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BORDEN, J., concurring. I agree with and join the majority opinion, except for that portion of part III G 3 in which the majority addresses the claim of the defendant, Ivo Colon, that the trial court improperly instructed the jury regarding whether a finding of mitigation by one or more jurors triggers the process of weighing the aggravating factor against any mitigating factors found. The majority indicates that the trial court's instruction reasonably could have misled the jury. The majority continues, appropriately, to make clear that so long as at least *one* juror has found the existence of a mitigating factor, the weighing process must then take place. I reach the same conclusion as the majority, but I do so by a different route.

Unlike the majority, I think that the question of whether the jury's finding of a mitigating factor must be by all or any of the jurors is, in the first instance at least, a question of statutory interpretation. I conclude that: (1) in amending our death penalty statute, General Statutes § 53a-46a, from a nonweighing to a weighing statutory scheme, the legislature intended that our prior law, which contemplated a hung jury in the event of a lack of unanimity on the issue of mitigation, be retained; but (2) as so construed, the statute would likely be unconstitutional. Therefore, in order to avoid holding our entire death penalty statute unconstitutional, I would construe it to permit the determination of the existence of a mitigating factor, so as to trigger the weighing process, to be made by any one or more jurors.

Prior to 1995, a finding of mitigation by the jury precluded the imposition of the death penalty, irrespective of whether the aggravating factor outweighed the mitigating factor. *State* v. *Rizzo*, 266 Conn. 171, 181, 833 A.2d 363 (2003). In 1995, the legislature, by virtue of Public Acts 1995, No. 95-19, § 1, amended the statutory scheme to provide that the death penalty would be imposed if the jury found that the aggravating factor outweighed any nonstatutory mitigating factors. Id.[1] These statutory amendments were made by virtue of Public Act 95-19, § 1, the relevant portions of which I have set forth in footnote 2 of this opinion.[2]

State v. *Rizzo*, supra, 266 Conn. 171, was the first case to come to us under the weighing statute. The present case is the second.

This court has recently adverted to the question of unanimity on the finding of mitigation, pointing out a potential conflict between our jurisprudence under our prior, nonweighing statute and our current, weighing statute. In *State* v. *Rizzo*, supra, 266 Conn. 204, we noted that the trial court had instructed the jury that any one juror's finding of mitigation would trigger the

weighing process. We stated: ''Under the prior, nonweighing statute, however, our law was clear that a finding of a mitigating factor or no mitigating factor must be made by a unanimous jury, and that, in the absence of such unanimity, there would be no finding regarding mitigation or the lack thereof, one way or another. *State* v. *Daniels*, [207 Conn. 374, 387–88, 542 A.2d 306, after remand for articulation, 209 Conn. 225, 550 A.2d 885 (1988), cert. denied, 489 U.S. 1069, 109 S. Ct. 1349, 103 L. Ed. 2d 817 (1989)]. In addition, we subsequently clarified our holding in *Daniels*. In *State* v. *Ross*, 230 Conn. 183, 243, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995), we rejected the defendant's claim 'that our death penalty system, as construed in *State* v. *Daniels*, supra, [374], is facially unconstitutional because it requires the jury to be unanimous in finding the existence of a mitigating factor before an individual juror can give effect to any mitigating factor,' purportedly contrary to the decision of the United States Supreme Court in *McKoy* v. *North Carolina*, 494 U.S. 433, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990). In rejecting this challenge, we stated: 'Our holding in *Daniels* did not imply that individual jurors are precluded from considering and giving effect to all mitigating evidence in a death penalty sentencing hearing. The unanimity requirement in our statute requires unanimity only in the sense that each juror must find at least one mitigating factor that was proved by a preponderance of the evidence. The jury need not unanimously find the same mitigating factor to have been proven by a preponderance of the evidence. So construed, our death penalty sentencing statute avoids the unanimity problem identified in *McKoy*, because our unanimity requirement does not interfere with the ability of each individual juror to consider and to give effect to any mitigating factor of which he or she is convinced by a preponderance of the evidence.' . . . *State* v. *Ross*, supra, 244. Thus, in *Daniels* and *Ross*, we made clear that: (1) all the jurors must agree that a mitigating factor exists, in order for there to be a valid determination that such a factor existed; but (2) the jurors need not be unanimous regarding which mitigating factor has been established.'' *State* v. *Rizzo*, supra, 192–93 n.15.

Thus, under our prior, nonweighing statute, the absence of unanimity on the question of whether the defendant had proven a nonstatutory mitigant would result in a hung jury. *State* v. *Ross*, supra, 230 Conn. 243; *State* v. *Daniels*, supra, 207 Conn. 393–94. Furthermore, under that jurisprudence, if the jury were hung, the court has the discretion to impose a penalty of life without the possibility of release. *State* v. *Daniels*, supra, 396. The majority in the present case assumes without analysis, however, that when the legislature amended the death penalty statutory scheme to substitute a weighing for a nonweighing process, it implicitly

abandoned our prior jurisprudence, exemplified by *Daniels* and *Ross*, that the jury's determination of whether a mitigating factor exists must be unanimous and that, in the absence of such unanimity, there would be a hung jury in the case. My analysis of the weighing statute leads me to conclude, to the contrary, that the legislature likely intended to incorporate that prior jurisprudence.

I first note that there is nothing in the language of Public Act 95-19 that specifically addresses the question involved in the present case, namely, whether there is a requirement of jury unanimity regarding the existence of a mitigating factor. Indeed, to the extent that, in *Daniels* and *Ross*, we were necessarily interpreting the provision in prior revisions of § 53a-46a (g) that ''[t]he court shall not impose the sentence of death on the defendant if the jury . . . finds by a special verdict . . . that any mitigating factor exists,'' the absence of any amendment to that language in the 1995 Public Act suggests that the prior interpretations of it were intended to be left undisturbed.

There is, moreover, more than the absence of amendatory language.[3] The legislative history, particularly the debate in the House of Representatives, strongly suggests that the legislature specifically considered the question of jury unanimity and likely intended not to disturb that prior jurisprudence. Representative Peter A. Nystrom introduced the issue, indicating his understanding that the weighing statute would preclude a hung jury and a consequent judge's decision to impose a life sentence.[4] 38 H.R. Proc., Pt. 3, 1995 Sess., p. 1015. Representative Nystrom's remarks, however, did not stand unchallenged. They were directly referred to and contradicted by Representative Alex A. Knopp and by Representative Michael J. Jarjura, who presented and explained the bill to the House on behalf of the Joint Committee on the Judiciary, and who formally moved for adoption of the bill. See id., p. 922, remarks of Representative Jarjura.

In the debate, Representative Knopp specifically referred to the remarks of Representative Nystrom ''where there was a hung jury on the matter of a mitigating factor''; id., p. 1047; and asked Representative Jarjura: ''[I]sn't it the case that there is nothing in the File Copy, as amended, that would prevent a hung jury on a mitigating factor from occurring again?'' Id. After Representative Jarjura indicated some confusion about the question and asked that it be repeated; id.; Representative Knopp did so: ''The question was this. Under the bill, as amended, before us, isn't it the case that there could be a hung jury on the matter of whether or not there exists any mitigating factor?'' Id., p. 1048. Representative Jarjura answered: ''Sure. Yes.'' Id. Representative Knopp then asked, regarding the court's power to impose a life sentence if the jury is hung on the issue

of mitigation: ''Isn't the case under criminal procedure that has happened in that case, [namely, *Daniels*] that even though the [s]tate asked that there be a retrial on the issue of mitigation in the sentencing phase, the court nonetheless has the inherent power to impose a life sentence and to turn down the [s]tate's request to retry the issue of mitigation?'' Id. Representative Jarjura answered: ''Yes.'' Id. Representative Knopp then went on to analyze the fifteen cases under the prior law in which penalty phase hearings had been held, and pointed out that, among those that would *not* be affected by the bill, ''[t]wo would not be affected because of the hung jury.'' Id., p. 1049.

Subsequently, Representative Dale W. Radcliffe, another proponent of the bill, made a similar, case-by-case analysis of those cases in which the outcome would arguably have been different under the weighing bill before the House. In doing so, he specifically referred to the case of ''*State* v. *Steiger*, [218 Conn. 349, 590 A.2d 408 (1991)], [in which] a panel deadlocked two to one on whether or not there was a mitigating factor. . . . *Had they found a mitigating factor,* that factor may not have outweighed the aggravating factors in this case and yes, it may have made a difference in [*Steiger*].'' (Emphasis added.) 38 H.R. Proc., supra, p. 1066. Thus, Representative Radcliffe understood, consistent with the remarks of Representative Knopp and Representative Jarjura, that the bill did not affect the potentiality of a hung jury on the question of whether a mitigating factor existed.

In my view, this record strongly suggests that, despite the belief of Representative Nystrom, the legislature understood and intended that the bill would not eliminate the requirement of jury unanimity on the question of the existence of a nonstatutory mitigating factor. I base this conclusion on the pointed legislative dialogue between Representative Knopp and Representative Jarjura, the chief proponent of the bill, who was explaining it to his colleagues in response to Representative Knopp's questions specifically aimed at the hung jury scenario, and on the similar stated understanding of another of the bill's proponents, namely, Representative Radcliffe. This conclusion is further supported by the fact that any conclusion that the bill was intended to eliminate the unanimity requirement would necessarily have to be reached by implication, and we do not ordinarily read legislation in that fashion. *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 242, 756 A.2d 1264 (2000) (repeal by implication disfavored). This is particularly true regarding the general issue of jury unanimity, which has deep roots in our criminal jurisprudence. See, e.g., *State* v. *Sawyer*, 227 Conn. 566, 585–86, 630 A.2d 1064 (1993).

The question of whether, in the death penalty context, a jury's finding of mitigation may be required to be

unanimous is, however, more than a question of statutory interpretation. It is also a question of federal constitutional law. My review of the relevant United States Supreme Court decisions, as well as the weight of authority following those decisions, persuades me that, at least in the context of a statutory weighing scheme, a requirement of jury unanimity on the question of the existence of a mitigating factor would potentially be unconstitutional. Therefore, in order to avoid any such potential unconstitutionality, I would interpret our statutory scheme so as not to impose such a requirement.

The seminal United States Supreme Court decisions on the question are *Mills* v. *Maryland*, 486 U.S. 367, 384, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988), and *McKoy* v. *North Carolina*, 494 U.S. 433, 435, 110 S. Ct. 1227, 108 L. Ed. 2d 369 (1990). Those two cases have long been understood to stand for the proposition that, in order to avoid the potentially arbitrary imposition of the death sentence, a state could not require jury unanimity on the question of the existence of a mitigating factor. See, e.g., *Beard* v. *Banks*, 542 U.S. , 124 S. Ct. 2504, 2508, 159 L. Ed. 2d 494 (2004). That potentiality would exist, in the Supreme Court's view, if either of two situations arose: (1) eleven of twelve jurors could agree that six mitigating circumstances existed, but one holdout could force the death penalty; or (2) all twelve jurors could agree that some mitigating circumstance existed, but could not agree on which particular circumstance. Id., 2515; *McKoy* v. *North Carolina*, supra, 439–40; *Mills* v. *Maryland*, supra, 373–74.

Although neither *Mills* nor *McKoy* specifically dealt with the possibility of a hung jury on the question of mitigation, and although arguably they could have been read to be consistent with such a possibility,[5] that has not generally been the case. Indeed, the United States Court of Appeals for the Sixth Circuit has recently stated: "[A] state may not require unanimity in finding mitigating factors. Such a requirement 'impermissibly limits jurors' consideration of mitigating evidence.' [*McKoy* v. *North Carolina*, supra, 494 U.S. 444]. In fact, as *Mills* and *McKoy* hold, any requirement that mitigating factors must be found unanimously is incoherent. See [*Mills* v. *Maryland*, supra, 486 U.S. 400; *McKoy* v. *North Carolina*, supra, 442–43]. A unanimity requirement on mitigating factors would mean that, if aggravating factors have been found by the jury, one or more jurors who—in disagreement with other jurors—find no mitigating factor, or find different mitigating factors, or find that the aggravating factors do not outweigh mitigating factors found by some (but not all) of the jurors, or find that no mitigating factor outweighs aggravating factors, could still produce a death verdict *or a hung jury*, depending on how state law treats the disagreement. Thus, in order for Eighth Amendment law on mitigating factors to be coherent and capable of judicial administration without serious confusion, a

capital jury must understand that, in the words of the Federal Death Penalty Act, 'a finding with respect to a mitigating factor may be made by one or more members of the jury.' " (Emphasis added.) *Davis* v. *Mitchell*, 318 F.3d 682, 688 (6th Cir. 2003); see also *Frey* v. *Fulcomer*, 132 F.3d 916, 921 (3d Cir. 1998) ("the essential holding of *Mills-McKoy* is simply that one juror cannot prevent the others from giving effect to mitigating evidence, regardless of whether the imposition of a life sentence depends on the existence of such evidence"); *Coe* v. *Bell*, 161 F.3d 320, 337 (6th Cir. 1998) (*Mills* and *McKoy* declare unconstitutional instructions that with reasonable probability could have led jurors to believe that they "could consider only those mitigating circumstances that they unanimously agreed were present"); *Kubat* v. *Thieret*, 867 F.2d 351, 371–73 (7th Cir. 1989) (*Mills* requires that jury be instructed "that even if one juror believed that the death penalty should not be imposed, [the defendant] would not be sentenced to death").

These authorities persuade me that, if we were to interpret our death penalty scheme to permit a hung jury on the question of the existence of a nonstatutory mitigating factor, the statute would, at the least, be subject to serious constitutional question. I decline to do so. I therefore join in the conclusion of the majority that if any one juror finds the existence of any mitigating factor, that is sufficient to trigger the weighing process called for by the statute.

One matter remains, however, for brief comment. The trial court in the present case instructed the jury that, in contrast to the nonstatutory mitigating factors, the existence of any of the factors listed in subsection (h) of § 53a-46a, to which we previously have referred as the statutory mitigating factors; see *State* v. *Rizzo*, supra, 266 Conn. 180 n.5; must be established by a unanimous vote of the jury. Although the defendant did not challenge that instruction in the trial court and does not do so in this court, I am constrained to point out that I cannot see, at least on the basis of a preliminary analysis and on the basis of the authorities discussed previously in this opinion, how those factors can be constitutionally subject to a unanimity requirement. For example, to use one of the same hypothetical scenarios that so troubled the Supreme Court in *Mills* and *McKoy*, suppose that eleven of the twelve jurors were persuaded that six of the statutory factors existed; the one holdout could preclude the jury from giving effect to those six statutory factors. This likely would be subject to the same constitutional flaws regarding unanimity and mitigation discussed in the federal case law interpreting *Mills* and *McKoy*.

It is true that, by virtue of the 1995 amendments, those factors are no longer specifically referred to as "mitigating" factors; they are now simply referred to by

their statutory subsection (h) of § 53a-46a. Nonetheless, they clearly perform the function of mitigating factors.[6] ''Mitigating factors . . . are . . . evidence relevant to a defendant's character or record or other circumstances of the offense that might lead a sentencer to decline to impose the death sentence.'' *Davis* v. *Mitchell*, supra, 318 F.3d 688. It is also true that, if the jury finds the existence of any such factor, that finding precludes the imposition of the death penalty without any further weighing. At this point, however, I do not see how such a dispositive effect evades the constitutional flaws discussed in this concurring opinion. If anything, the reasoning of those cases, barring a unanimity requirement on mitigation, seems to apply even more strongly to the statutory factors.

In sum, I conclude, consistent with the conclusion of the majority, that the jury must be instructed that, if any *one or more* jurors finds the existence of any mitigating factor proven by a preponderance of the evidence, then the jury must proceed to the weighing process. I also suggest, however, that the capital felony bench and bar look closely at the question of whether the same instruction must also be given regarding the factors listed in § 53a-46a (h).

[1] Under the amended statute, however, the presence of a so-called statutory mitigant, namely, one of those listed in General Statutes (Rev. to 1997) § 53a-46a (h), would preclude the imposition of the death penalty. *State* v. *Rizzo*, supra, 266 Conn. 181. I discuss later in this opinion my concerns about the factors set forth in subsection (h) of § 53a-46a.

[2] Section 1 of Public Act 95-19 provides in relevant part: ''(e) The jury or, if there is no jury, the court shall return a special verdict setting forth its findings as to the existence of any [aggravating or mitigating] factor SET FORTH IN SUBSECTION (h), THE EXISTENCE OF ANY AGGRAVATING FACTOR OR FACTORS SET FORTH IN SUBSECTION (i) AND WHETHER ANY AGGRAVATING FACTOR OR FACTORS OUTWEIGH ANY MITIGATING FACTOR OR FACTORS FOUND TO EXIST PURSUANT TO SUBSECTION *(d)*.

''(f) If the jury or, if there is no jury, the court finds that *(1)* NONE OF THE FACTORS SET FORTH IN SUBSECTION (h) EXIST, *(2)* one or more of the AGGRAVATING factors set forth in subsection [(h)] *(i)* exist and [that] (3) (A) no mitigating factor exists OR (B) ONE OR MORE MITIGATING FACTORS EXIST BUT ARE OUTWEIGHED BY ONE OR MORE AGGRAVATING FACTORS SET FORTH IN SUBSECTION *(i)*, the court shall sentence the defendant to death.

''*(g)* If the jury or, if there is no jury, the court finds that *(1)* ANY OF THE FACTORS SET FORTH IN SUBSECTION (h) EXIST, OR *(2)* none of the AGGRAVATING factors set forth in subsection [(h)] *(i)* exists, or [that] *(3)* ONE OR MORE OF THE AGGRAVATING FACTORS SET FORTH IN SUBSECTION (i) EXIST AND ONE OR MORE MITIGATING FACTORS EXIST, BUT THE ONE OR MORE AGGRAVATING FACTORS SET FORTH IN SUBSECTION (i) DO NOT OUTWEIGH THE one or more mitigating factors, [exist,] the court shall impose a sentence of life imprisonment without the possibility of release.

''[(g)] *(h)* The court shall not impose the sentence of death on the defendant if the jury or, if there is no jury, the court finds by a special verdict, as provided in subsection (e), that [any mitigating factor exists. The mitigating factors to be considered concerning the defendant shall include, but are not limited to, the following: That] at the time of the offense (1) he was under the age of eighteen YEARS or (2) his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution or [(3) he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution or (4)] *(3)* he was criminally liable under sections 53a-8, 53a-9 and 53a-10

for the offense, which was committed by another, but his participation in such offense was relatively minor, although not so minor as to constitute a defense to prosecution or [(5)] *(4)* he could not reasonably have foreseen that his conduct in the course of commission of the offense of which he was convicted would cause, or would create a grave risk of causing, death to another person. . . .'' Language that was amended is indicated by italics and capitalization. Language that was deleted is indicated by brackets.

[3] The majority opinion suggests that we should assume that the legislature was aware of the potential unconstitutionality of the statute and that it therefore must have intended to abolish the unanimity requirement. For two reasons, I believe such an assumption is not justified. First, there is no evidence in the legislative history that the legislature had any such knowledge. Indeed, the evidence that I have cited, in which the unanimity requirement was specifically discussed, indicates that the legislature was unaware of any such potential infirmity. Thus, in this instance, engaging in the presumption that the majority urges, namely, to presume that the legislature intended to enact a constitutional statute, would be to transform the presumption into a transparent fiction. Second, this court itself was unaware of the constitutional infirmity of the statute, as evidenced by our judicial gloss in *Daniels* and *Ross*, and I am willing to presume—because the legislative history specifically confirms—that the legislature was aware of that judicial gloss. Thus, it is more than reasonable—it is quite clear—that the legislature was also unaware of the constitutional implications of the unanimity requirement; it was under the incorrect impression, as were we until now, that the *Daniels* and *Ross* glosses rendered the statute constitutionally sufficient. Finally, I note that although the majority does not take issue with my reading of the unanimity cases, it nonetheless does not explain either the basis of its conclusion that there can be no unanimity requirement on the finding of mitigation or the reason that there should be no such requirement despite our long history of requiring unanimity on critical jury determinations in criminal cases.

[4] Representative Nystrom, after referring to *Daniels*, in which the jury was hung and the court imposed a life sentence, stated: ''It was a hung jury on the issue of mitigation. They never determined that a mitigating factor existed. They never determined that it did not exist either. *And under our current law, without this recommended change, that could happen again*. . . . It is for that reason I support the weigh test and many others that have since followed. But I believe the law we have is flawed. For that issue could rise itself in another case and if you had a hung jury again on mitigation, under our current law, that could happen.'' (Emphasis added.) 38 H.R. Proc., Pt. 3, 1995 Sess., pp. 1014–15.

[5] In fact, this court has done precisely that. In *Ross*, we read *McKoy* to hold only that unanimity cannot be required on the question of *which* mitigating factor existed, and not on whether mitigation had been proven to the satisfaction of all of the jurors. See *State* v. *Ross*, supra, 230 Conn. 244. I now have serious doubt about the validity of this narrow reading of *McKoy*.

[6] Indeed, in the debate in the House of Representatives, Representative Jarjura repeatedly referred to them as ''dispositive or statutory mitigating factors.'' 38 H.R. Proc., supra, pp. 924–25.