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KATZ, J., concurring and dissenting. I maintain my belief that the death penalty fails to comport with contemporary standards of decency and thereby violates our state constitution's prohibition against cruel and unusual punishment. See Conn. Const., art. I, §§ 8 and 9. Nevertheless, I address the issue pertaining to the burden of persuasion for the imposition of the death penalty because, as I have stated previously, ''I have an obligation, consistent with my oath and responsibilities as a justice of this court, to decide the issue before the court . . . .'' *State* v. *Courchesne*, 262 Conn. 537, 584, 816 A.2d 562 (2003) (*Katz, J.*, concurring and dissenting).

In this case, by exercising my obligation, I express my agreement with the majority that, in order to prevail at the penalty phase hearing, the state must establish by a heightened burden of persuasion that any aggravating factor upon which the jury unanimously has agreed outweighs any mitigating factor.[1] The majority has engaged in a well reasoned analysis leading to its conclusion that the highest burden of persuasion—beyond a reasonable doubt—must be imposed on the weighing process in light of ''(1) the unique and irrevocable nature of the death penalty, (2) the overarching need for reliability and consistency in the imposition of the death penalty, and (3) the awesome and wrenching nature of the jury's determination to render a verdict requiring the death penalty . . . .'' In my view, anything short of the highest standard fails to comport with due process. This is because the decision of whether the defendant should suffer the ultimate penalty that the judicial system can impose—death—is the most crucial decision made in any stage of the proceedings, requiring jurors to make their most reasoned and judicious moral determination. Demanding that this final determination be made pursuant to the highest standard of proof properly conveys the seriousness of the task and the importance of the highest degree of certainty in the outcome. We, as a society, must have confidence that, should the penalty of death be imposed, it is a decision about which no reasonable person could differ. To allow jurors to make that judgment guided by a procedure that demands less than the highest level of certainty is, to me, inconceivable.

Additionally, I agree that the court must fill a ''statutory lacuna'' regarding the level of certitude required of the jury's weighing determination in order to fulfill the constitutional requirements of consistency and reliability in the imposition of the death penalty. *State* v. *Ross*, 230 Conn. 183, 252, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995). Accordingly, the court is obligated in this

instance to fill the void in General Statutes (Rev. to 1997) § 53a-46a to enable it to survive the particular challenge at issue. See *Roth* v. *Weston*, 259 Conn. 202, 234, 789 A.2d 431 (2002) (judiciary may '' 'delineate a procedural scheme for the protection of constitutional rights where statutory protections fall short or are nonexistent' ''); *Sassone* v. *Lepore*, 226 Conn. 773, 785, 629 A.2d 357 (1993) (''[i]f literal construction of a statute raises serious constitutional questions, we are obligated to search for a construction that will accomplish the legislature's purpose without risking the statute's invalidity''). ''When the Legislature has not specified the requisite standard of persuasion or certitude necessary in an adjudication, it is the duty of the Court to fill such a gap by weighing the relative interests of the State and the defendant in light of potential constitutional considerations and legislative intent to determine what the degree of persuasion ought to be.'' *State* v. *Wood*, 648 P.2d 71, 83 (Utah 1981), cert. denied, 459 U.S. 988, 103 S. Ct. 341, 74 L. Ed. 2d 383 (1982).

Where the majority and I part company, however, is with regard to part I E of the majority opinion. In my view, the majority goes halfway by applying the standard only to the jury's degree of certitude in its outcome, and incorrectly stops short of applying the highest standard, or indeed, *any* heightened burden to the weighing process itself. The majority concludes that ''because the reasonable doubt standard focuses on the jury's subjective sense of certitude in arriving at the critical finding or judgment, not on the quantum or degree by which one factor outweighs another,'' we should reject the application of that standard in capital felony cases. Therefore, the majority concludes that, by requiring the jury to be convinced beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors by a preponderance of the evidence, the statute meets constitutional muster. I disagree. Any rule that fails to require the jury to be convinced that the aggravating factors *outweigh* the mitigating factors *beyond a reasonable doubt* is deficient. Because the majority does not require the jury to determine beyond a reasonable doubt that the aggravating factors justify a sentence of death, and I conclude that the ''[f]undamental fairness of a system that generates life and death decisions'' requires just that; *State* v. *Biegenwald*, 106 N.J. 13, 66, 524 A.2d 130 (1987); I dissent.

The majority provides several reasons for its determination that, in deciding the balance between the aggravating factors and the mitigating factors, the jury must apply only the preponderance of the evidence standard. First, although it acknowledges the judicial gloss on the text of our due process clause provided in *State* v. *Ross*, supra, 230 Conn. 252, to ''require, as a constitutional minimum, that a death penalty statute . . . must channel the discretion of the sentencing judge or jury so as to assure that the death penalty is being imposed

consistently and reliably,'' the majority nevertheless contends that, when the constitution imposes the minimum, ''it is a difficult leap'' to state, as a matter of constitutional mandate, that the maximum legal standard should be imposed. Second, the majority notes that no state ''has imposed the reasonable doubt standard on the outcome of the weighing process, as a matter of state constitutional law.'' Third, the majority finds the reasonable doubt standard in this context to be ''simply ill equipped . . . .'' I disagree with the majority's rationale for the reasons that follow, and I would impose the highest standard, beyond a reasonable doubt, on the outcome of the weighing process.

First, I acknowledge that, when the constitution imposes the minimum, we generally do not, as a matter of constitutional mandate, impose the maximum legal standard. Although I recognize these concerns as a general matter, the present case requires us to acknowledge that the weighing of mitigating factors against aggravating factors under § 53a-46a (e) is a somewhat anomalous exercise within the criminal justice system. Accordingly, the general rules should not necessarily dictate. Jurors asked to weigh, for example, as a mitigating factor that the defendant was an abused youth against some aggravating factor in order to determine whether the defendant should live or die are making a moral judgment. Recognizing that this exercise is beyond what we generally call upon jurors to do, we should impose a standard that conveys to them ''the concept that the values upon which the criminal justice system is built do not permit the ultimate sanction to be imposed unless the conclusion is free of substantial doubt of any kind. That standard would . . . take into account the tolerable frailties of human beings. It is, after all, in deference to those frailties that the jury is required to consider mitigating circumstances.'' *State* v. *Brown*, 607 P.2d 261, 275 (Utah 1980) (Stewart, J., concurring). The majority's premise that we generally do not, as a matter of constitutional mandate, require the maximum legal standard, does not pay proper homage to the concept that ''the imposition of death by public authority is so profoundly different from all other penalties . . . .'' *Lockett* v. *Ohio*, 438 U.S. 586, 605, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978) (plurality opinion). A difference of this magnitude, therefore, calls for different measures.

The second basis for the majority opinion is the fact that no state requires the reasonable doubt standard as a matter of constitutional law. As the majority notes, however, three states, namely, New Jersey, Arkansas and Tennessee, appear to impose the reasonable doubt burden directly on the outcome of the weighing process as a matter of legislation. See N.J. Stat. Ann. § 2C:11-3 (c) (3) (a) (West 1995) (''[i]f the jury or the court finds that any aggravating factors exist and that *all of the aggravating factors outweigh beyond a reasonable*

doubt all of the mitigating factors, the court shall sentence the defendant to death'' [emphasis added]); Ark. Code Ann. § 5-4-603 (a) (Michie 1997) (''[t]he jury shall impose a sentence of death if . . . (2) *[a]ggravating circumstances outweigh beyond a reasonable doubt all mitigating circumstances* found to exist'' [emphasis added]); Tenn. Code Ann. § 39-13-204 (g) (1) (1997) (''[i]f the jury unanimously determines that . . . [B] *[any aggravating circumstances] have been proven by the state to outweigh any mitigating circumstances beyond a reasonable doubt*; then the sentence shall be death'' [emphasis added]).[2] Therefore, although perhaps an anomaly as a matter of constitutional jurisprudence, the concept is not alien.

Of these jurisdictions, New Jersey provides the most guidance because, before that state's legislature changed the statutory language expressly to incorporate the reasonable doubt standard in the weighing process, the New Jersey Supreme Court had interpreted its statute to incorporate the reasonable doubt standard. *State* v. *Biegenwald,* supra, 106 N.J. 53. In 1983, the time of the trial in *Biegenwald,* § 2C:11-3 (c) (3) (a) of the New Jersey Statutes Annotated merely provided that ''[i]f the jury or the court finds that any aggravating factor exists and is not outweighed by one or more mitigating factors, the court shall sentence the defendant to death.'' See *State* v. *Biegenwald,* supra, 58. In *Biegenwald,* the New Jersey Supreme Court held, sua sponte, that the trial court's instruction to the jury on the weighing provision, which was based on the plain language of the statute, was improper for two reasons. Id., 53. First, the trial court's instructions did not require that the state bear its burden of proving that the aggravating factors outweighed the mitigating factors *beyond a reasonable doubt,* a burden that the New Jersey Supreme Court concluded the prosecution should bear ''as a matter of fundamental fairness . . . .'' Id., 53. Second, because the trial court's instructions required that the mitigating factors outweigh the aggravating factors in order for the defendant to be spared the death sentence, the defendant could have been sentenced to death even if the factors were in equipoise. Id., 60–61.

As to the proper burden of proof, the New Jersey Supreme Court emphasized that the issue was one of requiring certainty before the imposition of the death sentence. Id., 60. Noting that New Jersey's requirement of proof beyond a reasonable doubt in criminal prosecutions predated ''any suggestion that the [federal] Constitution compels that burden,'' the court approached the issue in the context of the ''long-standing practice in the criminal law of this state . . . .'' Id., 59. The court considered the statute's requirement—that the state prove the existence of aggravating circumstances beyond a reasonable doubt—to be an indication of the understanding that death is '' 'profoundly different,' '' and ''of [the legislature's] probable intention to impose

the same burden on the weighing process itself.'' Id., 60. Finally, although the court recognized that some judicial determinations of ''great import'' are not governed by the reasonable doubt standard, it concluded that ''in New Jersey, where the jury is charged with making that value judgment, a determination of death despite reasonable doubt as to its justness would be unthinkable. We can think of no judgment of any jury in this state in any case that has as strong a claim to the requirement of certainty as does this one.'' Id. In my view, this reasoning is indicative of a constitutional imperative.

As to the third reason for the majority's rejection of the application of the reasonable doubt standard to the outcome of the weighing process, it asserts that the weighing process itself ''is simply not a determination that focuses on the subjective level of certitude of the jury.'' The majority relies heavily on the fact that the reasonable doubt standard is *traditionally* employed as a standard for fact-finding and that the weighing that is conducted pursuant to the statute is not addressed to fact-finding but, rather, pertains to the exercise of judgment. This statement oversimplifies, and indeed obfuscates, the issue.

The weighing process ultimately leads to the crucial determination of life or death, and the fact that this judgment is made after a two step, as opposed to a one step, process should not dictate the result. Although aggravating factors and mitigating factors are weighed, not to prove a factual proposition, but to determine a punishment, regardless of the characterization of this ultimate determination, whether factual or moral, the level of confidence in this resolve should be the same. The proposal by the majority does not suffice because it does not apply the same level of certitude in arriving at the outcome of the weighing process as it does to the degree by which one factor outweighs another. What the majority proposes, in essence, is to ask the jury if it is convinced beyond a reasonable doubt that the aggravating factor outweighs the mitigating factor by a preponderance of the evidence. By measuring the balance by 51 percent, the court does not ask the jury to determine beyond a reasonable doubt the outcome of the weighing process, which directly informs the court whether the defendant should be put to death. Therefore, it does not ask the jury to determine beyond a reasonable doubt that the aggravating factors *justify* a sentence of death, a judgment I believe is mandated by fundamental fairness.

I also part company with the majority on the perceived difficulties of administering the heightened burden. The majority is critical of the ''lack of fit'' in this approach. As Arkansas, New Jersey and Tennessee have recognized, linguistics should not control the analysis in this regard. Nor do I envision any problems conveying

this burden of persuasion to a jury. The majority's approach distinguishes one part of the penalty phase, the state's burden of proving an aggravating factor beyond a reasonable doubt, from its burden of proof in another part of the penalty phase, its burden of proving that the aggravating factor outweighs the mitigating factor. By contrast, by requiring the state to prove that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt, we would impose a uniform burden of proof on the state throughout the proceedings, a burden that the jury will, no doubt, be very familiar with by this final stage of the process.

Just as the reasonable doubt standard "is a prime instrument for reducing the risk of convictions resting on factual error"; *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); it is indispensable at this stage of the proceedings because it impresses on the jurors the need to reach a subjective state of certitude about their ultimate and irreversible decision. The standard reflects the degree of confidence that a civilized society thinks each juror should have in the correctness of his or her ultimate disposition of the life of another human being. In my view, the standard should be high enough that, when death is determined to be the appropriate sentence, we are convinced that this decision is one in which virtually no reasonable person could differ. Therefore, independent of the issue of legislative intent, fundamental fairness dictates that the highest standard be applied to both the weighing process *and* to the jury's level of certitude in arriving at the outcome of that weighing process. *State* v. *Biegenwald*, supra, 106 N.J. 53.

Accordingly, I respectfully dissent as to part I E of the majority opinion.[3]

[1] I recognize that by this decision, I help to enable the state to retry the defendant for capital felony. I appreciate the tension that exists between my view of the constitutionality of the death penalty and my resolution of the issue on appeal. "I am mindful, however, that because of the unique posture of this case, other challenges by the defendant to the application of the death penalty may arise and, accordingly, can be addressed at another time, if and when those issues become pertinent." *State* v. *Courchesne*, supra, 262 Conn. 584–85 (*Katz, J.*, concurring and dissenting). Accordingly, by engaging in this judicial technique, I do not mean to suggest that my position on the ultimate issue has changed. See id. (*Katz, J.*, concurring and dissenting); *State* v. *Reynolds*, 264 Conn. 1, 254–55, 824 A.2d 611 (2003) (*Katz, J.*, dissenting); *State* v. *Webb*, 252 Conn. 128, 147–48, 750 A.2d 448 (*Katz, J.*, dissenting), cert. denied, 531 U.S. 835, 121 S. Ct. 93, 148 L. Ed. 2d 53 (2000).

[2] New York takes a middle ground approach, imposing the reasonable doubt standard on the sentencer's level of certitude, and a different, *substantiality* requirement on the outcome of the weighing process. See N.Y. Crim. Proc. Law § 400.27 (11) (a) (McKinney 2003) ("[t]he jury may not direct imposition of a sentence of death *unless it unanimously finds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factor or factors established*, if any, and unanimously determines that the penalty of death should be imposed" [emphasis added]).

[3] As I previously have indicated herein, I strenuously disagree with the majority's determination in part I E of its opinion that the beyond a reasonable doubt standard should not be applied to the weighing of the aggravating and mitigating factors. Nonetheless, I concur with that part of part I F of

the majority opinion, as summarized in footnote 31, which applies the beyond a reasonable doubt standard to the degree of the jury's certitude in performing the weighing process, and that, therefore, the jury must be persuaded beyond a reasonable doubt that death is the appropriate penalty. I also concur with part II of the majority opinion reversing the trial court's judgment with respect to the imposition of the death penalty on the basis of the state's improper closing argument.