SULLIVAN, C. J., with whom NORCOTT, J., joins, concurring and dissenting. I agree with the majority that the trial court should have instructed the jury that it could return a partial verdict as to a greater offense when deadlocked on a lesser included offense, and that the trial court should not have declared a mistrial without inquiring if the jury had reached such a verdict. In my view, however, this court should remand the case to the trial court to conduct such an inquiry.

The defendant, James Tate, argued in his briefs to this court and at oral argument that this court may consider the affidavits from seven of the jurors, in which they stated, in essence, that the jury had unanimously determined that the state had not proven the elements of first degree manslaughter, but that the jurors were deadlocked on the charge of second degree manslaughter. See footnote 11 of the majority opinion. I agree with the majority that this court is not a fact-finding tribunal, but I see no reason that the trial court should not consider the affidavits and make such a factual determination.

The trial court concluded that ''[e]ven if the defense were to assemble affidavits from all of the jurors and

all the jurors agreed that they had unanimously voted the defendant not guilty of the crime of murder, the defense has offered no precedent for substituting that assemblage of documents for the jury's declaration at the time of trial that it was unable to reach a verdict.'' See footnote 17 of the majority opinion. The affidavits would not be a substitute for the jury's declaration, however, but merely a clarification of it. The majority has concluded, and I agree, that the court should have granted the defendant's request that the jury clarify whether it had acquitted the defendant of any of the offenses. Although that would have been the preferable course, I see nothing in our case law to suggest that, after the jury has been discharged, juror testimony should be inadmissible for the purpose of establishing whether the jury had reached a partial verdict.[1] I would hold that, if the state, at a factual hearing after the jury is discharged, can establish beyond a reasonable doubt that the defendant was not acquitted of a particular offense, the defendant may be retried for that offense.

[1] We previously have not addressed this specific issue, but it is well established in this state that jurors may testify as to factual issues that do not involve the jurors' thought processes during deliberations. ''[A]ffidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, as that a juror was improperly approached by a party, his agent, or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner. . . . [S]uch affidavit to avoid the verdict may not be received to show any matter which does essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instructions of the court; the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgment, or other matter resting alone in the juror's breast. . . . [J]urors [are] competent to testify to the occurrence of incidents during trial or during their deliberations which might have affected the result of the trial, but [cannot] testify as to the impact of such incidents on their verdict.'' (Citations omitted; internal quotation marks omitted.) *Josephson* v. *Meyers*, 180 Conn. 302, 310–11, 429 A.2d 877 (1980).

In *Aillon* v. *State*, 168 Conn. 541, 363 A.2d 49 (1975), this court considered the admissibility of testimony concerning an ex parte conversation between the trial judge and one of the jurors, and the juror's subsequent statements to the jury concerning that conversation. We noted that the policies behind the outdated rule that a juror is always incompetent to testify in impeachment of his verdict ''were to give stability to the verdicts of jurors, to minimize the temptation for jury-tampering, and to prevent inquisition into the arguments and reasoning of the jurors that go into their ultimate verdict.'' Id., 550. We held that those policies were served equally well by a narrower rule that allowed the admission of certain evidence extraneous to the mental operations of the jury. Id. Allowing postdischarge juror testimony on the narrow factual question of whether the jury reached a partial verdict would not undermine any of these policies.