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KATZ, J., concurring and dissenting. I maintain my belief that the death penalty fails to comport with contemporary standards of decency and thereby violates our state constitution's prohibition against cruel and unusual punishment. See Conn. Const., art. I, §§ 8 and 9. Nevertheless, I concur in the judgment reached by the majority because, 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 the present case, in fulfilling my obligation, I agree with the majority, pursuant to what this court stated in *State* v. *Rizzo*, 266 Conn. 171, 233, 833 A.2d 363 (2003), that, in order to establish that death is the appropriate sentence, the state must establish by a level of certitude beyond a reasonable doubt that any aggravating factor upon which the jury unanimously has agreed outweighs any mitigating factor. As I stated in *Rizzo*, it is my view that "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." Id., 315–16 (*Katz, J.*, concurring and dissenting). Therefore, I agree with the majority's conclusion in the present case that the trial court improperly refused to instruct the jury that, in order to impose the death penalty, the jury had to be persuaded beyond a reasonable doubt that any aggravating factor upon which it unanimously has agreed outweighs any mitigating factor.[1]

Where the majority and I part company, however, is with regard to the right of allocution, which permits a convicted defendant personally to address his or her sentencer and plead for mercy. The majority concludes that there is no common-law, statutory or constitutional right of allocution to the jury in a capital sentencing proceeding. Specifically, the majority concludes that Practice Book § 43-10 (3),[2] which codifies a common-

law right of allocution in sentencing proceedings generally, does not apply in the context of capital sentencing proceedings, which are governed by General Statutes (Rev. to 1997) § 53a-46a.[3] In reaching this conclusion, the majority reasons that the capital sentencing procedures set forth by § 53a-46a (c) "fulfill the purposes of allocution" by allowing the defendant to offer any evidence in mitigation and to testify at his sentencing hearing, albeit "subject to cross-examination concerning his testimony."

I cannot agree with the majority's conclusion, however, in light of the historical development of the right to allocution, the fundamental purposes served by that right and the purposes served by the separate capital sentencing hearing provided by § 53a-46a. Specifically, I would conclude that a defendant in a capital sentencing hearing has a common-law right to allocution, and that the legislature has not expressed any clear intention to abrogate or preempt that common-law right. The majority's conclusion to the contrary creates an anomalous result, namely, that a capital defendant has *less* of a right personally to address his sentencers and plead for mercy than a noncapital defendant, who has an unfettered right to allocution. I do not believe that the legislature intended such a bizarre result in its promulgation of § 53a-46a, which is meant to provide *greater* protections to defendants in capital sentencing hearings than those provided in sentencing hearings generally. See *State* v. *Rizzo*, supra, 266 Conn. 226–27. Accordingly, I respectfully dissent from part III C of the majority opinion.

Allocution has been defined as "[a]n *unsworn* statement from a convicted defendant to the sentencing judge or jury in which the defendant can ask for mercy, explain his or her conduct, apologize for the crime, or say anything else in an effort to lessen the impending sentence. *This statement is not subject to cross-examination.*" (Emphasis added.) Black's Law Dictionary (7th Ed. 1999). In *State* v. *Strickland*, 243 Conn. 339, 703 A.2d 109 (1997), we reviewed the historical underpinnings of the right to allocution. "Allocution, or the right of a defendant to make a statement to the court on his own behalf and present information in mitigation of sentence, has its origins in the ancient common-law practice of inquiring of every defendant if he had anything to say before sentence was imposed. . . . Historically, the practice marked a critical juncture in criminal proceedings, as it afforded defendants the opportunity to inform the court as to the applicability of any of numerous recognized exemptions from the otherwise severe punishments imposed by the common law of the period. When asked whether sentence should not be pronounced, a defendant might then 'plead his benefit of clergy, that he had obtained a pardon, identity of person, pregnancy [insanity] or . . . any ground in arrest of judgment . . . .' " (Citation omitted.) Id., 343,

quoting P. Barrett, "Allocution," 9 Mo. L. Rev. 115, 121 (1944).

"Modern day justifications for preserving the practice focus on tailoring punishment to individual circumstances, providing an avenue through which a defendant may ask for mercy based on factors that might not otherwise be brought to the court's attention, and promoting safety, certainty and equity in sentencing and the judicial process overall." *State* v. *Strickland*, supra, 243 Conn. 344–45. "Thus, although at one time allocution as a critical stage in criminal proceedings was perceived to be on the wane in some jurisdictions, it has not disappeared from our jurisprudence, but instead has been affirmatively adopted by statute or procedural rule in several jurisdictions during the modern era. The United States Supreme Court has stated: 'We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century . . . [b]ut we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself.' *Green* v. *United States*, 365 U.S. 301, 304, 81 S. Ct. 653, 5 L. Ed. 2d 670 (1961) . . . ." *State* v. *Strickland*, supra, 345–46.

Practice Book § 43-10 is a detailed provision governing the procedures to be followed at sentencing hearings in general. This provision expressly does not distinguish between capital and noncapital proceedings. The common-law right of allocution is codified by § 43-10 (3), which provides: "The judicial authority shall allow the defendant a reasonable opportunity to make a personal statement in his or her own behalf *and* to present any information in mitigation of the sentence." (Emphasis added.) In other words, § 43-10 (3) "explicitly affords the defendant *two* rights: to make a statement in his own behalf, and to present any information in mitigation of punishment." (Emphasis added; internal quotation marks omitted.) *Green* v. *United States*, supra, 365 U.S. 304 (construing rule 32 [a] of Federal Rules of Criminal Procedure, now rule 32 [c] [3] [C], providing right of allocution in federal cases).

Section 53a-46a (c), by contrast, specifically governs the admission and use of *information* at capital sentencing hearings. The statute provides in relevant part: "Any *information* relevant to any mitigating factor may be presented by either the state or the defendant . . . . The state and the defendant shall be permitted to rebut any *information* received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the *information* to establish the existence

of any mitigating or aggravating factor. . . ." (Emphasis added.) General Statutes (Rev. to 1997) § 53a-46a (c).

It is a well established principle of statutory construction that this court cannot presume that a statute abrogates a common-law right in the absence of a clear expression of legislative intent to the contrary. See *Matthiessen* v. *Vanech*, 266 Conn. 822, 838–39, 836 A.2d 394 (2003) ("[a]lthough the legislature may eliminate a common law right by statute, the presumption that the legislature does not have such a purpose can be overcome only if the legislative intent is clearly and plainly expressed" [internal quotation marks omitted]); see also *State* v. *Brocuglio*, 264 Conn. 778, 792, 826 A.2d 145 (2003). Although § 53a-46a (c) expressly governs the presentation of *information* relevant to any mitigating or aggravating factor, it is silent concerning the other right afforded by § 43-10 (3) and the common law—the right "to make a personal statement in his or her own behalf . . . ." The legislative history of § 53a-46a similarly contains no reference to the right of allocution. Therefore, I cannot conclude that the legislature clearly has evidenced an intent to abrogate the common-law right of allocution in capital sentencing proceedings. Moreover, I cannot conclude that § 53a-46a (c) preempts the common-law right of allocution, that is, that the legislature "has manifested an intention to occupy the field" of allocution, or that application of the common-law right of allocution "would conflict with or frustrate the purpose of the [statute], so as to stay our hand in . . . [applying the] common law." *Craig* v. *Driscoll*, 262 Conn. 312, 323, 813 A.2d 1003 (2003).

Although the majority does not point to any clear expression of legislative intent to abrogate or preempt the common-law right of allocution in capital sentencing hearings, it nonetheless concludes that "there is no right of allocution within the structured setting of a capital sentencing hearing." In reaching this conclusion, the majority notes its approval of *Commonwealth* v. *Abu-Jamal*, 521 Pa. 188, 211–13, 555 A.2d 846 (1989), cert. denied, 498 U.S. 881, 111 S. Ct. 215, 112 L. Ed. 2d 175 (1990), wherein the Pennsylvania Supreme Court concluded that, "[w]hatever force the common law of allocution has with respect to other criminal cases, the General Assembly has abrogated that law and replaced it with statutory law devised specifically for first degree murder cases." Id., 212. In so concluding, the court apparently treated allocution as "evidence"; see id.; and noted that "[i]mplicit in the fact that the statute assigns to the defendant the burden of proving mitigating circumstances by a preponderance of evidence is the understanding that the jury is to [assess] the evidence for credibility." Id., 213.

The problem with this reasoning, which the majority has adopted in the present case, is that it fundamentally blurs "the distinction between the accused giving *testi-*

mony in his own behalf and the accused making a *plea for mercy*. In the first instance, the testimony is offered either to dispute a fact in issue at trial or to offer evidence of another fact which the accused advances defensively. . . . In contrast, the accused making a plea for mercy does not intend to advance or to dispute facts, but instead uses the plea to ask for lenience or understanding in the sentencer's decision." (Emphasis added.) J. Sullivan, "The Capital Defendant's Right to Make a Personal Plea for Mercy: Common Law Allocution and Constitutional Mitigation," 15 N.M. L. Rev. 41, 63 (1985); see *United States* v. *Chong*, 104 F. Sup. 2d 1232, 1234 (D. Haw. 1999) (defendant's right to testify in own behalf does not implicate his right to allocute). Put another way, "[a]llocution is a plea for mercy; it is not intended to advance or dispute facts." *State* v. *Lord*, 117 Wash. 2d 829, 897, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1992). "It is essential to understand and apply properly this fundamental distinction between the unrestricted right to present relevant *evidence* and speaking in allocution without being subject to cross-examination." (Emphasis in original.) *Shelton* v. *State*, 744 A.2d 465, 494–95 (Del. 1999), cert. denied, 530 U.S. 1218, 120 S. Ct. 2225, 147 L. Ed. 2d 256 (2000).

As previously stated, § 53a-46a (c) explicitly governs the presentation of *information* in capital sentencing proceedings. Neither the plain language nor the legislative history of § 53a-46a elaborates on whether "information" is the functional equivalent to "evidence," on the one hand, or whether that term encompasses procedures that are beyond the scope of standard evidentiary law. More important, § 53a-46a (c) governs only the presentation of information, and is silent concerning the other right that is explicitly provided for by § 43-10 (3)—the defendant's right to make a *personal statement* in his or her own behalf. Accordingly, I would conclude that § 53a-46a (c) neither abrogates nor preempts the common-law right of allocution in capital sentencing proceedings, insofar as that right permits a capital defendant personally to address his or her sentencers in a plea for mercy.[4]

Furthermore, I also would conclude that the right of allocution may be satisfied only by permitting the defendant personally to address the sentencing jury without subjecting himself to cross-examination. In *State* v. *Strickland*, supra, 243 Conn. 348, we recognized the right of allocution in the context of the disposition phase of a probation revocation proceeding. Specifically, we examined the interplay between the rule of practice that is now Practice Book § 43-29, which governs probation revocation proceedings, and the rule that is now § 43-10 (3). We noted that Practice Book, 1978–97, § 919, the precursor to § 43-10, "is a detailed provision that specifies the procedures to be followed at sentencing hearings, and subsection (3) specifically

provides that the voice of the defendant himself is to be heard at the hearing should he elect to allocute." *State* v. *Strickland*, supra, 348. By contrast, Practice Book, 1978–97, § 943, the precursor to § 43-29, governed probation revocation proceedings, but did not govern those proceedings exclusively and did not specify the procedures to be followed during the disposition phase of those proceedings. See id., 348–49. Therefore, we concluded that, because probation revocation proceedings embody a form of sentencing, a defendant in those proceedings has a right of allocution. Id., 349–50.

In so concluding, we noted in *Strickland* that the right of allocution remained significant, in light of the trial court's discretion in determining the sanction for a violation of probation. We stated: "In this case . . . the punishment to be imposed for a violation of probation was not preordained. Under [General Statutes] § 53a-32, the court was vested with broad discretion during the disposition phase of the revocation hearing. . . . The court was not obligated to require the defendant to serve any or all of his remaining sentence; indeed, it had the discretion to continue probation, and modify or enlarge the conditions if it so chose. In these circumstances, allocution was not rendered a meaningless formality by a predetermined outcome to the proceeding. Instead, the circumstances involved an exercise of broad discretion that the defendant could have attempted to influence if allocution had been allowed. Although the defendant had an opportunity to make a statement on his own behalf at his original sentencing, that opportunity did not allow him meaningfully to attempt to influence the exercise of another judge's discretion with regard to the consequences to be imposed for the subsequent violation of probation. *In other words, timing is an important element of the right of allocution.*" (Citation omitted; emphasis added.) Id., 353; see *United States* v. *Behrens*, 375 U.S. 162, 165–66, 84 S. Ct. 295, 11 L. Ed. 2d 224 (1963) (right of allocution "would be largely lost" if afforded only at time of preliminary commitment and not at final sentencing, which is "the sentence that counts"); *United States* v. *Buckley*, 847 F.2d 991, 1002 (1st Cir. 1988) (right of allocution must be extended when defendant is finally sentenced, even if allocution previously afforded at provisional sentencing), cert. denied, 488 U.S. 1015, 109 S. Ct. 808, 102 L. Ed. 2d 798 (1989).

The right of allocution is meaningless if it does not permit the defendant to make a personal statement on his own behalf to the body that actually has the discretion to sentence him. See *State* v. *Strickland*, supra, 243 Conn. 353–54. In Connecticut, as in many other states, the trial court has no discretion in a capital sentencing proceeding before a jury. Rather, once the jury has returned a verdict for the death penalty, the trial court shall sentence the defendant accordingly. See General Statutes § 53a-46a (f). Therefore, the defen-

dant in a capital sentencing hearing must be afforded the right to make a personal statement to the jury. Anything less would render the process a " 'meaningless formality' " and, therefore, would not satisfy the right of allocution. See *United States* v. *Li*, 115 F.3d 125, 133 (2d Cir. 1997) (right to allocution is not satisfied if reduced to " 'meaningless formality' "); see also *State* v. *Young*, 853 P.2d 327, 372 (Utah 1993) (Durham, J., dissenting) ("[a]llocution in a capital sentencing trial after the jury has returned its verdict on sentencing is a meaningless formality, 'no more than an empty gesture' ").

Furthermore, the defendant's right to make a personal plea to the jury for mercy must not be hampered by the threat that the defendant could incriminate himself, for use in further proceedings, by being subject to cross-examination. "[T]he fear of cross-examination might compel capital defendants to forego addressing the jury and offering pleas for mercy, expressions of remorse, or some explanation that might warrant a sentence other than death." *United States* v. *Chong*, supra, 104 F. Sup. 2d 1236. In other words, by equating allocution with testimony that is subject to cross-examination, the majority essentially forces capital defendants to choose between personally addressing the sentencing jury in a plea for mercy, on the one hand, and exercising their constitutional right to remain silent and free from self-incrimination, on the other. "Exercise of the right to remain silent, an important decision in terms of trial and appellate strategy, may prove correct in terms of avoiding negative evidence or waiver of error. It also may have the result of insulating the jury from the accused and isolating its sentencing decision from the fact that the death sentence, if imposed, will actually result in the execution of a fellow human being." J. Sullivan, supra, 15 N.M. L. Rev. 63. Consequently, "[t]he right to speak without threat of disclosing otherwise undisclosed information such as a prior record may prove valuable or decisive, to a capital defendant seeking to avoid the death penalty." Id., 42.

Moreover, I see "no reason why a *capital* defendant should have a lesser right to explain his position and ask for mercy by being sworn and subject to cross examination than a *non-capital* defendant, who has an unfettered right to allocute." (Emphasis added.) *United States* v. *Chong*, supra, 104 F. Sup. 2d 1236; see *State* v. *Strickland*, supra, 243 Conn. 354 (recognizing right of allocution in probation revocation proceedings). As this court has stated, statutes must be construed to avoid bizarre, difficult or impractical results. *AvalonBay Communities, Inc.* v. *Inland Wetlands Commission*, 266 Conn. 150, 165, 832 A.2d 1 (2003). Accordingly, I would conclude that the common-law right of allocution entitles a capital defendant personally to address his sentencing jury and plead for mercy without subjecting himself to cross-examination.

Finally, I note that this right of allocution is not unlimited. The trial court may limit the duration and content of allocution. *Harris* v. *State*, 306 Md. 344, 359, 509 A.2d 120 (1986) ("[a]lthough a sentencing court may not deny a defendant who elects to allocute a fair opportunity to exercise his right, the court may in its discretion curtail allocution that is irrelevant or unreasonably protracted"); *State* v. *Zola*, 112 N.J. 384, 430, 548 A.2d 1022 (1988) (defendant not "permitted to rebut any facts in evidence, to deny his guilt, or indeed, to voice an expression of remorse that contradicts evidentiary facts"), cert. denied, 489 U.S. 1022, 109 S. Ct. 1146, 103 L. Ed. 2d 205 (1989). The court may preview proposed allocution statements; *State* v. *Rogers*, 330 Or. 282, 302, 4 P.3d 1261 (2000); and may take remedial action if the defendant oversteps the bounds of allocution. See *State* v. *Lord*, supra, 117 Wash. 2d 900 (court may allow prosecution to cross-examine capital defendant if he offers testimony); see also *Bevill* v. *State*, 556 So. 2d 699, 710–11 (Miss. 1990) (if unsworn statement exceeds scope of evidence, state can point out to jury that no such statement was made under oath); *Homick* v. *State*, 108 Nev. 127, 134–35, 825 P.2d 600 (1992) (state can rebut remarks that are beyond scope of allocution). Therefore, the right of allocution, properly limited, is consistent with the purposes underlying the statutory capital sentencing scheme. "The broad sweep of § 53a-46a (c) reflects a balance struck by the legislature between a defendant's eighth amendment right to receive individualized consideration when faced with the death penalty; see *Lockett* v. *Ohio*, [438 U.S. 586, 606, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)]; and a trial court's need to exercise appropriate control over courtroom proceedings." *State* v. *Ross*, 230 Conn. 183, 270, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995).[5] Because the trial court may limit the scope and duration of allocution statements, the right of allocution would impose a minimal burden on the court's ability to exercise control over courtroom proceedings. Moreover, because the importance of allocution is even more pronounced when the defendant is facing the possibility of a death sentence; *People* v. *Borrego*, 774 P.2d 854, 856 (Colo. 1989); any burden on the trial court, or the state, is far outweighed by the defendant's interest in receiving individualized consideration in the face of the death penalty.[6] Therefore, the purposes of the capital sentencing scheme are only furthered by the right of allocution, which, as this court has noted, serves the "fundamental purposes" of "maintaining fair standards of procedure, individualized and equitable sentencing, and the perception of fairness in the judicial system overall . . . ." *State* v. *Strickland*, supra, 243 Conn. 354.

Because I would conclude that there is a common-law right of allocution in a capital sentencing hearing, I do not address whether the defendant had a constitu-

tional right to allocution, as well. "The question . . . is not what the Constitution commands, but what our civilization commends. Under our system of capital punishment, a jury of men and women forms the essential link between society and the defendant before the court. Each capital jury expresses the collective voice of society in making the individualized determination that a defendant shall live or die. Whatever the Constitution permits, it bespeaks our common humanity that a defendant not be sentenced to death by a jury 'which never heard the sound of his voice.' " *State* v. *Zola*, supra, 112 N.J. 429–30, quoting *McGautha* v. *California*, 402 U.S. 183, 220, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971).

Accordingly, I respectfully dissent.

[1] I also continue to maintain that, to prevail at the penalty phase hearing, the state must convince the jury that any aggravating factor outweighs any mitigating factor beyond a reasonable doubt. In other words, I would require the jury to determine beyond a reasonable doubt that aggravating factors justify a sentence of death. *State* v. *Rizzo*, supra, 266 Conn. 317 (*Katz, J.*, concurring and dissenting). To achieve this, I believe that the same level of certitude should be applied both in arriving at the outcome of the weighing process as well as to the degree by which one factor outweighs another. Id., 321–22.

[2] Practice Book § 43-10 (3) provides: "The judicial authority shall allow the defendant a reasonable opportunity to make a personal statement in his or her own behalf and to present any information in mitigation of the sentence."

[3] General Statutes (Rev. to 1997) § 53a-46a provides in relevant part: "(a) A person shall be subjected to the penalty of death for a capital felony only if a hearing is held in accordance with the provisions of this section. . . .

"(c) In such hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report which may have been prepared. No presentence information withheld from the defendant shall be considered in determining the existence of any mitigating or aggravating factor. Any information relevant to any mitigating factor may be presented by either the state or the defendant, regardless of its admissibility under the rules governing admission of evidence in trials of criminal matters, but the admissibility of information relevant to any of the aggravating factors set forth in subsection (i) shall be governed by the rules governing the admission of evidence in such trials. The state and the defendant shall be permitted to rebut any information received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any mitigating or aggravating factor. The burden of establishing any of the aggravating factors set forth in subsection (i) shall be on the state. The burden of establishing any mitigating factor shall be on the defendant. . . ."

To be consistent with the majority opinion, we refer herein to the 1997 revision of § 53a-46a, which was in effect at the time of the sentencing proceedings in the present case. We note, however, that the language of subsections (a) and (c) has remained unchanged.

[4] Like the majority, I recognize the split of authority concerning the existence of a common-law right to allocution in a capital sentencing proceeding. Some jurisdictions expressly have recognized such a right. See, e.g., *Harris* v. *State*, 306 Md. 344, 356, 509 A.2d 120 (1986); *Homick* v. *State*, 108 Nev. 127, 133–34, 825 P.2d 600 (1992); *State* v. *Zola*, 112 N.J. 384, 431, 548 A.2d 1022, cert. denied, 489 U.S. 1022, 109 S. Ct. 1146, 103 L. Ed. 2d 205 (1989); *State* v. *Lord*, supra, 117 Wash. 2d 900. Other jurisdictions do not recognize a common-law right of allocution in a capital sentencing proceeding. See, e.g., *United States* v. *Hall*, 152 F.3d 381, 393 (5th Cir. 1998), cert. denied, 526 U.S. 1117, 119 S. Ct. 1767, 143 L. Ed. 2d 797 (1999); *State* v. *Whitfield*, 837 S.W.2d 503, 514 (Mo. 1992); *State* v. *Perkins*, 345 N.C. 254, 289, 481 S.E.2d 25, cert. denied, 522 U.S. 837, 118 S. Ct. 111, 139 L. Ed. 2d 64 (1997); *Duckett* v. *State*, 919 P.2d 7, 22 (Okla. Crim. App. 1995), cert. denied, 519 U.S. 1131, 117 S. Ct. 991, 136 L. Ed. 2d 872 (1997); *Commonwealth* v. *Abu-Jamal*, supra, 521 Pa. 211; *State* v. *Stephenson*, 878 S.W.2d 530, 552 (Tenn. 1994). Although I find these authorities from other jurisdictions informative,

I nevertheless would conclude, on the basis of the interplay between Connecticut's capital sentencing scheme and the common-law right of allocution, that the legislature has neither abrogated nor preempted that common-law right in the context of capital sentencing proceedings.

[5] The majority, referring to our decision in *State* v. *Ross*, 251 Conn. 579, 588, 742 A.2d 312 (1999), notes that § 53a-46a permits the state "to rebut mitigating evidence with any information, regardless of its admissibility under the evidentiary rules generally applicable to criminal trials." The majority therefore concludes that, "because the state is permitted to rebut the information offered by the defendant to establish the existence of any mitigating factors, the plain text of § 53a-46a simply does not contemplate the right of a defendant to make a statement to the jury that is not subject to cross-examination." In *State* v. *Ross*, supra, 251 Conn. 584–85, however, the defendant claimed that the state had no right to present information concerning any *mitigating* factor, despite the plain language of § 53a-46a (c) that such information may " 'be presented *by either the state or the defendant* . . . .' " (Emphasis in original.) We concluded therein "that § 53a-46a (c) should be applied as written." Id., 587. In the present case, however, a literal reading of the statute is silent concerning the right of allocution. Rather, the plain language of the statute concerns only *information*, which, as I have stated, is separate and distinct from the defendant's common-law right to make a *personal statement* in his or her own behalf. Therefore, the plain language of § 53a-46a (c) does not preclude operation of the common-law right of allocution in the context of capital sentencing proceedings.

[6] I recognize the majority's concern that the jury, unlike the trial court, might not recognize "the legal effect of the fact that the [allocution] statements are not sworn and the attendant potential effect of this fact upon the credibility of the defendant's statements . . . ." *United States* v. *Hall*, 152 F.3d 381, 393 (5th Cir. 1998), cert. denied, 526 U.S. 1117, 119 S. Ct. 1767, 143 L. Ed. 2d 797 (1999). By limiting allocution to a plea for mercy on the basis of facts that are already in evidence, however, the trial court greatly can reduce the possibility of any diminution in the reliability and accuracy of capital sentencing. See *Shelton* v. *State*, supra, 744 A.2d 496 (capital defendant's statements concerning new evidence must be sworn and subject to cross-examination); *Henry* v. *State*, 324 Md. 204, 247, 596 A.2d 1024 (1991) (right of allocution is not "a right to present a transcript of extraneous, out of court statements made by a person who did not testify at trial"), cert. denied, 503 U.S. 972, 112 S. Ct. 1590, 118 L. Ed. 2d 307 (1992); *State* v. *Zola*, supra, 112 N.J. 430 (defendant not permitted to rebut facts in evidence, deny guilt, or voice expression of remorse that contradicts evidentiary facts). In addition, the trial court could "require an appropriate limiting instruction explaining that any statements given by [the] [d]efendant are not under oath and not subject to cross-examination." *United States* v. *Chong*, supra, 104 F. Sup. 2d 1234 n.5.

Moreover, it is important to remember that "[t]he imposition of death by public authority is . . . profoundly different from all other penalties . . . ." *Lockett* v. *Ohio*, supra, 438 U.S. 605. In a capital sentencing proceeding, there is no verdict of "not guilty"—rather, a capital defendant who is not sentenced to death will receive a sentence of life imprisonment. Therefore, because the potential harm from an erroneous sentencing verdict is far greater for the defendant than it is for the state, the balance of equities requires that any inaccuracies in the capital sentencing process be resolved in favor of the defendant. See *State* v. *Rizzo*, supra, 266 Conn. 233–34 (recognizing "the unique and irrevocable nature of the death penalty, and . . . the consequently overarching need for reliability in the imposition of such a penalty").