****

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.

The syllabus and procedural history accompanying the opinion as it appears on the Commission on Official Legal Publications Electronic Bulletin Board Service and in the Connecticut Law Journal and bound volumes of official reports are copyrighted by the Secretary of the State, State of Connecticut, and may not be reproduced and distributed without the express written permission of the Commission on Official Legal Publications, Judicial Branch, State of Connecticut.

****

ZARELLA, J., concurring. I concur in the result reached by the majority. I write separately, however, because I do not agree with the majority that General Statutes (Rev. to 1997) § 53a-70 (b),[1] which provides for a mandatory minimum sentence of ten years imprisonment when the victim is less than ten years of age, requires a determination by the jury, rather than the sentencing court, that the victim of a sexual assault was less than ten years of age at the time the assault occurred.

The majority concedes that age is an element of the offense of sexual assault in the first degree under § 53a-70 (a) (2) only to the extent that the state is required to prove to the jury that the victim was less than *thirteen* years of age. The majority further concedes that the structure of the statute suggests that our legislature did *not* intend to make the age of a victim less than ten years old an element of the offense. Finally, the majority notes that, in *Harris* v. *United States*, 536 U.S. 545, 122 S. Ct. 2406, 153 L. Ed. 2d 524 (2002), the United States Supreme Court determined that a sentencing court has discretion to make factual findings that give rise to the imposition of a mandatory minimum sentence. The majority nonetheless declares that ''there is nothing that *prevents* our legislature from requiring the jury to make a finding'' that triggers the imposition of a mandatory minimum sentence. (Emphasis in original.) The majority then examines the legislative history of the sentencing provision and concludes that the legislature intended that the issue of whether the victim was less than ten years of age should be submitted to the jury for the purpose of imposing the mandatory minimum sentence. I disagree with the conclusion of the majority because such a conclusion is contrary to the plain language of the statute, is inconsistent with the statutory scheme and is not supported by the legislative history on which the majority relies.

Public Acts 2003, No. 03-154, § 1, provides: ''The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.''

In the present case, the statute in effect at the time the crimes were committed was General Statutes (Rev. to 1997) § 53a-70, which provides in relevant part: ''(a) A person is guilty of sexual assault in the first degree when such person . . . (2) engages in sexual intercourse with another person and such other person is under thirteen years of age and the actor is more than

two years older than such person . . . .'' Section 53a-70 (a) (2) thus requires proof that the victim was under thirteen years of age and the offender was more than two years older than the victim.

The majority concludes, after analyzing the language of the statute, that ''the age of the victim *is* an element of the offense of sexual assault in the first degree, but only, at least explicitly, inasmuch as the state is required to prove that the victim was less than *thirteen* years of age.'' (Emphasis in original.) I emphatically agree. I also believe, however, unlike the majority, that including the age of thirteen, and not the age of ten, as an element of the offense *strengthens* the argument of the state that ''under ten years of age'' is a sentencing factor because once the state has proved to the jury that the victim was less than thirteen years of age and the defendant is found guilty, no further proof of the victim's age is necessary. The requisite determination as to the age of the victim having been made by the jury, the offender is exposed to a maximum penalty of twenty years incarceration, and in the case of a victim less than ten years old, a mandatory minimum sentence of ten years incarceration. See General Statutes (Rev. to 1997) § 53a-70 (b) and General Statutes § 53a-35a (5).

The majority next observes that the fact that § 53a-70 (a) (2) expressly refers to victims under thirteen years of age and the fact that the mandatory minimum sentencing provision is contained in subsection (b) suggest that the legislature did not intend for the factual predicate of the mandatory minimum sentence to constitute an element of the offense. I could not agree more.

The sentencing portion of the statute provides in relevant part: ''Sexual assault in the first degree is a class B felony for which one year of the sentence imposed may not be suspended or reduced by the court or, if the victim of the offense is under ten years of age, for which ten years of the sentence imposed may not be suspended or reduced by the court.'' General Statutes (Rev. to 1997) § 53a-70 (b). The sentencing range for a class B felony under § 53a-70 (a) is between one year and twenty years imprisonment. See General Statutes § 53a-35a (5). Subsection (b) of § 53a-70 thus does not alter the sentencing range established by § 53a-35a (5), but merely requires the court to impose a mandatory minimum sentence within that range if the victim was less than ten years of age. I therefore submit that the plain language of subsection (b) supports the view that the age of a victim less than ten years old is a sentencing factor to be determined by the court. See *Harris* v. *United States*, supra, 536 U.S. 565 (court has discretion to make factual finding for purpose of imposing mandatory minimum sentence, as long as such sentence does not exceed statutory maximum).

Moreover, there can be no doubt that there is a clear division in the structure of the statute between the

substantive provisions of subsection (a), which describe the elements of the offense, and the sentencing provisions of subsection (b), which describe the manner in which a sentence is to be imposed. Indeed, because § 53a-70 (a) (2) defines the offense as pertaining to a victim who is less than thirteen years of age, it seems only reasonable to assume that any reference in subsection (b) to the exact age of such a victim, insofar as the victim's age affects the *length* of a sentence imposed within the prescribed range of one to twenty years, was intended by the legislature to be a sentencing factor rather than an element of the offense. Accordingly, the structure and the text of the statute strongly support the conclusion that the age of a victim less than ten years old is not an element of the offense that the state must prove to the jury.

"We are constrained to read a statute as written . . . and we may not read into clearly expressed legislation provisions which do not find expressions in its words . . . ." (Internal quotation marks omitted.) *Carmel Hollow Associates Ltd. Partnership* v. *Bethlehem*, 269 Conn. 120, 139, 848 A.2d 451 (2004). Furthermore, when the legislature drafts sentencing provisions, it knows how to do so. *State* v. *Jones*, 234 Conn. 324, 367, 662 A.2d 1199 (1995). If the legislature had intended for the jury to make a factual finding regarding the victim's age for mandatory minimum sentencing purposes, it could have made the age of such a victim an element of § 53a-70 (a) or enacted a separate statute pertaining to the assault of victims who are less than ten years of age, as it did in the case of victims who are at least sixty years of age and victims who are blind, disabled, pregnant or mentally retarded. General Statutes §§ 53a-59a (a), 53a-60b (a), 53a-60c (a) and 53a-61a (a).

Furthermore, when considering § 53a-70 within the context of the broader statutory scheme, the statute should be compared with General Statutes § 53a-59,[2] which pertains to the offense of assault in the first degree, because both statutes provide for a mandatory minimum sentence of ten years imprisonment if the victim is less than ten years of age, but neither includes the age of the victim as an element of the offense. Compare General Statutes § 53a-59 (b) with General Statutes (Rev. to 1997) § 53a-70 (b). To require the jury to make a factual finding as to the age of the victim in § 53a-70 (b), when there appears to be no similar requirement with respect to § 53a-59 (b), would be inconsistent with the well established principle of statutory interpretation that "the legislature is always presumed to have created a harmonious and consistent body of law . . . . [T]his tenet of statutory construction . . . requires [this court] to read statutes together when they relate to the same subject matter . . . . Accordingly, [i]n determining the meaning of a statute . . . we look not only at the provision at issue, but also to the broader statutory scheme to ensure the coher-

ency of our construction. . . . [T]he General Assembly is always presumed to know all the existing statutes and the effect that its action or non-action will have upon any one of them.'' (Citations omitted; internal quotation marks omitted.) *Hatt* v. *Burlington Coat Factory*, 263 Conn. 279, 310, 819 A.2d 260 (2003). Therefore, the majority's comparison of § 53a-70 with § 53a-59a is inappropriate and can offer this court little guidance because, although § 53a-59a pertains to an age-related offense, it is structurally dissimilar to § 53a-70.

No other Connecticut case has addressed the issue presented in this appeal. In *State* v. *Velasco*, 253 Conn. 210, 751 A.2d 800 (2000), this court determined that the question of whether a defendant used a firearm in the commission of a felony, which *increases* the penalty for the underlying felony beyond the statutory *maximum* under General Statutes § 53-202k, must be submitted to the jury. Id., 214; see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 435 (2000) (''any fact that increases the penalty for a crime beyond the prescribed statutory *maximum* must be submitted to a jury'' [emphasis added]). The factors that persuaded this court in *Velasco*, however, including the ''well established practice of submitting to the jury the ultimate fact that triggers the application of a sentence enhancement statute''; *State* v. *Velasco*, supra, 226; and a comparison of § 53-202k with other sentence enhancement statutes that limit the role of the judge as the fact finder; id., 227–28; do not exist in the present case because § 53a-70 (b) is not a sentence enhancement statute. It is therefore useful to examine the reasoning in *Harris* v. *United States*, supra, 536 U.S. 545, in which the United States Supreme Court considered the distinction between the elements of a crime and the factors that influence a criminal sentence in the context of a mandatory minimum sentencing scheme.

In *Harris*, the petitioner was convicted of carrying a firearm in the course of committing a drug trafficking crime. Id., 550–51. The applicable sentencing scheme provided for a mandatory minimum sentence of seven years imprisonment if the defendant had brandished the firearm during the commission of the underlying crime. See 18 U.S.C. § 924 (c) (1) (A) (ii) (2000). The government presumed that brandishing was a sentencing factor to be considered by the judge when formulating the sentence. *Harris* v. *United States*, supra, 536 U.S. 551. The indictment therefore did not allude to the petitioner's brandishing of the firearm, and the government simply alleged the elements of the underlying offense. Id. After the petitioner was found guilty, the presentence investigation report recommended that he be given the mandatory minimum sentence because he had brandished the firearm. Id. The petitioner argued, however, that brandishing was a separate element of the offense and that the jury, rather than the sentencing judge, was required to make a finding that he had bran-

dished the firearm. See id. The United States Supreme Court disagreed, concluding that brandishing a firearm was a sentencing factor to be determined by the judge and not an element of the offense to be determined by the jury. Id., 556. The court reasoned that increasing the mandatory minimum sentence did not alter the prescribed range of penalties to which the petitioner was exposed, but ''merely required the judge to impose a specific sentence within the range authorized by the jury's finding that the [petitioner was] guilty.'' (Internal quotation marks omitted.) Id., 563–64.

The majority acknowledges that, under *Harris* and other federal precedent, ''the legislature [is] not constitutionally prohibited from permitting the sentencing court, as opposed to a jury, to determine whether a victim of sexual assault in violation of § 53a-70 (a) was less than ten years of age.'' The majority nonetheless concludes, despite the clarity of the language and structure of § 53a-70, that nothing ''*prevents* our legislature from requiring the jury to make a finding'' as to the age of a victim less than ten years old for the purpose of imposing the mandatory minimum sentence. (Emphasis in original.) The majority therefore finds it necessary to examine the legislative history of the provision in order to discern the legislature's intent.

I disagree with the majority's conclusion that the legislative history shows a clear intent to submit the question of the victim's age to the jury. Representative Andrew M. Norton introduced the proposed legislation regarding the ten year mandatory minimum sentence following a highly publicized case involving the rape of an infant. See 38 H.R. Proc., Pt. 7, 1995 Sess., p. 2666. His primary concern was to increase the penalty for first degree sexual assault involving very young victims, for whom the consequences could be most devastating. See id. He did not address whether the age of the victim should be a factual issue for the court or for the jury to determine.

Representative Michael P. Lawlor urged rejection of the proposed legislation because it did not make the age of the victim an ''*element of the offense . . . .*'' (Emphasis added.) 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2670. He characterized this omission as a flaw that would render the provision unworkable.[3] Id. He therefore made no comment as to whether it would be *preferable* for the court or the jury to make the factual finding regarding the victim's age.

Thereafter, Representative Dale W. Radcliffe stated that the language of the proposed legislation was not flawed because it was similar to the language of § 53a-59a, which proscribes the assault of elderly persons, that is, persons who are at least sixty years of age. Id., p. 2671; see General Statutes § 53a-59a. Representative Lawlor pointed out that Representative Radcliffe's observation was incorrect, explaining that § 53a-59a

makes the assault of elderly victims a separate offense and that, consequently, § 53a-59a was structurally dissimilar to § 53a-70. 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2673. Representative Radcliffe also discussed the manner in which the age of the victim could be proved at trial but did not offer an opinion as to whether such proof should be made to the court or to the jury. Id., p. 2672.

Representative Robert M. Ward believed that the proposed legislation was similar to an ''enhanced penalty'' that would require the state to give the defendant notice by way of a two part information and to prove the victim's age to the jury. Id., pp. 2674–75. He indicated that the provision could be drafted as a separate statute or as an amendment to § 53a-70. See id., p. 2675. He also noted that any ''technical'' problems with the amendment could be resolved by the legislature in the future. Id. Representative Richard D. Veltri stated that he was unconcerned about whether the proposed amendment had been drafted correctly; he simply believed that it should be adopted. Id., p. 2677.

In my view, there was no consensus among those who participated in the legislative debate that the jury should make the factual finding regarding the age of a victim less than ten years old. The comments of Representatives Radcliffe and Ward indicate their belief that the proposed legislation was drafted properly and was viable from a technical standpoint, despite Representative Lawlor's comments to the contrary, because of its purported structural similarity to mandatory minimum sentencing provisions in other penal statutes. None of those who spoke on the matter, however, expressed an opinion as to the *merits* of allowing the sentencing court or the jury to make the factual finding regarding the victim's age. I therefore submit that the majority's conclusion that ''the understanding of legislators on both sides of the amendment . . . that the factual question of whether the victim was under ten years of age . . . is to be determined by the jury'' is not supported by the legislative record.

Moreover, the majority's willingness to weigh comments made during the legislative debate that are inconclusive, at best, more heavily than the language and the structure of the statute itself, flies in the face of the principle established in *State* v. *Courchesne*, 262 Conn. 537, 816 A.2d 562 (2003), that, because ''the statutory language is the most important factor in [interpreting a statute] . . . we necessarily employ a kind of sliding scale: the more strongly the bare text of the language suggests a particular meaning, the more persuasive the extratextual sources will have to be in order for us to conclude that the legislature intended a different meaning.'' Id., 574. Indeed, I fail to comprehend how the majority can *concede* that the text and the structure of the statute strongly suggest that the legislature did

not intend for the age of a victim under ten years old to be an element of the offense, yet rely on a legislative history fraught with ambiguity to reach the conclusion that the age of such a victim must be submitted to the jury.

The majority's construction of the statute also raises more questions than it answers. For example, because the mandatory minimum sentencing provision in subsection (b) of § 53a-70 applies to each of the other three offenses described in subsection (a), would the majority have the jury determine whether the victim is less than ten years old in cases involving those other offenses even though the age of the victim is not an element of any of those offenses?[4]

The majority's decision raises additional questions as to the trial court's discretion to impose an appropriate sentence. Presentence investigation reports, which are a product of the state office of adult probation, routinely are developed in many criminal cases to aid the court in determining a proper sentence. Typically, such reports delve into the defendant's history and his relation to the community, prior criminal record and work experience, as well as other considerations regarding the defendant's background. The reports also assess the impact of the crime on the victim and the victim's family. If a presentence investigation report provides that the victim is under the age of ten and that the victim's age is a factor in assessing the impact of the crime on the victim, is the court required to disregard this factor if it is not proven to the jury or is it permitted to rely on this factor as a reason for not suspending any portion of the sentence? Additionally, if the court decides that the appropriate sentence is a ten year sentence, is it required to state on the record that it is not deriving its authority from § 53a-70 (b)?

In summary, I submit that it is clear from the language and the structure of the statute that the age of a victim less than ten years old is not an essential element of the crime of sexual assault in the first degree. Consequently, although I concur in the result reached by the majority, I conclude that § 53a-70 does not require the jury to make a finding that the victim of first degree sexual assault is less than ten years of age for the purpose of imposing the mandatory minimum sentence.

[1] All references in this opinion to § 53a-70 are to the 1997 revision. See footnote 3 of the majority opinion.

[2] General Statutes § 53a-59 provides in relevant part: "(a) A person is guilty of assault in the first degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument; or (2) with intent to disfigure another person seriously and permanently, or to destroy, amputate or disable permanently a member or organ of his body, he causes such injury to such person or to a third person; or (3) under circumstances evincing an extreme indifference to human life he recklessly engages in conduct which creates a risk of death to another person, and thereby causes serious physical injury to another person; or (4) with intent to cause serious physical injury to another person and while aided by two or more other persons actually present, he causes such injury to such person

or to a third person; or (5) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of the discharge of a firearm.

"(b) Assault in the first degree is a class B felony provided . . . (2) *any person found guilty under subsection (a) shall be sentenced to a term of imprisonment of which ten years of the sentence imposed may not be suspended or reduced by the court if the victim of the offense is a person under ten years of age . . . .*" (Emphasis added.)

[3] Representative Lawlor's position that the amendment was "flawed" appears to have been based on his view that the age of such a victim must be treated as an element of the offense. 38 H.R. Proc., Pt. 8, 1995 Sess., p. 2670; see, e.g., General Statutes § 53a-59a (a) (1) (age of victim at least sixty years old is element of offense). When the mandatory minimum sentence provision of § 53a-70 (b) was adopted, the legislature did not have the benefit of the reasoning in two subsequent United States Supreme Court cases in which the court distinguished between facts that increase the penalty *beyond the statutory maximum*, which must be found by the jury; see *Apprendi* v. *New Jersey*, supra, 530 U.S. 490; and facts that increase the mandatory minimum sentence *within the range* of penalties prescribed by the statute, which are sentencing factors that may be found by the court. See *Harris* v. *United States*, supra, 536 U.S. 565.

[4] Other offenses proscribed by § 53a-70 (a) that would appear to require a jury finding that the victim was less than ten years of age in accordance with the majority's interpretation of the mandatory minimum sentencing provision include: (1) sexual intercourse compelled by the use of force or by the threat of use of force; (2) sexual intercourse that is aided by two or more other persons who are actually present; and (3) sexual intercourse with a person who is mentally incapacitated such that he or she is unable to consent to sexual intercourse. See General Statutes § 53a-70 (a) (1), (3) and (4).