****

The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

All opinions are subject to modification and technical correction prior to official publication in the Connecticut Reports and Connecticut Appellate Reports. In the event of discrepancies between the electronic version of an opinion and the print version appearing in the Connecticut Law Journal and subsequently in the Connecticut Reports or Connecticut Appellate Reports, the latest print version is to be considered authoritative.

****

ZARELLA, J., with whom SULLIVAN, C. J., joins, dissenting. The majority's opinion is nothing short of breathtaking. The majority expressly abandons the plain meaning rule and fails to apply the rule of lenity in a death penalty case in which the majority states that the text of the statutory provision at issue favors the defendant's interpretation. Moreover, application of the tools of interpretation that the majority employs in reaching its conclusion leads to a flawed assessment of the rationality of the legislature's choices in drafting this state's death penalty statute. I believe, for reasons distinct from those offered by the majority, that the text of the statute at issue suggests that the defendant's interpretation of the statute should be rejected. I am not convinced, however, that the statute is clear and unambiguous, which, under well established law, is constitutionally required if this court is to reject the defendant's interpretation. Finally, in my view, the majority's abandonment of the plain meaning rule in favor of an alternative and novel method of statutory interpretation represents an incorrect deviation from our traditional mode of statutory interpretation and an impermissible usurpation of the legislative function. Accordingly, I dissent.

First, as I describe in part I of this opinion, the majority's statutory interpretation is, in reality, a series of assertions about the purported irrationality of that which the majority perceives as the probable textual meaning of the statute, i.e., that the existence of the aggravating factor enumerated in General Statutes (Rev. to 1997) § 53a-46a (i) (4) cannot be established under the circumstances of this case unless *both* murders are proven to be committed in an especially heinous, cruel or depraved manner.[1] Nevertheless, the majority holds that the statute's ''context and history'' reveal that the existence of the aggravating factor enumerated in § 53a-46a (i) (4) can be established upon proof that *one* of the murders was committed in a cruel manner. In my view, however, the majority's assertions regarding the statute's ''context and history'' are wholly unpersuasive.

Even more striking is the majority's failure to apply the rule of lenity. The rule of lenity, which embodies the fundamental constitutional principles of due process and the separation of powers; see, e.g., *United States* v. *Bass*, 404 U.S. 336, 348, 92 S. Ct. 515, 30 L. Ed. 2d 488 (1971); provides that our death penalty statute should not be applied unless the legislature ''*expressly* so intend[s].'' (Emphasis in original; internal quotation marks omitted.) *State* v. *Harrell*, 238 Conn. 828, 832, 681 A.2d 944 (1996), quoting *State* v. *Breton*, 212 Conn. 258, 268–69, 562 A.2d 1060 (1989). I cannot fathom how

the majority can conclude that a statute, the plain meaning of which, according to the majority, *favors* the defendant's interpretation, nevertheless reveals an *express* legislative intent to impose the death penalty under the circumstances of this case. The majority's failure to adhere to the clear command of the rule of lenity under such circumstances is not only unprecedented, but startling, in view of the fact that this court expressly has concluded that the rule is ''especially pertinent to a death penalty statute . . . .'' (Internal quotation marks omitted.) *State* v. *Harrell*, supra, 833.

In contrast, as I describe in part II of this opinion, I would conclude that the text of § 53a-46a (i) (4) strongly suggests that the state must prove that, under the totality of the circumstances, the offense, i.e., capital felony, as a *whole*, was committed in a cruel manner. In my view, an inquiry into whether the constituent parts of the capital felony—in the present case, each of the two murders—were committed in a cruel manner simply is unnecessary under our death penalty scheme. I also would conclude, however, that a reasonable doubt persists about the statute's meaning. Specifically, although I believe that, under § 53a-46a (i) (4), the state need not prove that each murder was committed in a cruel manner in order to establish the existence of that aggravating factor, my belief is not the product of statutory language that is manifest. Therefore, I would uphold the trial court's application of the rule of lenity and hold that § 53a-46a (i) (4) requires the state to prove that each murder was committed in a cruel manner in order to establish the existence of that aggravating factor.

Finally, as I describe in part III of this opinion, I strongly disagree with the majority's unique approach to statutory interpretation. In particular, I believe that this court should continue to adhere to the plain meaning rule as it has, along with nearly every other court in this country, for the past 100 years. In my view, the problems inherent in the majority's alternative method of statutory interpretation could not be illustrated better than by the majority opinion itself. I conclude by offering an approach to statutory interpretation that I believe is more consistent with the fundamental role that the text of a statutory provision should play in statutory interpretation.

I

A

As the majority notes, the defendant argues that the aggravating factor at issue requires proof that ''the defendant committed *the offense* in an especially heinous, cruel or depraved manner . . . .'' (Emphasis added.) General Statutes (Rev. to 1997) § 53a-46a (i) (4). Moreover, the majority states that ''the likely referent of 'the offense' is the capital felony of which the defendant

has been convicted . . . .'' In the present case, that offense is defined as the ''murder of two or more persons at the same time or in the course of a single transaction . . . .'' General Statutes (Rev. to 1997) § 53a-54b (8). Thus, the defendant argues that, because the offense enumerated in § 53a-54b (8) is the murder of two persons, § 53a-46a (i) (4) requires proof that both murders were committed in a cruel manner. The majority concludes that this is the most persuasive textual reading of the statute.[2]

I would further note that the defendant's interpretation is consistent with the notion expressed in this state's appellate case law that the term ''offense'' refers to all, and not part, of the elements of the offense. For example, in *State* v. *Miller*, 69 Conn. App. 597, 795 A.2d 611, cert. denied, 260 Conn. 939, 802 A.2d 91 (2002), the Appellate Court recently noted that, ''[t]o sustain a conviction for conspiracy to commit a particular *offense*, the prosecution must show not only that the conspirators intended to agree but also [that] they intended to commit the *elements of the offense*.'' (Emphasis added; internal quotation marks omitted.) Id., 607. Thus, the Appellate Court in *Miller* refers to the term ''offense'' and the phrase ''elements of the offense'' as identical concepts. See id. That is, one cannot be convicted of conspiracy to commit an ''offense'' unless one conspires to commit the ''elements of the offense.'' (Internal quotation marks omitted.) Id. Likewise, the text of § 53a-46a (i) (4) reasonably can be construed to require the state to prove that ''the defendant committed [all of the elements of] *the offense* in an especially heinous, cruel or depraved manner . . . .'' (Emphasis added.) General Statutes (Rev. to 1997) § 53a-46a (i) (4).[3]

Although the majority acknowledges that the text of the statute favors the defendant's interpretation over the state's contrary textual interpretation, the majority nevertheless concludes that the statute's ''context and history'' support the state's interpretation. Unlike the defendant, who relies upon the similarity between the meaning of the word ''offense'' and the meaning of the phrase ''elements of the offense'' in offering his construction of § 53a-46a (i) (4), the majority relies on the statute's context and history in construing that statutory provision to require proof only that ''the defendant committed [*at least part of*] the offense in an especially heinous, cruel or depraved manner . . . .'' General Statutes (Rev. to 1997) § 53a-46a (i) (4). Obviously, an interpretation of a statute that is based on the insertion of words that do not appear in its text should be rejected. This is all the more true in the present case in light of the unpersuasiveness of the reasons offered by the majority in support of its implicit judicial insertion. In my view, the ''first part of [its] analysis is nothing more than a truism. The second part merely sets up the proverbial straw man.'' *Sheff* v.

O'Neill, 238 Conn. 1, 94, 678 A.2d 1267 (1996) (*Borden, J.*, dissenting).

First, the majority states that there are two ''constituent parts'' to the capital offense at issue, namely, two murders. The majority then goes on to conclude that this fact ''permits the interpretation that the aggravating factor [enumerated in § 53a-46a (i) (4)] may be satisfied by proof of its existence with respect to at least *one* of those constituent parts.''[4] (Emphasis added.) In my view, this circular logic does nothing more than merely assume the majority's conclusion.[5]

The second rationale that the majority provides is more elaborate but, I believe, no more persuasive. The majority's construction of the statute at issue rests upon its analysis of the application of the aggravating factor enumerated in § 53a-46a (i) (4) to another capital offense, namely, murder in the course of a kidnapping. See General Statutes (Rev. to 1997) § 53a-54b (5). The majority concludes that when the legislature adopted the death penalty statute in 1973, it did *not* require the state to prove, in the context of a kidnap-murder, that both the kidnapping and the murder were committed in a cruel manner in order to establish the existence of the ''cruel'' aggravating factor. The majority reaches this important conclusion, which forms the entire underpinning of its theory, first, by explaining that when a capital felony involves only one underlying offense, e.g., murder for hire pursuant to § 53a-54b (2), the state need only prove that the *one* murder was committed in a cruel manner. The majority further states that if the defendant's interpretation were accepted, when a capital felony involves two underlying offenses, e.g., kidnapping and murder, the state would be required to prove that *both* offenses were committed in a cruel manner. In contemplating this result, the majority states that it ''can conceive of no rationale for the legislature to have set a higher bar to the imposition of the death penalty when the underlying capital felony involve[s], not one, but two underlying serious felonies, namely, kidnapping and murder.''

I see nothing irrational about a reading of the statute that would require proof of the existence of an aggravating factor as to all of the potentially applicable constituent parts of the offense. When a defendant is charged with two crimes and one crime has one element and the second crime has two elements, all things being equal, it will be harder for the state to prove the crime having two elements than the crime having one. This does not mean that the classification lacks a rationale, however. It simply means that the legislature intended to require proof of both elements of the crime before the defendant can be found guilty. Likewise, in determining the application of the aggravating factor enumerated in § 53a-46a (i) (4) to each of the capital offenses enumerated in § 53a-54b, it would not be irra-

tional to conclude that the legislature required that, for each potential constituent part, the fact finder determine whether the defendant carried out the proscribed act in a cruel manner.[6]

Moreover, neither the text of the statute nor any a priori reasoning can reveal the degree of comparative moral abhorrence that the legislature attributed to a kidnap-murder as opposed to a murder for hire. The mere fact that a particular capital offense consists of two underlying felonies does not, in my view, necessarily suggest that the legislature believed that it should be just as easy to impose the death penalty for that capital offense as it is for another capital offense that the legislature had deemed abhorrent on the basis of the nature of the defendant's conduct or the status of the victim.

Having suggested this purported irrationality, the majority continues its analysis by stating that it makes little sense to think that, in 1980, when the legislature added multiple murders in the course of a single transaction to the list of capital felonies, it intended to change the manner in which the aggravating factor of § 53a-46a (i) (4) operates. The majority states that it can conceive of no reason why the *legislature* would have intended to require proof of the existence of an aggravating factor only as to one of the constituent parts of the capital felony of kidnap-murder, but require proof of the existence of an aggravating factor as to both of the constituent parts of the capital felony of multiple murders committed in the course of a single transaction.

Although I acknowledge that it might be unusual for the aggravating factor enumerated in § 53a-46a (i) (4) to operate in this fashion, one obvious rationale for such an interpretation of the two statutes would be that the legislature did not deem multiple murders to be as morally abhorrent as a murder in the course of a kidnapping. In my view, not only is there nothing irrational about such a moral determination, but the legislative genealogy upon which the majority relies strongly suggests that the legislature did make such a determination.

As the majority acknowledges, the legislature designated kidnap-murder as a capital offense in 1973 but ''made the policy choice not to include multiple murders within the definition of capital felony [at that time].'' Footnote 12 of the majority opinion. The legislature did not make multiple murder a capital felony until 1980. Moreover, in 1980, notwithstanding the existing designation of kidnap-murder as a capital felony, several legislators expressed doubts about whether the moral abhorrence of multiple murders justified its classification as a capital felony. See, e.g., 23 H.R. Proc., Pt. 19, 1980 Sess., p. 5678, remarks of Representative Naomi W. Otterness (''I feel that when you are talking about one murder, two murders ad infinitum, what's the differ-

ence? Why is it now, that we have to say, when you have a murder of more than one person that it becomes a capital felony?''); id., p. 5679, remarks of Representative Paul Gionfriddo (''I don't believe that there is any qualitative difference between the murder of one person and the murder of two people''); id., pp. 5680–81, remarks of Representative Rosalind Berman (questioning need to distinguish between status of multiple murders and ''routine'' or single murders). Thus, the majority need not look any farther than the legislative history of § 53a-54b to find evidence of a possible rationale for why the legislature might have chosen to require, in the context of a multiple murder capital felony, proof that each murder had been committed in a cruel manner, even if it is assumed that, in 1973, the legislature intended to require proof only that the murder was committed in a cruel manner in order to establish the existence of the ''cruel'' aggravating factor in the context of kidnap-murder.[7]

There is, however, an even more fundamental problem with the majority's reasoning, namely, that the majority's hypothetical rests entirely upon the *majority's* previous conclusion that, with regard to kidnap-murder, the state can establish the existence of the aggravating factor merely by proving that the murder was committed in a cruel manner. Obviously, the *legislature* did not have the benefit of the majority opinion in 1980 when it designated multiple murders as a capital felony. Thus, it makes no sense to rely upon what the majority labels a ''perverse result'' that derives from an alternate interpretation of the statute when that result is premised entirely on an interpretation of the statute that the majority, itself, not the legislature, presents for the first time in its opinion in the present case.

Moreover, as I noted previously, the legislative genealogy of § 53a-54b reveals that the majority's conclusions about the rationality of various schemes of deterrence are unsupported. The majority concludes that ''[a] capital felon who murder[s] two persons in the course of a single transaction must be regarded, *under any rational system of deterrence and moral hierarchy, as . . . at least equally morally blameworthy* to one who murders and either kidnaps or sexually assaults only one victim in the course of a single transaction. We cannot conceive of any legislative rationale pursuant to which the legislature would have intended, when it added multiple murder to the definition of capital felony, to set a higher bar to the imposition of the death penalty on multiple murder in a single transaction than it would have for murder-kidnap or murder-sexual assault in a single transaction.'' (Emphasis added.) Prior to 1980, however, the bar not only was higher for the former, but the legislature apparently did *not* regard a defendant who murdered two persons in the course of a single transaction as morally blameworthy as a defendant who murdered and kidnapped only one per-

son in the course of a single transaction. Prior to 1980, a double murder, in the absence of other circumstances, could *not* result in the imposition of the death penalty whereas a kidnap-murder could. See, e.g., General Statutes (Rev. to 1979) § 53a-54b. Thus, the majority's logic is inexplicable, for the system of deterrence that the legislature adopted in 1973 is exactly the system that the majority now suggests is irrational.

This incongruity reveals the unsoundness of the majority's reliance upon its own notions as to the legislature's rationale behind the death penalty statute. The majority contends that the defendant's interpretation of § 53a-46a (i) (4) must be incorrect inasmuch as there is no basis for finding that the legislature would have enacted a statute that is consistent with the interpretation advanced by the defendant. Yet, the death penalty statutory scheme that the legislature established in 1973, which designated kidnap-murder as a capital felony but not multiple murders in the course of a single transaction; see General Statutes (Rev. to 1975) § 53a-54b; is the very system of deterrence that the majority's analysis suggests is *irrational*. Thus, it is implicit in the majority's analysis both that: (1) the defendant's interpretation of § 53a-46a (i) (4) must be rejected because *it would have been irrational* for the legislature to have enacted such a statute; and (2) in 1973, the legislature enacted a death penalty statutory scheme that *is irrational*. This makes no sense.

The majority's response to this critique only further proves this point. The majority chides the dissent for ''misconstru[ing] [its] reasoning,'' noting that any question regarding the rationality of the 1973 statute is not before this court. Footnote 12 of the majority opinion. I never have suggested that it is. On the contrary, what I have maintained as inexplicable is that, in one part of its analysis, the majority states that the defendant's interpretation must be rejected because, if it were applied to the death penalty statute, as enacted in 1973, it would lead to a purportedly irrational result. Specifically, the purportedly irrational result with which the majority is concerned is that it would be harder to establish the existence of the ''cruel'' aggravating factor in connection with kidnap-murder than in connection with murder for hire. Yet, the very next part of the majority's analysis assumes that the death penalty statute, as enacted in 1973, was irrational because it designated kidnap-murder, but not multiple murders, as a capital felony. I do not see how the defendant's interpretation can be rejected on the ground that it supposedly suggests that the legislature enacted an irrational statute in light of the fact that the majority's own reasoning leads to the same conclusion. The majority never explains this paradoxical logic.

I also would note that, in responding to the dissent's critique, the majority simply elucidates its straw man

technique further by stating that the question before the court is ''whether, when [the legislature] did decide to include multiple murders in the capital felony scheme in 1980, [it] intended for the state to have a heavier burden with respect to the aggravating factor as applied to that crime than every other offense, including kidnap-murder, already included in that scheme.'' Footnote 12 of the majority opinion. Of course, as I previously noted, that is the question before this court *only* if it is assumed that the legislature intended, in the context of a kidnap-murder, to make proof of the existence of the aggravating factor enumerated in § 53a-46a (i) (4) dependent on whether the defendant committed the murder but not the kidnapping in a cruel manner. It is the *majority*, not the *legislature*, that has reached such a conclusion. The transparency of the majority's analysis is all too apparent owing to the fact that the majority provides *no* response to the dissent's criticism of the majority's critical misapplication of the aggravating factor of § 53a-46a (i) (4) to the capital felony of kidnap-murder, upon which the majority's opinion rests.

B

Even more distressing is the majority's rejection of the rule of lenity under the circumstances of the present case. The majority's rejection of this important rule is indefensible, especially in light of the fact that the majority's statutory interpretation rests on little more than its thrice stated confidence in its ability to discern the irrationality of various possible death penalty schemes.

As the majority acknowledges, the rule of lenity applies whenever there is a reasonable doubt as to the scope of a statute. E.g., *State* v. *Sostre*, 261 Conn. 111, 120, 802 A.2d 754 (2002). Contrary to the majority's assertion that the rule of lenity is to be applied ''like all . . . axioms of construction,'' however, the United States Supreme Court repeatedly has held that the rule is ''*not* merely a convenient maxim of statutory construction.'' (Emphasis added.) *Dunn* v. *United States*, 442 U.S. 100, 112, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979). As the United States Supreme Court consistently has reaffirmed, the rule of lenity is rooted in principles of due process and the separation of powers. E.g., id. (rule is rooted in fundamental principles of due process); *United States* v. *Bass*, supra, 404 U.S. 348 (twin rationales of rule of lenity are '' 'fair warning' '' and that ''legislatures and not courts should define criminal activity''); *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (''The rule that penal laws are to be construed strictly . . . is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals . . . and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department.'').

In view of the majority's willingness to dispense with

even the most bedrock principles of statutory interpretation; see part II of the majority opinion; its disregard of ''the constitutional underpinnings of lenity'' is of even greater consequence. Note, ''The Mercy of Scalia: Statutory Construction and the Rule of Lenity,'' 29 Harv. C.R.-C.L. L. Rev. 197, 202 (1994); cf. *Lurie* v. *Wittner*, 228 F.3d 113, 123 n.4 (2d Cir. 2000) (rejecting government's claim that ''rule of lenity is a statutory presumption lacking a constitutional dimension'' inasmuch as rule protects defendant's constitutional right to fair warning).

In the present case, the majority's acknowledgment that the defendant has the better textual argument dictates the conclusion that there is, at the very least, a reasonable doubt as to the interpretation of the statute. Indeed, in *State* v. *Harrell*, supra, 238 Conn. 828, this court emphasized that a criminal statute should not be applied so as to impose criminal liability unless the legislature has ''*expressly* so intended.'' (Emphasis in original; internal quotation marks omitted.) Id., 832; accord *State* v. *Breton*, supra, 212 Conn. 268–69. I do not see how the majority possibly could reach such a conclusion in light of its determination that the *defendant* has the better textual argument. Apparently, neither does the majority; rather than attempting to distinguish this language in *Harrell*, the majority simply ignores *Harrell*'s requirement of an *express* legislative intent. Furthermore, for the first time, this court, unlike any other court of which I am aware, holds that, although a review of the plain text of the statute *favors* the defendant's interpretation, other tools of statutory interpretation remove all reasonable doubt that the defendant's interpretation is erroneous.[8] In my view, such a holding relegates the constitutionality mandated rule of lenity to a judicial nicety.

The majority's unprecedented conclusion is even more startling in view of the fact that this court has stated that ''[i]t is axiomatic that any statutory construction implicating the death penalty must be based on a conclusion that the legislature has clearly and unambiguously made its intention known. . . . The rules of strict construction and lenity applicable to penal statutes generally are especially pertinent to a death penalty statute such as § 53a-54b.'' (Citations omitted; internal quotation marks omitted.) *State* v. *Harrell*, supra, 238 Conn. 833. In my view, it is manifestly unjust for the majority to interpret the death penalty statute so as to subject the defendant to the death penalty upon proof that one of the murders in the present case was committed in a cruel manner, while also stating that the text of the statute suggests that proof that both murders were committed in a cruel manner is required. This is particularly so when the majority fails to provide any persuasive reason justifying such an interpretation, much less offer an interpretation that establishes beyond a reasonable doubt that the legislature

expressly intended such a result.

Finally, contrary to the majority's assertion, I do not conclude that the rule of lenity applies "in every case in which the defendant [is] able to muster a plausible, albeit erroneous, interpretation of a criminal statute." Footnote 15 of the majority opinion. Likewise, I reject the majority's characterization of my dissent as suggesting that the rule of lenity applies whenever a "defendant's interpretation appears to be plausible." Id. Rather, I am simply unable to conclude beyond a reasonable doubt, as our law requires; see, e.g., *State* v. *Sostre*, supra, 261 Conn. 120; that the defendant's interpretation of the statute is, in fact, erroneous. Had the majority properly applied the rule of lenity, it would have reached the same conclusion.

Instead of reaching this conclusion, however, the majority employs its familiar straw man technique and suggests that my application of the rule of lenity would dictate that defendants in criminal cases with statutory interpretation claims almost always prevail. On the contrary, this court long has employed the reasonable doubt formulation, as I do in this opinion, and only rarely has it concluded that the rule applied. That is because, contrary to the majority's belief that nearly all cases of statutory interpretation give rise to arguments that raise a reasonable doubt as to a statute's application, a view engendered by its relativistic method of statutory interpretation; see part III of this opinion; this court and other courts routinely reject arguments that fail to raise such a doubt. When, however, as in the present case, a defendant has a strong textual argument—indeed, in the majority's view, the *strongest* textual argument—it is clear that the rule of lenity applies.

II

In contrast to the majority's determination that the defendant has a strong textual argument, I believe that the text of § 53a-46a (i) (4) does not require the state to prove the existence of the aggravating factor as to each individual constituent part, in the present case, each individual murder. I also would conclude, however, that, after interpreting the statute, a reasonable doubt persists about whether the legislature expressly intended that the death penalty be imposed under the circumstances of the present case. Therefore, I would uphold the trial court's application of the rule of lenity and require that the state prove beyond a reasonable doubt that both murders were committed in a cruel manner in order to satisfy its burden of establishing the existence of the aggravating factor enumerated in § 53a-46a (i) (4).

As I noted previously, the state satisfies its burden of establishing the existence of the aggravating factor enumerated in § 53a-46a (i) (4) when it proves that

"the defendant committed *the offense* in an especially heinous, cruel or depraved manner . . . ." (Emphasis added.) General Statutes (Rev. to 1997) § 53a-46a (i) (4). I conclude that the italicized term, "the offense," refers to the capital offense or, in other words, the crime of capital felony. See generally General Statutes (Rev. to 1997) § 53a-54b. In the present case, the particular capital felony with which the defendant was charged is the "murder of two or more persons at the same time or in the course of a single transaction . . . ." General Statutes (Rev. to 1997) § 53a-54b (8).

In my view, the text of § 53a-46a (i) (4) does not suggest that the state must prove, in the context of multiple murders, that both murders were committed in a cruel manner in order to satisfy its burden of establishing the existence of the aggravating factor, as the defendant argues. I also reject the majority's conclusion that the sentencer should determine if either of the two murders was committed in a cruel manner and return a verdict in favor of the death penalty if it determines that one was committed in a cruel manner. Rather, I believe that the statute requires the state to prove that the offense, as a whole, was committed in a cruel manner. In other words, I believe that the statute requires the sentencer to consider the totality of the circumstances surrounding the commission of the offense. I do not believe that the statute requires the sentencer to focus its analysis on a determination of whether each constituent part of the offense was committed in a cruel manner.

Our death penalty case law is consistent with my interpretation of the statute. I begin by acknowledging that this court expressly reserved the issue presented in the present case in *State* v. *Breton*, 235 Conn. 206, 220 n.15, 663 A.2d 1026 (1995). This court never has tied aggravating factors to the particular constituent parts of a capital felony in any of this court's many previous death penalty cases. See generally, e.g., *State* v. *Johnson*, 253 Conn. 1, 751 A.2d 298 (2000); *State* v. *Cobb*, 251 Conn. 285, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000); *State* v. *Webb*, 238 Conn. 389, 680 A.2d 147 (1996); *State* v. *Ross*, 230 Conn. 183, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995).

On the contrary, this court's analysis has focused on the totality of the circumstances surrounding the offense in determining whether the evidence was sufficient to support a finding that the aggravating factor of § 53a-46a (i) (4) had been adequately established. For example, in *State* v. *Cobb*, supra, 251 Conn. 285, this court noted that "[t]he evidence supports the determination that the victim experienced extreme psychological and physical pain and suffering *throughout this entire episode*." (Emphasis added.) Id., 449. Similarly,

in *State* v. *Webb*, supra, 238 Conn. 389, this court noted that, ''[p]rior to her death, [the victim] *experienced a prolonged abduction* during which she was held at gunpoint while the defendant drove, for approximately twelve minutes, to a park nearly four miles away from the point of abduction.'' (Emphasis added.) Id., 486. In neither case did the court ask whether the ''cruel'' aggravating factor was applicable to each constituent part of the capital felony at issue.

Likewise, in *State* v. *Ross*, supra, 230 Conn. 183, this court stated that ''the jury received evidence about the effect of the kidnapping as an aggravating factor for the capital felony count predicated on a sexual assault, and evidence about the effect of the sexual assault as an aggravating factor for the capital felony count predicated on a continuing kidnapping.'' Id., 264. In *Ross*, this court did *not* indicate whether the kidnapping aggravated the sexual assault or the murder component of the sexual assault-murder capital felony. Similarly, the court did *not* indicate whether the sexual assault aggravated the kidnapping or the murder component of the kidnap-murder capital felony.

Finally, in *State* v. *Johnson*, supra, 253 Conn. 1, the court expressly acknowledged that, ''[a]lthough there are cases in which a near instantaneous death by gunfire could satisfy the . . . aggravating factor [enumerated in § 53a-46a (i) (4)], typically such cases have involved extreme fear, emotional strain and terror *during the events leading up to the murder*.'' (Emphasis added.) Id., 74–75. In other words, in such a case, the act of murdering the victim, itself, is *not* committed in a cruel manner.[9] Nevertheless, what this court was suggesting in *Johnson* is that, in light of the totality of the circumstances surrounding the commission of the offense in such a hypothetical case, we *would* conclude that the defendant committed such an offense in a cruel manner. See id.

Such analysis makes perfect sense to me. If a defendant kidnaps and brutally tortures someone and then kills that person, is that a cruel *kidnapping* or a cruel *murder*? More importantly, does the statutory scheme require that the sentencer make such a determination? In my view, there is nothing in the text of the statute that suggests that such an inquiry is necessary. On the contrary, I believe that the statutory scheme simply requires that, when a person kidnaps and brutally tortures the victim and then kills the victim, the question for the sentencer is whether, under the totality of the circumstances, the offense, considered as a whole, was committed in a cruel manner. Likewise, when two murders are involved, as in the present case, the question is whether, under the totality of the circumstances, the offense, considered as a whole, was committed in a cruel manner.

I also note that this court repeatedly has held that

the legislature is presumed to know how to draft a statute to reach a particular result. See, e.g., *State* v. *King*, 249 Conn. 645, 684, 735 A.2d 267 (1999) (''if the legislature had sought to distinguish between the different degrees of kidnapping for purposes of § 53a-54b [5], it knew how to do so''). Indeed, the legislature expressly could have required the state to prove that a capital felon committed *all of the constituent parts* of the offense in a cruel manner, as the defendant would have us construe the statute. Conversely, the legislature expressly could have required that the state merely prove that the defendant committed *at least part of* the offense in a cruel manner, as the majority concludes.[10] The legislature chose neither option. Instead, it required the state to prove that the defendant committed ''*the offense*'' in a cruel manner. (Emphasis added.) General Statutes (Rev. to 1997) § 53a-46a (i) (4). Consequently, the text of § 53a-46a (i) (4) should not be interpreted as either the defendant or the majority suggests.

Although I would conclude that the text of the statute strongly supports my conclusion,[11] I am unable to conclude beyond a reasonable doubt, as our law requires; see, e.g., *State* v. *Sostre*, supra, 261 Conn. 120; that the defendant misconstrues the scope of the statute. Indeed, the fact that neither the majority nor the state, the trial court, or the defendant has construed the statute in the way that I believe the text warrants, strengthens my ultimate conclusion that the rule of lenity should apply.

Therefore, I would conclude, as this court did in *State* v. *Harrell*, supra, 238 Conn. 828, that ''[w]hen, as in th[e] [present] case, the imposition of the death penalty is the possible consequence of our decision, we must not toy with competing, plausible interpretations of a statutory penal scheme.'' Id., 838. Accordingly, I would uphold the trial court's application of the rule of lenity under the circumstances of the present case.

III

I also strongly disagree with the majority's approach to statutory interpretation and its abandonment of the plain meaning rule. In my view, the majority's opinion is an exemplar of the problems engendered by such an approach. I propose an alternative approach that builds upon the plain meaning rule and describes the manner in which I apply the various tools of statutory interpretation.

A

The majority's method of statutory interpretation is radical, its central premise is misguided, and its application is likely to lead to an unpredictable and unconstrained statutory interpretation jurisprudence. I discuss each of these conclusions in turn.

As the majority acknowledges, its approach to statutory interpretation ''has not been adopted in the same

specific formulation by *any* other court in the nation.'' (Emphasis added.) Footnote 19 of the majority opinion. I think for good reason.

My most fundamental disagreement with the majority's approach to statutory interpretation is its heavy reliance upon unexpressed statutory purposes.[12] Such reliance is particularly inappropriate when a statute's text is plain and unambiguous. Indeed, even proponents of the purposive approach to statutory interpretation that the majority embraces acknowledge that nontextual sources should be resorted to only when a statute is *unclear*. See, e.g., S. Breyer, ''On the Uses of Legislative History in Interpreting Statutes,'' 65 S. Cal. L. Rev. 845, 848 (1992) (legislative history is useful in interpreting *unclear* statutes). Thus, the majority's contention that a statute's unenumerated purpose can trump statutory language that is plain and unambiguous is truly beyond the pale. I am particularly troubled by such an approach because I agree with John M. Walker, Jr., the chief judge of the United States Court of Appeals for the Second Circuit, who recently assessed the lack of usefulness of the purposive method of statutory interpretation: ''[A legislative] purpose, whether derived from legislative history, the entirety of the statute, the mischief at which the statute is aimed, or the judge's imagination, is normally of such generality as to be useless as an interpretative tool, unless, of course, it is being used as a cover for the judge to 'do justice' as he sees fit.'' J. Walker, Jr., ''Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge,'' 58 N.Y.U. Ann. Surv. Am. L. 203, 236 (2001).[13]

Indeed, I think that it is highly questionable whether it is epistemologically possible for legislation to reflect any single underlying purpose. In my view, notions of extratextual legislative intent or purpose are devoid of meaning because a ''group may act (for example, by enacting a statute), but it is a mistake to attribute a collective intention to its action.'' B. Karkkainen, '' 'Plain Meaning': Justice Scalia's Jurisprudence of Strict Statutory Construction,'' 17 Harv. J.L. & Pub. Policy 401, 415–16 (1994). In other words, ''[i]ndividuals may have mental states, but groups do not.'' Id., 415; see also M. Radin, ''Statutory Interpretation,'' 43 Harv. L. Rev. 863, 870 (1930) (it is ''transparent and absurd fiction'' to attribute collective intent to entire legislative body).

Moreover, as defenders of the purposive method of statutory interpretation have acknowledged, even if it were theoretically possible to uncover a statute's purpose with sufficient specificity to guide the interpretative process of the particular issue before the court, public choice theory presents a ''substantial'' critique of such a method. S. Breyer, supra, 65 S. Cal. L. Rev. 866. Such a theory teaches that legislation is the product of bargaining between various interest groups rather

than an underlying common will or purpose among legislators. Id. Thus, the theory suggests, as an empirical matter, that statutes will rarely have a single purpose that can guide interpretation.[14]

Finally, beyond properly stating that "the language of the statute is the most important factor to be considered," the majority, in introducing its new approach to statutory interpretation, fails to provide any guidance as to the significance that should be attached to the other interpretative tools that its approach encompasses. Instead, the majority's approach envisions the interpretation of statutes on a case-by-case basis, whereby the judicial authority can pick and choose from among various tools of interpretation to construct a meaning that might reflect a reasoned judgment. In contrast, I believe that an explanation of the relative usefulness of the various tools of statutory interpretation is of vital importance in providing litigants, judges, legislators and the public with clear guidance and notice as to how the statutes of this state will be interpreted in future cases.[15]

B

As problematic as the majority's approach to statutory interpretation is in a case in which a statute is ambiguous, the majority's representation that it will apply such an approach even when a statute's text is clear is even more problematic. In other words, I am in sharp philosophical disagreement with the majority's express abandonment of the plain meaning rule.

As a preliminary matter, it is important to note that, in stating that when the plain meaning rule is applied, a court is "*precluded as a matter of law*" from inquiring beyond the text of a statute; (emphasis in original); the majority suggests that the plain meaning rule is a rule of law. It is well established, however, that "the plain-meaning rule is rather an axiom of experience than a rule of law . . . ." (Internal quotation marks omitted.) *Public Citizen* v. *United States Dept. of Justice*, 491 U.S. 440, 455, 109 S. Ct. 2558, 105 L. Ed. 2d 377 (1989). Thus, the rule, as well as the majority's rejection of the rule, is one of judicial *philosophy*, not one of *substantive law*. Accordingly, it follows that part II of the majority opinion, in which the majority expresses the judicial philosophy of five members of this court, does not describe the manner in which I will interpret statutes.

The majority essentially outlines the plain meaning rule in a manner that is consistent with the way in which I view the rule. There is, however, one important statement that the majority makes in describing the rule with which I take issue. The majority maintains that, under the plain meaning rule, as well as the majority's own approach to statutory interpretation, "the task of the court is to ascertain *the intent of the legislature* in using the language that it chose to use, so as to

determine [the] meaning [of that language] in the context of the case.'' (Emphasis added.) The plain meaning rule, however, is premised on the idea that we are governed by what the legislature actually said as opposed to that which it intended to say. Thus, while the majority's approach strives to uncover *subjective legislative intent*, the plain meaning rule searches for a statute's *objective textual meaning*.[16]

With that clarification, I agree with the majority that the plain meaning rule dictates that, if the language of a statute is plain and unambiguous, and if a construction based on the plain and unambiguous language of the statute does not yield an absurd result, then the court should end its inquiry there. In my view, the majority's disavowal of this rule is unwarranted and problematic for several reasons.

First, it bears emphasizing that the majority essentially declares that a method of statutory construction used by this court in literally hundreds of cases over the past century, including very recent cases, was incorrect. See, e.g., *MacDermid, Inc.* v. *Dept. of Environmental Protection*, 257 Conn. 128, 154, 778 A.2d 7 (2001); *Rizzo Pool Co.* v. *Del Grosso*, 240 Conn. 58, 74, 689 A.2d 1097 (1997); *State* v. *Blasko*, 202 Conn. 541, 553, 522 A.2d 753 (1987); *State* v. *Springer*, 149 Conn. 244, 248, 178 A.2d 525 (1962); *Evans* v. *Administrator, Unemployment Compensation Act*, 135 Conn. 120, 124, 61 A.2d 684 (1948); *Lee Bros. Furniture Co.* v. *Cram*, 63 Conn. 433, 438, 28 A. 541 (1893).[17] We were not alone. As the author of a leading treatise on statutory interpretation has explained, the plain meaning rule is ''[a] basic insight about the process of communication . . . given classic expression by the Supreme Court of the United States . . . .'' 2A J. Sutherland, Statutory Construction (6th Ed. Singer 2000) § 46.01, p. 113.[18] Similarly, a federal circuit court of appeals recently referred to this principle of statutory interpretation as ''too elementary to require a citation . . . .'' *Cline* v. *General Dynamics Land Systems, Inc.*, 296 F.3d 466, 467 (6th Cir. 2002). The rule's doctrinal pedigree is, indeed, impressive. The principle upon which the rule is premised can be traced at least as far back as Blackstone. See 1 W. Blackstone, Commentaries on the Laws of England (1765) pp. 59–62. One commentator has noted that the United States Supreme Court first articulated the rule as early as 1928 in *United States* v. *Missouri Pacific R. Co.*, 278 U.S. 269, 278, 49 S. Ct. 133, 73 L. Ed. 322 (1929). B. Karkkainen, supra, 17 Harv. J.L. & Pub. Policy 433. The United States Supreme Court continues to rely on the rule in construing federal statutes. E.g., *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 450, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002). Indeed, an *overwhelming* majority of federal and state courts adhere to the plain meaning rule. 2A J. Sutherland, supra, § 46.01, pp. 113–15 n.1 (citing cases).

Moreover, as an empirical matter, it is not unusual for a court to find that the text of a statute is plain and unambiguous. See, e.g., W. Eskeridge, Jr., ''The New Textualism,'' 37 U.C.L.A. L. Rev. 621, 656 (1990) (''the [United States] Supreme Court has decided almost half of its statutory interpretation cases by reference to a statute's plain meaning in each of the last three [t]erms''). Thus, notwithstanding the majority's suggestion that there is ''really nothing startlingly new about'' its approach to statutory interpretation, the majority's rejection of the plain meaning rule renders this court an outlier among nearly all other federal and state courts in this country and, indeed, with respect to this court's jurisprudence for the last 100 years, on an issue of great importance.[19] This *is* a startling, and in my view, unjustified, course for the majority to take.

Furthermore, not only has the plain meaning rule long been a bedrock principle of statutory interpretation in both this state and throughout the country, but the majority has failed to provide any evidence that the plain meaning rule has impeded this court's interpretative process. Indeed, no party in this case, nor in any other case of which I am aware, has ever even asked this court to abandon the plain meaning rule. Instead, the majority's departure from the legal mainstream comes solely as a result of its philosophical bent, one that I am confident will some day prove to be as unsound as it is rare.

The majority's abandonment of the plain meaning rule is unjustified for three related reasons. Most importantly, the plain meaning rule is premised on the fact that only the text of a statute formally has been approved by the legislature and signed into law by the executive. The aspirations of legislators as expressed in the legislative history or this court's notions concerning the rationality of various legislative schemes have not. Thus, through its application of plain and unambiguous language, the rule gives effect to ''the essence of the famous American ideal . . . [a] government of laws, not of men.'' A. Scalia, A Matter of Interpretation: Federal Courts and the Law (A. Gutmann ed., 1997) p. 17. Accordingly, it is the objective meaning of a statute's text that should govern rather than the legislature's subjective intent in choosing that text. See, e.g., O. Holmes, ''The Theory of Legal Interpretation,'' 12 Harv. L. Rev. 417, 419 (1899) (''[w]e do not inquire what the legislature meant; we ask only what the statute means'').

In light of the majority's new approach to statutory construction, individuals no longer can rely on the plain meaning of the laws of this state in conducting their affairs. Instead, they will be forced to rely on this court's ex post facto use of extratextual sources to discern the scope of a statute. I agree with United States Supreme Court Justice Antonin Scalia's eloquent expression regarding the essential unfairness of such a system: ''I

think . . . that it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. That seems to me one step worse than the trick the emperor Nero was said to engage in: posting edicts high up on the pillars, so that they could not easily be read. Government by unexpressed intent is similarly tyrannical.'' A. Scalia, supra, p. 17.

The present case aptly illustrates Justice Scalia's concerns. In essence, the majority rejects the defendant's interpretation because it concludes that the legislature meant something different than what is conveyed by the text the legislature used in the statute. My concerns are heightened more so in *the present case* in light of the fact that, until today, this court, for more than 100 years, consistently has followed the plain meaning rule. That is to say nothing of the fact that the use of extratextual sources that the majority refers to in its opinion justifying deviation from this supposed plain meaning is, as I describe in part I of this opinion, unpersuasive and, by definition, insufficient to demonstrate an *express* legislative intent.

The plain meaning rule encourages both judicial restraint and predictability in interpretation. See J. Walker, Jr., supra, 58 N.Y.U. Ann. Surv. Am. L. 238. Indeed, a court's disregard of the plain meaning of a legislature's enactments amounts to little more than judicial lawmaking. Such judicial lawmaking constitutes an arrogation of the legislature's constitutional responsibility to enact laws.

Moreover, the majority's abandonment of the plain meaning rule and its adoption of the alternative purposive approach to statutory interpretation pays little heed to this fundamental principle of the separation of powers. In applying the majority's approach, a judge will ask himself for what purpose was the statute enacted. In answering this question, a judge likely will ask what purpose a wise and intelligent lawmaker would have attached to the statute. The judge then will ask himself what he, who, after all, also is wise and intelligent, believes the law's purpose is. Id., 223. In so doing, the judge will assume the role of law giver and substitute judicially ascribed notions of the statute's purpose for the plain meaning of the text that the legislature has chosen. See id. This is precisely what the majority transparently has done in the present case. Indeed, each step in the majority's analysis begins with a statement such as, ''[w]e can conceive of no rationale for the legislature'' to have enacted a statute that differs in interpretation from that proposed by the majority.[20]

Conversely, the incentive for legislators to write clear statutes and for interest groups to prevail in getting their views enacted into law takes on a diminished importance if it is made known to them that this court

will not limit itself to the plain meaning of the law but, rather, will decide cases on the basis of the unenacted purposes behind a law.[21] By contrast, the plain meaning rule encourages legislators to ''fulfill their constitutional responsibility to legislate by disabusing them of the expectation that the courts will do it for them.'' J. Walker, Jr., supra, 58 N.Y.U. Ann. Surv. Am. L. 235.

The majority offers three criticisms of the plain meaning rule, which, according to the majority, provide justification for its rejection of the rule. I find the majority's criticisms unpersuasive. First, the majority states that ''the rule is fundamentally inconsistent with the purposive and contextual nature of legislative language.'' Therefore, the majority states, ''it *does* matter what meaning the legislature intended [statutory] language to have.'' (Emphasis in original.) Yet, the mere fact that the legislature *may* have had a purpose in enacting a statute does not mean that we should give *effect* to such an unenumerated purpose. In construing statutes, I believe that a court should not be governed by such *unstated purposes* but, rather, by what the legislature actually enacted into *law*. Thus, I disagree with the majority's proposition that, simply because legislation may have a purpose, that purpose is relevant to a court's construction of that legislation.

Second, the majority asserts that ''the plain meaning rule is inherently self-contradictory.'' In support of its assertion, the majority questions the validity of the frequently heard refrain that, ''if the language is plain and unambiguous, there is no room for interpretation . . . .'' The majority states that, in such a case, there is interpretation and that, even though interpretation may be a ''simple matter'' under such circumstances, interpretation still exists. Without disagreeing with the majority, I do not see what difference this makes. Whether we label it ''interpretation,'' ''application of the plain meaning rule,'' or ''a merry dance,'' I simply do not see this as a reason to reject the plain meaning rule.

The majority's other contention in this regard, namely, that the ''absurdity'' exception to the plain meaning rule somehow suggests that the rule's true goal is to reveal legislative intent, also is misguided. An absurd statute, like an ambiguous statute, causes an objective interpreter to inquire further into its meaning. Thus, the determination of a provision's plain meaning should not end a court's inquiry under such circumstances, not because the rule is concerned with uncovering what the legislature intended, but because a reasonable person would not believe that the law is what it appears to be on its face.[22]

Third, the majority contends that the rule has spawned a body of inconsistent law regarding whether a plain meaning can be found and that such inconsistencies leave this court vulnerable to criticism for what may be perceived as a result oriented work product. Yet,

it seems entirely unfair to cite to misguided *deviations* from the plain meaning rule as a reason not to *follow* the rule. In my view, many of the ''intellectually and linguistically dubious'' decisions to which the majority cites are examples of why this court should follow the plain meaning rule more closely, not why this court should abandon the rule. See, e.g., *Conway* v. *Wilton*, 238 Conn. 653, 664–65, 680 A.2d 242 (1996); *State* v. *Cain*, 223 Conn. 731, 744–45, 613 A.2d 804 (1992).

In fact, the dissenting justice in *Cain* made just this point: ''The application of Connecticut's rules of construction has become exceedingly complex and unpredictable. This is due, in part, to the fact that the rule prohibiting a court from looking behind the plain and unambiguous language of an act has become blurred to the point where the court will often look beyond that language without first deciding the threshold issue of whether an ambiguity exists. . . . Thus, one can never be certain, no matter how clear and unambiguous the language of an act may be, that the court will not look beyond that language and interpret it in a manner contrary to its literal meaning. . . . Where these rules are employed with respect to an unambiguous statute, the likelihood of an erroneous interpretation is significantly increased.'' (Citation omitted; internal quotation marks omitted.) *State* v. *Cain*, supra, 223 Conn. 756 n.3 (*Berdon*, *J.*, dissenting), quoting R. Williams, ''Statutory Construction in Connecticut: An Overview and Analysis,'' 62 Conn. B.J. 307, 343 (1988).

Moreover, even if one accepts the premise that it is difficult to craft a plain meaning rule that fosters consistency in statutory interpretation, the debate the rule engenders with respect to the validity of textual arguments is one of the most important reasons justifying adherence to the rule. In other words, I believe that the plain meaning rule's ubiquity in our legal landscape is due in no small measure to the fact that it emphasizes the primacy of the text by advising litigants, legislators and judges that the best textual argument is likely to be the argument that prevails.

I also strongly disagree with the majority's proposition that adherence to the plain meaning rule leaves this court vulnerable to criticism of being ''result-oriented.'' On the contrary, it is the majority's case-by-case approach to statutory interpretation that is subject to such criticism inasmuch as it encourages as a virtue unfettered discretion in utilizing the various tools of statutory construction. Such an approach expands the judiciary's power to the detriment of the legislature by allowing courts to depart from the plain meaning of the law under the guise of interpretation. Indeed, the majority's nebulous relativistic approach, under which all factors are considered, and under which no factor aside from the text is taken as a priori more informative than any other, virtually guarantees that there will be

some evidence for nearly *any* interpretation that a court may wish to advance. As Justice Scalia has noted in paraphrasing Judge Harold Leventhal's statements about the expanded use of just one of the many tools that the majority embraces today: ''[T]he trick is to look over the heads of the crowd and pick out your friends. The variety and specificity of result that [the majority's approach] can achieve is unparalleled.'' A. Scalia, supra, p. 36.

Thus, it is the majority's approach that will ''give the appearance of . . . result-oriented decision-making . . . .'' Footnote 28 of the majority opinion. Indeed, in my view, litigants are unlikely to trust a court that feels free to disregard the plain meaning of the law. Those litigants are more likely to view such a court as one that simply does justice as it sees fit rather than one that applies the law evenhandedly. This appearance presents a grave danger to an institution that depends upon such trust as an essential source of its legitimacy.

Finally, I respond briefly to the majority's major criticisms of this opinion. First, the majority contends that the dissent's embrace of the plain meaning rule causes it to ignore statutory purpose. Yet, the plain meaning rule simply embodies the commonsense notion that when the text of a statute is plain and unambiguous, the statute's purpose will be reflected in the text. That is why even proponents of the purposive approach to statutory interpretation, unlike the majority, believe that, when the language is plain and unambiguous, it should be given effect. Indeed, no court, with the exception of those in Alaska, has stated that it may disregard the legislature's use of plain and unambiguous language in favor of a judicially determined statutory purpose.

Second, with regard to the issue of whether judges employing the majority's approach to statutory interpretation will be more likely to substitute their own notions of wise and intelligent policy for those of the legislature, I think one need look no further than the majority's own words in the present case. As I noted previously, the majority, itself, expressly states that its approach to statutory interpretation rests upon its assessment of the rationality of various possible death penalty schemes.

Third, with regard to the majority's assertion that ''there is simply no basis for'' the dissent's contention ''that the plain meaning rule is based on the constitutional doctrine of the separation of powers,'' my only response is that there simply is no basis for the majority's assertion. In surveying the plain meaning rule, the author of the leading treatise on statutory interpretation could not have stated it any clearer: ''The preference for literalism in determining the effect of a statute is based on the constitutional doctrine of separation of powers.'' See 2A J. Sutherland, supra, § 46.03, p. 135. Although, I acknowledge that the majority may disagree

with such a rationale, its assertion as to the lack of support for my contention is demonstrably incorrect.

C

As I noted previously, I believe that the majority's approach to statutory interpretation is misguided inasmuch as it disavows the plain meaning rule, is premised on a search for the subjective intent of the legislature and because the majority fails to provide adequate guidance as to the manner in which statutes will be interpreted in future cases. I offer, instead, the following alternative method of interpreting statutes.

The process of statutory interpretation involves a reasoned and ordered search for the meaning of the legislation at issue. In other words, we seek to determine the meaning of statutory language as would be understood by a reasonable person reading the text of the statute.

In determining this objective meaning, we look first and foremost to the words of the statute itself. If the language of a statute is plain and unambiguous, we need look no further than the words themselves, unless such an interpretation produces an absurd result. In seeking the plain meaning of a statute, we generally construe words and phrases ''according to the commonly approved usage of the language''; General Statutes § 1-1 (a); in the context of the entire statute and employ ordinary rules of grammar. In addition, we may apply the ordinary canons of judicial construction in seeking the plain meaning, recognizing that such canons are not infallible in aiding the search for plain meaning.

When, and only when, the meaning of a statute cannot be ascertained in this fashion, we next eliminate all possible interpretations that render the statutory scheme incoherent or inconsistent. If more than one reasonable interpretation of the statute remains, we next consider the statute's relationship to other existing legislation and to common-law principles governing the same general subject matter and eliminate any interpretations incompatible with this legal landscape.

If ambiguity still remains, we seek to uncover the meaning of the statute by way of review of the statute's legislative history and the circumstances surrounding its enactment. Finally, if we are still left with an ambiguous statute after resort to all the foregoing tools of statutory interpretation, we apply any applicable presumptions in reaching a final interpretation.

This approach is premised on the notion that statutory text should be the polestar of a court's search for the meaning of a statute. This approach reflects the foregoing philosophy by attributing primary importance to statutory text and reaffirming this court's continued adherence to the plain meaning rule.

Moreover, inherent in the framework of this approach

is the acknowledgment that there are statutes containing language that is ambiguous or, if interpreted according to its plain meaning, susceptible to producing an absurd result. Under such circumstances, the framework envisions a court's consideration of related statutes in an attempt to discern the statute's meaning. Consideration of related statutes as a potential second step is premised upon the notion that courts should endeavor to uncover the meaning a reasonable person reading the text of the law likely would attribute to the statute. Thus, such a tool is likely to be useful in eliminating possible interpretations that, although plausible given the language of a statute, become implausible when considering, first, the relevant statutory scheme and, if necessary, the broader legal landscape.

In addition, my approach to statutory interpretation permits the statutory interpreter to consider legislative history only when the utilization of other enumerated tools of construction has not produced a single, reasonable interpretation. Among the principal reasons for the diminished role that this framework ascribes to legislative history are the following. Most fundamentally, legislative history is generally used to attempt to gain insight into subjective legislative intent, which I believe should not be the endeavor of the interpretative process.

Moreover, even if it is assumed that the uncovering of subjective legislative intent were a worthy enterprise, legislative history is an unreliable source for the discovery of such intent. For example, it is unrealistic to think that such history sufficiently can reveal the mental states of a majority of the legislators as well as the executive who signs the particular legislation into law. Yet, it is only this intent, and not that of a committee or of an individual legislator, that is arguably even relevant to the construction of a statute. In addition, other commentators properly have questioned the reliability of legislative history because of concerns over the manipulation by legislators or interest groups seeking to influence judicial interpretation after having failed to have their views adopted in the text of the legislation. See, e.g., A. Scalia, supra, p. 34.

A final critique of legislative history is that "it has facilitated rather than deterred decisions that are based upon the courts' policy preferences, rather than neutral principles of law." Id., p. 35. It is for these reasons that many scholars and jurists are increasingly coming to share the view of John M. Walker, Jr., the chief judge of the Second Circuit Court of Appeals, that, "[b]ecause of problems associated with legislative history, including its unreliability, manipulability, and lack of authority as law, I have come to attach very little, or no, weight to it . . . ." J. Walker, Jr., supra, 58 N.Y.U. Ann. Surv. Am. L. 233. This court should do the same.[23]

Finally, substantive presumptions should generally be applied only after utilization of all of the other tools of construction has failed to produce a reasonable interpretation. Such presumptions essentially are rules that ''load the dice for or against a particular result''; A. Scalia, supra, p. 27; and, thus, should be employed as a last resort, after all other attempts to garner meaning have been exhausted. See id., pp. 27–29.[24]

For the foregoing reasons, I respectfully dissent.

[1] For ease of reference, I hereinafter refer to the phrase ''especially heinous, cruel or depraved'' found in § 53a-46a (i) (4) as ''cruel.''

[2] In her separate opinion, Justice Katz agrees with the majority's assessment in stating that ''[t]he defendant's strongest arguments involve the plain language of the statute and are indeed, at first blush, persuasive.''

[3] I would also note that our Penal Code defines the term ''offense'' in a manner that makes clear that that term, for purposes of the present case, refers to the crime of capital felony and not a part thereof. General Statutes § 53a-24 provides in relevant part: ''(a) The term 'offense' means any crime or violation which constitutes a breach of any law of this state or of any other state, federal law or local law or ordinance of a political subdivision of this state . . . .''

[4] The majority cites *State* v. *Ross*, 230 Conn. 183, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995), in support of its conclusion. Specifically, the majority relies on this court's suggestion in *Ross* that an aggravating factor can be established by proof ''beyond the elements of the [capital felony] charged.'' Id., 264. The court in *Ross*, however, merely was rejecting the claim of the defendant that, inasmuch as certain elements of the crime with which he was charged overlapped with the evidence of the existence of an aggravating factor, that the aggravating factor could not be established. See id., 263–64. The majority does not explain the relevance of this quote from *Ross* beyond the out-of-context parenthetical that it provides.

[5] The entirety of the majority's contention on this score, its first one in support of its conclusion, is the following: ''First, as our case law demonstrates, the constituent parts of the capital felony involved here are two murders that are committed in the course of a single transaction. See *State* v. *Solek*, 242 Conn. 409, 423, 699 A.2d 931 (1997) (constituent parts of capital felony under § 53a-54b [7] are murder and sexual assault in first degree). Thus, the reference in § 53a-46a (i) (4) to the offense must be read as referring to those constituent parts. This reading permits the interpretation that the aggravating factor may be satisfied by proof of its existence with respect to at least one of those constituent parts. See *State* v. *Ross*, 230 Conn. 183, 264, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 138 L. Ed. 2d 1095 (1995) (aggravating factor satisfied by proof of existence beyond the elements of the [capital felony] charged). Put another way, it would permit the interpretation that the language, the offense, refers to either of those parts, and does not necessarily refer to *both, and only both,* of those parts.'' (Emphasis in original; internal quotation marks omitted.)

I find this reasoning incomprehensible as the majority begins by stating that ''the offense must be read as referring *to those constituent parts*,'' and concludes, without any logical explanation, by stating that ''the offense, refers to *either* of those parts . . . .'' (Emphasis added; internal quotation marks omitted.)

[6] Although I do not believe that this would be an irrational statute for a legislature to enact, as the majority concludes, I do not think, as I describe in part II of this opinion, that this is the best reading of the death penalty statute.

[7] Ironically, in part II of its opinion, the majority emphasizes the importance of legislative history in construing statutes, yet, in part I of its opinion, the majority proclaims the purported irrationality of the defendant's interpretation of § 53a-46a (i) (4), as it applies to § 53a-54b, without considering the views of those legislators who enacted § 53a-54b. Although I view the use of legislative history *to interpret a statute* with great skepticism; see part III of this opinion—indeed, in the case of the 1980 legislation that added multiple murders to the list of capital offenses, there were legislators who disagreed with the doubt expressed by other legislators regarding the need to add multiple murders to that list; see, e.g., 23 H.R. Proc., Pt. 19, 1980 Sess., p. 5682, remarks of Representative Gerard B. Patton—I believe that

it is certainly appropriate to consult that history to determine whether there is *any possible rationale* for why a statute was enacted notwithstanding the majority's assertion to the contrary.

[8] Several members of the United States Supreme Court even have expressed their view that the rationale for the rule of lenity precludes consideration of extratextual sources to clarify an ambiguous statute. See *United States* v. *R. L. C.*, 503 U.S. 291, 307, 112 S. Ct. 1329, 117 L. Ed. 2d 559 (1992) (Scalia, J., with whom Kennedy and Thomas, Js., join, concurring in part and concurring in judgment) ("it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history"); cf. *Hughey* v. *United States*, 495 U.S. 411, 422, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990) ("[e]ven [when] the statutory language . . . [is] ambiguous, longstanding principles of lenity . . . preclude our resolution of the ambiguity against [the criminal defendant] on the basis of general declarations of policy in the statute and legislative history" [citation omitted]). But cf. *United States* v. *R. L. C.*, supra, 306 n.6 (plurality opinion) ("[w]hether lenity should be given the more immediate and dispositive role Justice Scalia espouses is an issue that is not raised and need not be reached"). I acknowledge that there are contrary indications in the decisions of the United States Supreme Court. See, e.g., *Moskal* v. *United States*, 498 U.S. 103, 108, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990) (rule of lenity applies, if at all, only after consideration of "the language and structure, legislative history, and motivating policies" of statute [internal quotation marks omitted]). This court previously has relied on the *Moskal* formulation, as the majority does in the present case, without considering whether it is consistent with, for example, the fair warning rationale behind the rule. See generally, e.g., *State* v. *Jason B.*, 248 Conn. 543, 555, 729 A.2d 760, cert. denied, 528 U.S. 967, 120 S. Ct. 406, 145 L. Ed. 2d 316 (1999).

In any event, although acceptance of the Scalia-Kennedy-Thomas understanding of the rule of lenity would require that the defendant prevail in the present case, I need not pursue this issue any farther inasmuch as I conclude that the other tools of interpretation upon which the majority relies do not come close to removing reasonable doubt as to the statute's meaning.

[9] Indeed, it is apparent from this court's inclusion of *psychological* cruelty as a category of conduct that may qualify under § 53a-46a (i) (4); see, e.g., *State* v. *Johnson*, supra, 253 Conn. 67; that the state may establish the existence of that factor without proof that the defendant had inflicted extreme *physical* pain, suffering or torture on the victim.

[10] See part I of this opinion for a discussion about why the latter interpretation is a particularly poor interpretation.

[11] None of the other tools of statutory interpretation informs my interpretation of the issue in the present case. There are no other related statutes or common-law principles that are helpful in guiding the interpretation. Moreover, as I previously discussed, the legislative genealogy upon which the majority relies is unpersuasive. Likewise, for reasons that I discuss later in this opinion, I believe that the evidence of the statute's purpose upon which Justice Katz relies in her separate opinion also is uninformative.

[12] In so stating, I do not intend to de-emphasize my fundamental disagreement with the majority's rejection of the plain meaning rule.

[13] For example, in her separate opinion, Justice Katz notes that the defendant claims that the legislature's purpose in enacting § 53a-54b and, in particular, subdivision (8) of that section, which contains the multiple murder provision, was to adopt a narrow capital felony scheme under which only extreme murders qualify a person for the death penalty. In contrast, Justice Katz concludes that the legislature's purpose in enacting § 53a-54b (8) was the deterrence of multiple murders. In my view, irrespective of who is correct, however, the generality of these supposed purposes render them useless in interpreting the specific statutory provisions at issue in the present case.

[14] See footnote 13 of this opinion for a description of two plausible views as to the purposes behind the statutory provisions at issue in the present case.

[15] In part III C of this opinion, I present an alternative approach to statutory interpretation that provides such an explanation.

[16] On a more technical note, the majority also states "that [this court has] not been consistent in [its] formulation of the plain meaning rule." Footnote 24 of the majority opinion (comparing *Sanzone* v. *Board of Police Commissioners*, 219 Conn. 179, 187–88, 592 A.2d 912 [1991] with *State* v. *Cain*, 223 Conn. 731, 744–45, 613 A.2d 804 [1992]). The multistep process that the court referred to in *Sanzone* was *not* the plain meaning rule, however. Rather it was a process that we stated we would follow in the *absence* of

a plain and unambiguous statute. See *Sanzone* v. *Board of Police Commissioners*, supra, 187. In contrast, the multistep process that this court described in *Cain* simply consisted of *qualifications* of the plain meaning rule. See *State* v. *Cain*, supra, 744. Thus, I do not see any conflict between *Sanzone* and *Cain*.

[17] Indeed, the genesis of the *majority's* approach can be traced to *Texaco Refining & Marketing Co.* v. *Commissioner of Revenue Services*, 202 Conn. 583, 522 A.2d 771 (1987), a case in which the court cites to cases that expressly state the *plain meaning rule*. Id., 589, citing *Dart & Bogue Co.* v. *Slosberg*, 202 Conn. 566, 572, 522 A.2d 763 (1987), *State* v. *Blasko*, 202 Conn. 541, 553, 522 A.2d 753 (1987), and *Rhodes* v. *Hartford*, 201 Conn. 89, 93, 513 A.2d 124 (1986).

[18] In contrast, the majority asserts that this "rigid threshold-passing requirement as a route to determining the meaning of statutory language is simply counter to any ordinary way of determining the meaning of [statutory] language." Footnote 24 of the majority opinion. On the contrary, I agree with the Sutherland treatise and the United States Supreme Court that the plain meaning rule is the *primary* way by which we communicate. The interpreter reads or listens to a statement and accords that statement its ordinary and plain meaning, inquiring further only when there is some ambiguity inherent in the statement. Moreover, such an approach is hardly foreign to our law. One need only look to the parol evidence rule to find another manifestation of this basic method of human communication. See, e.g., *Heyman Associates No. 1* v. *Ins. Co. of Pennsylvania*, 231 Conn. 756, 780–81, 653 A.2d 122 (1995) ("Parol evidence offered solely to vary or contradict the written terms of an integrated contract is . . . legally irrelevant. When offered for that purpose, it is inadmissible not because it is parol evidence, but because it is irrelevant."); see also *Canaan National Bank* v. *Peters*, 217 Conn. 330, 337, 586 A.2d 562 (1991) ("[a] court may not stray beyond the four corners of the will where the terms of the will are clear and unambiguous" [internal quotation marks omitted]).

[19] Elsewhere in its opinion, the majority acknowledges that its approach to statutory interpretation is unprecedented. See footnote 19 of the majority opinion.

[20] The illogicality of such reasoning is demonstrated by a simple hypothetical. Consider the following hypothetical statute:

(a) In the context of the capital offense of kidnapping committed in the course of a murder, the state need only prove that the murder was committed in a cruel manner in order to establish the existence of the aggravating factor for offenses committed in a cruel manner.

(b) Notwithstanding subsection (a), in the context of the capital offense of two murders committed in the course of the same transaction, the state must prove that both murders were committed in a cruel manner in order to establish the aggravating factor for offenses committed in a cruel manner.

Inasmuch as the basis for the majority's opinion in the present case is the purported irrationality of such a statute, one is left to wonder whether, notwithstanding the legislature's use of plain and unambiguous language in this hypothetical statute, the majority would conclude, under the statute, that the state need only prove that *one* murder in a multiple murder case was committed in a cruel manner in order to prove the existence of the aggravating factor.

[21] Although the majority suggests, without citation, that it is inappropriate to consider such an incentive when interpreting statutes; see footnote 32 of the majority opinion; I note that the United States Supreme Court has suggested that courts should consider just this in interpreting criminal statutes. See *Dunn* v. *United States*, supra, 442 U.S. 112–13 ("to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not plainly and unmistakably proscribed" [internal quotation marks omitted]).

[22] The majority also claims that the fact that some courts, not including this court, have recognized an exception to the plain meaning rule when the legislative history reveals a scrivener's error in the drafting of the statute demonstrates a "fundamental flaw" in the rule. Footnote 26 of the majority opinion. It is hard to understand how this exception possibly could demonstrate a "fundamental flaw" in the plain meaning rule in light of the fact that, as the majority acknowledges, this court *never* has had occasion to consider this exception notwithstanding the century old application of the rule in Connecticut courts. Thus, regardless of whether this court would choose to use legislative history to override the plain meaning of a statute

in such an instance, the extreme rarity of this example makes it obvious that this exception carries with it no license for the wholesale abandonment of the plain meaning rule.

[23] The majority rhetorically asks why, if I believe that there are so many problems with legislative history, should legislative history have *any* place in my approach to statutory construction. My answer is simple. I believe that this court should attach the most weight to the most reliable indicators of a statute's meaning and the least weight to the least reliable indicators. Legislative history, in my view, is less reliable than other tools, but may have some usefulness under circumstances in which the other tools of interpretation fail to produce a single, reasonable meaning.

[24] As I noted previously, I would leave for another day the question of whether, because of the constitutional underpinnings embodied in its fair warning rationale, the rule of lenity should be employed immediately upon determining that the text of a criminal statute is ambiguous, or whether it should, along with other substantive presumptions, be employed only as a last resort after all of the relevant tools of construction have been employed.