (stating purpose of multiple murder amendment is ''deterrent effect''); 23 H.R. Proc., Pt. 19, 1980 Sess., pp. 5695, 5697, remarks of Representative Eugene A. Migliaro, Jr. (explaining, in opposition to amendment to capital punishment scheme that proposed changing sentence for capital felony from death penalty to life imprisonment, that death penalty was deterrent).

It also is rational to assume from the capital punishment scheme that the legislature considered murder to be the ultimate crime. Indeed, as the defendant points out, each offense delineated in § 53a-54b is, at base, a murder, singled out by the legislature as death eligible by virtue of the fact that an additional characteristic accompanies it, for example, kidnapping, sexual assault, a victim who is a police officer, or, as in the present case, another murder. With respect to all but subdivision (8) of § 53a-54b, therefore, the state has to prove that the (i) (4) aggravating factor applies only to one murder before a defendant can receive a death sentence. Nonetheless, according to the defendant, with respect to § 53a-54b (8), the state has to prove that the (i) (4) aggravating factor applies to at least two murders before a defendant will receive a death sentence. If the legislature viewed murder as the ultimate crime, however, and if its purpose in enacting § 53a-54b was to deter certain kinds of murders by making them death eligible, then it would have been irrational for the legislature to have intended that two aggravated murders are required before the offense is death eligible under subdivision (8), given that, under every other subdivision of § 53a-54b, one aggravated murder suffices to establish eligibility for the death penalty. Moreover, this is especially so, given that the legislature's express intent in enacting § 53a-54b (8) was to deter multiple murders.[4] It would have been irrational, in attempting to deter multiple murders, to make it more difficult for the state to establish that the offense of multiple murder

is death eligible than it is for the state to establish that one murder is death eligible.

In support of his interpretation of § 53a-54b (8), the defendant also argues that this court should look to states with similar capital punishment schemes, that is, those that define multiple murder as a capital offense, not an aggravating factor, and also have a similar aggravating factor that is applied to that offense before the death penalty can be imposed. There are only two states that have such schemes: Virginia and Alabama.[5] Review of those states' application of their death penalty schemes, however, does not support the defendant's position.

Virginia's capital punishment scheme defines capital murder as the murder of "more than one person as a part of the same act or transaction"; Va. Code Ann. § 18.2-31 (7) (Michie Cum. Sup. 2002); and instructs that the death penalty "shall not be imposed unless . . . [the defendant's] conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim . . . ." Va. Code Ann. § 19.2-264.2 (Michie 2000). In *Barnes* v. *Commonwealth*, 234 Va. 130, 131–33, 360 S.E.2d 196 (1987), cert. denied, 484 U.S. 1036, 108 S. Ct. 763, 98 L. Ed. 2d 779 (1988), the defendant appealed his conviction of capital murder under § 18.2-31 (7) in connection with an attempted robbery during which he shot and killed a store owner and his employee. He claimed at oral argument before the Virginia Supreme Court that, because the capital murder charge was premised on multiple murders, *both* murders had to meet the vileness predicate of § 19.2-264.2 before the death penalty could be imposed. Id., 138. That court expressly concluded: "Where the 'vileness' predicate is under consideration, the manifest legislative purpose is to punish and deter any conduct which meets that standard. We conclude that if the killing *of any victim* in a multiple homicide meets the test of . . . § 19.2-264.2, the death penalty may be imposed." (Emphasis added.) Id.; see, e.g., *Goins* v. *Commonwealth*, 251 Va. 442, 470 S.E.2d 114, 132, cert. denied, 519 U.S. 887, 117 S. Ct. 222, 136 L. Ed. 2d 154 (1996) (implicitly affirming application of vileness factor to only one murder in conviction under multiple murder statute during review of sufficiency of evidence claim); *Thomas* v. *Commonwealth*, 244 Va. 1, 24–25, 419 S.E.2d 606 (1992) (same). Accordingly, Virginia's statutory scheme does not lend support to the defendant's claim in the present case.

Likewise, Alabama's statutory scheme does little to support the defendant's claim. Alabama's capital punishment scheme defines capital murder as "[m]urder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct"; Ala. Code § 13A-5-40 (a) (10) (1994);

and allows the imposition of the death penalty when "[t]he capital offense was especially heinous, atrocious or cruel compared to other capital offenses." Ala. Code § 13A-5-49 (8) (1994). The Alabama courts have not addressed explicitly the issue of whether, in a multiple murder conviction under § 13A-5-40 (a) (10), the heinous factor must be found to apply to two or more murders before the death penalty can be imposed. Review of the case law in which the Alabama courts have applied the heinous factor to a capital conviction pursuant to Alabama's multiple murder provisions, however, reveals that such cases have involved the application of the heinous factor to at least two murders. See, e.g., *Acklin* v. *State*, 790 So. 2d 975, 1001 (Ala. Crim. App. 2000), cert. denied, 533 U.S. 936, 121 S. Ct. 2565, 150 L. Ed. 2d 729 (2001) (evidence that defendant beat, humiliated and tortured, then shot three victims sufficient to support finding that murders were heinous); *Norris* v. *State*, 793 So. 2d 847, 861 (Ala. Crim. App. 1999) (evidence insufficient to elevate offense to especially heinous when three victims shot in rapid, uninterrupted succession); *Wilson* v. *State*, 777 So. 2d 856, 882 (Ala. Crim. App. 1999) (evidence that "defendant was unnecessarily torturous in his commission of the crimes" sufficient to support finding that four murders were heinous); *Peoples* v. *State*, 510 So. 2d 554, 573 (Ala. Crim. App. 1986), cert. denied, 484 U.S. 933, 108 S. Ct. 307, 98 L. Ed. 2d 266 (1987) (evidence that kidnapping and murder of husband, wife and child by blunt trauma to head sufficient to support finding that three murders were heinous); *Wright* v. *State*, 494 So. 2d 726, 744 (Ala. Crim. App. 1985), aff'd sub nom. *Ex parte Wright*, 494 So. 2d 745 (Ala.), cert. denied, 479 U.S. 1101, 107 S. Ct. 1331, 94 L. Ed. 2d 183 (1987) (evidence that two victims were shot in head and slowly died in pools of blood sufficient to support trial court's finding that murders were heinous). Accordingly, in the absence of any evidence indicating that the Alabama legislature's intention in enacting its particular capital sentencing scheme was to make only multiple murders in which at least two of the murders were heinous eligible for the imposition of the death penalty, the similarity of that scheme to Connecticut's carries little persuasive force in the effort to interpret our scheme in this regard.

Finally, the defendant constructs an elaborate argument based upon the differences between the language our legislature chose in enacting § 53a-54b (8), the language of the Model Penal Code and a proposed 1973 federal death penalty statute. According to the defendant, those differences reflect an intention by the legislature that the (i) (4) aggravating factor apply to at least two murders, unlike the statutory formulations called for by those sources, permitting application of the aggravant to only one of the murders. In light of the fact, however, that there is no mention of these sources

in our legislative history tending to indicate that the legislature took into consideration the language used in these sources, this argument is without merit.

In conclusion, consistent with the principles of statutory construction set forth in the majority opinion, I agree with the majority that the state's interpretation is more rational and, accordingly, is the correct one. While the interpretation proffered by the defendant and endorsed by the trial court is plausible, namely, that the (i) (4) aggravating factor applies to the underlying ''offense,'' which consists of at least two murders, and that at least two murders must, therefore, be aggravated, a careful review of the statutory language and scheme, the legislative intent, and the practical outcome of such an application reveals that such an interpretation is not rational and, as such, could not have been the legislature's intention. The defendant's strongest arguments involve the plain language of the statute and are indeed, at first blush, persuasive. But plain language is only the beginning of our statutory interpretation jurisprudence. See part II of the majority opinion. Indeed, further examination using our remaining available tools of statutory construction reveals that his arguments are hollow. Moreover, the defendant's reliance on the statutes of other states does not counter this conclusion and, in fact, Virginia's interpretation of its statutory scheme supports it. The defendant's claim is, therefore, without merit.

[1] I recognize, however, that because four other members of this court also agree with the state's interpretation of the revision of General Statutes § 53a-54b (8) in effect at the time of the commission of the crimes here; see footnote 2 of this concurring and dissenting opinion; the majority's ability to persuade me to concur in the judgment in the present case provides a hollow victory.

[2] General Statutes (Rev. to 1997) § 53a-54b, as amended by P.A. 98-126, provides: ''A person is guilty of a capital felony who is convicted of any of the following: (1) Murder of a member of the Division of State Police within the Department of Public Safety or of any local police department, a chief inspector or inspector in the Division of Criminal Justice, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman appointed under section 29-18, an employee of the Department of Correction or a person providing services on behalf of said department when such employee or person is acting within the scope of his employment or duties in a correctional institution or facility and the actor is confined in such institution or facility, or any fireman, while such victim was acting within the scope of his duties; (2) murder committed by a defendant who is hired to commit the same for pecuniary gain or murder committed by one who is hired by the defendant to commit the same for pecuniary gain; (3) murder committed by one who has previously been convicted of intentional murder or of murder committed in the course of commission of a felony; (4) murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; (5) murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; (6) the illegal sale, for economic gain, of cocaine, heroin or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone; (7) murder committed in the course of the commission of sexual assault in the first degree; *(8) murder of two or more persons at the same time or in the course of a single transaction*; or (9) murder of a person under sixteen years of age.'' (Emphasis added.)

Section 53a-54b subsequently has been amended, resulting in the elimination of then subdivision (6) relating to the death of a person as a result of the illegal sale of drugs. See Public Acts 2001, No. 01-151, § 3. References

herein to § 53a-54b are to the 1997 revision, as amended by P.A. 98-126.

[3] General Statutes § 53a-46a (i) provides in relevant part: "The aggravating factors to be considered [when determining the sentence to be imposed for a capital felony] shall be limited to the following . . . (4) the defendant committed the offense in an especially heinous, cruel or depraved manner . . . ."

While § 53a-46a has been amended since 1998, the time of the commission of the crimes in the present case; see Public Acts 2001, No. 01-151, §§ 1 and 2; subsection (i) (4) has remained unchanged. References herein to § 53a-46a (i) (4) are to the current revision of the statute.

[4] Although the legislature, in debates on the statute, did not discuss explicitly the application of the (i) (4) aggravating factor to § 53a-54b (8), it did discuss expressly that the thrust of the provision was to deter multiple murders. In particular, it was noted that the multiple murder provision was included in direct response to the public outrage created following the 1979 murders that had occurred in Waterbury, during which three Purolator Armored Car guards were ambushed in a garage and shot to death. See *State* v. *Couture*, 218 Conn. 309, 589 A.2d 343 (1991); *State* v. *Pelletier*, 209 Conn. 564, 552 A.2d 805 (1989). The murders were not punishable by death under the capital punishment scheme in effect at that time. Thus, the legislature enacted § 53a-54b (8) in an effort to deter multiple murders by making such offenses death eligible. See 23 S. Proc., supra, pp. 2326–27, remarks of Senator Owens. This express purpose is better served by a construction of § 53a-54b (8) under which only one aggravated murder is required for the imposition of the death penalty than under one in which two aggravated murders would be required.

[5] The state argues that Texas and Kansas also have such death penalty schemes. As the defendant correctly notes, however, Texas' statute provides no guidance in answering the question at hand—the application of the (i) (4) aggravating factor to the offense of multiple murder—because Texas does not have an aggravating factor analogous to the (i) (4) aggravating factor, and does not use aggravating factors to determine which capital murders are death eligible. Rather, Texas requires the sentencing authority to answer questions relating to the defendant's conduct and the likelihood of similar future conduct. See Tex. Penal Code Ann. § 19.03 (a) (7) (A) and (B) (Vernon 1994); Tex. Crim. Proc. Code Ann. art. 37.071 (Vernon 2002). Kansas' scheme also is unhelpful because, although that state's scheme is similar to Connecticut's; see Kan. Stat. Ann. §§ 21-3439 (6) and 21-4625 (6) (1995); my research has revealed no case law addressing this issue.