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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.

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SULLIVAN, C. J., concurring in part and dissenting in part. I agree with parts I and II of the majority opinion, which address the defendant's appeal. With respect to part III of the majority opinion, which addresses the state's appeal, I respectfully dissent. Although I agree with the majority's conclusion that the court's statements[1] to the jury were not a proper statement of the law, I do not agree that those statements tainted the jury so as to render the court's denial of the state's motion for mistrial an abuse of discretion. Furthermore, I would conclude that the record is ambiguous as to whether the court dismissed the proceedings under General Statutes § 54-56[2] or acquitted the defendant pursuant to Practice Book § 42-40.[3] Accordingly, I would not reach the state's remaining claims and would remand the issue for an articulation as to which action the court took.

I

The majority first asserts that the court's statements are grounds for a mistrial because they led the jury to believe that it was not solely responsible for determining the appropriate sentence for the defendant in violation of the eighth amendment. It cites *Caldwell* v. *Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), in support of this proposition. I disagree. First, as a factual matter, I do not understand how instructing the jury that a life sentence is the ''required'' outcome in the event of a deadlock amounts to an instruction that some other body is responsible for making the final decision as to whether the defendant receives a sentence of life imprisonment or the death penalty. A required outcome precludes choice. Second, and more importantly, I believe that *Caldwell* is inapposite to the present case.

In *Caldwell* v. *Mississippi*, supra, 472 U.S. 324, defense counsel, during closing argument, spoke of the jury's awesome responsibility in deciding whether the defendant would live or die. The prosecutor, in response, argued that the defense inappropriately had suggested that the jury was solely responsible for its decision. Id., 325. The prosecutor further stated that the jury's decision was not ''the final decision''; id.; because it was reviewable automatically by the Mississippi Supreme Court. Id., 325–26. On appeal, the United States Supreme Court concluded that the prosecutor's comments had violated the defendant's eighth amendment right to reliable imposition of the death penalty because ''it is constitutionally impermissible to rest a *death sentence* on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.'' (Emphasis added.) Id., 328–29.

In the present case, the death penalty was not imposed. Thus, the *Caldwell* court's concerns with respect to the reliable imposition of the death penalty do not exist here.[4] Even if *Caldwell* may be read so broadly as to require the same level of reliability when a life sentence has been given, I believe that *Caldwell* is inapposite for other reasons. The majority asserts that the court's statements in the present case, like the prosecutor's comments in *Caldwell*, "created a reasonable likelihood that the jury failed to appreciate its 'awesome responsibility . . . .' " The majority's conclusion necessarily suggests that because of this failure, the defendant's eighth amendment right to reliable imposition of the death penalty has been violated. The defendant claims no such violation, however. Rather, the *state* claims that the court's instructions violated *Caldwell* and "prejudiced" the state. The majority, therefore, appears to be invoking *Caldwell* not to protect the defendant's eighth amendment rights, but, rather, to protect some unidentified interest of the state. Without an explanation of this unprecedented expansion of eighth amendment jurisprudence, I am compelled to disagree.

Moreover, the *Caldwell* court was particularly concerned with the bias in favor of the death sentence created by the prosecutor's comments.[5] The court in the present case did not suggest to the jury that if it imposed a death sentence, or any sentence, its decision would not be final because it would be subject to review by an appellate court. There also was no suggestion that the imposition of a death sentence would lead to appellate review, but that a life sentence would not. Unlike *Caldwell*, the court's instruction created no bias in favor of a death sentence. If the court's statements created any bias at all, it was in favor of a life sentence for the defendant.

The majority also asserts that the court's statements are grounds for a mistrial because they gave the jurors in favor of a life sentence an incentive to cut deliberations short, thereby increasing the likelihood that the jury would remain deadlocked. I conclude that the state was not prejudiced by the court's statements.[6] As noted by the majority, the statements may have provided an incentive for those jurors in favor of a life sentence to stop trying to convince those in favor of death to change their minds. The statements did not provide any incentive for the jurors in favor of death to cease their efforts to convince those in favor of life, because doing so would only have resulted in a hung jury with a resultant life sentence. Therefore, I do not agree with the majority that the court's statements adversely affected the state's interests.

Accordingly, I conclude that the court's statements to the jury did not create circumstances such that the court's denial of the state's motion for a mistrial consti-

tuted a manifest abuse of discretion.

II

I, therefore, would reach the state's claim that the court abused its discretion by denying its motion for mistrial and by dismissing the proceedings pursuant to General Statutes § 54-56. The defendant claims that the court did not abuse its discretion when it dismissed the proceedings, and, in the alternative, that the court was not dismissing the proceedings pursuant to § 54-56, but, rather, was acquitting the defendant pursuant to Practice Book § 42-40 or § 42-50. Having carefully reviewed the record, I believe that it is simply unclear whether the court was acquitting the defendant or dismissing the case. Accordingly, bearing in mind the double jeopardy concerns with respect to acquittal, I would remand the case for further articulation.

The following additional facts and procedural history are necessary for the resolution of this issue. Immediately after the court ordered the jury's special verdict accepted and recorded, the state made an oral motion for a mistrial pursuant to Practice Book § 42-45. The state argued that a mistrial was necessary because the jury was deadlocked, but the court denied the state's motion. The state then asked for permission to appeal, and the court reserved ruling on the issue until the day of sentencing.

At the sentencing hearing, the court denied the state's motion for permission to appeal and reiterated its assertion that a mistrial was not appropriate.[7] The court then imposed a total effective sentence of life imprisonment without the possibility of release.

In a subsequent memorandum of decision on the court's denial of the motion for permission to appeal, the court further articulated its reasons for denying the state's motion for a mistrial. The court first noted that it could take one of three courses of action in response to the jury's inability to agree, pursuant to *State* v. *Daniels*, 207 Conn. 374, 394–97, 542 A.2d 306 (1988). Specifically, the court stated that it could: ''(1) declare a mistrial; (2) make factual findings 'acquitting' the defendant of the death penalty; or (3) exercise its discretion pursuant to General Statutes § 54-56 to dismiss the death penalty proceedings.'' The court then stated: ''Because the jury was unable to unanimously agree as to whether the proved aggravating factor or factors outweighed the proved mitigating factor or factors, *the court found that the state failed to sustain its burden of proof*. Anything beyond this conclusion is mere speculation. Indeed, the verdict, as exemplified by the questions posed by the jury and the formulation of the special verdict form, which was accepted by both the state and the defendant, indicates that the state was unable to overcome the mitigating factor or factors found by the jury. Consequently, the court, *exercising*

its discretion, denied the state's motion for a mistrial and dismissed the death penalty proceedings.'' (Emphasis added.) The court concluded by stating: ''The court has given due consideration to the circumstances of the case, including the evidence presented and the jury's verdict as indicated on the special verdict forms. Because the court finds that *the state failed to sustain its burden of proof* that the one or more aggravating factors outweighed the one or more mitigating factors, the motion for permission to appeal is hereby denied.'' (Emphasis added.)

In *State* v. *Daniels*, supra, 207 Conn. 380–81, the court imposed a life sentence after the jury could not unanimously agree as to the presence or absence of a mitigating factor. On appeal, after determining that the court had three options for disposing of the case after the jury deadlocked (acquit, dismiss or declare a mistrial), this court concluded that the record was ambiguous as to which action the court had taken and why. Id., 401–403. We could not ascertain whether the court acquitted the defendant on the basis of its assessment of the facts or imposed a life sentence because it thought it was required to do so. Id., 402. We refused to entertain the state's remaining claims because, in the event that the court's imposition of a life sentence constituted an acquittal, further review of the state's claim would have been barred by double jeopardy. Id. ''If the trial court's imposition of a life sentence amounts to an 'acquittal' of the death penalty then double jeopardy bars a second capital sentencing proceeding.'' Id., 398. The effect of an acquittal is particularly important in the context of the state's claim that the court imposed a life sentence on the basis of erroneous legal conclusions, because, ''[t]he fact that an acquittal is based in whole or in part on an erroneous construction of the governing law is of no import. That fact affects the accuracy of that determination, but it does not alter its essential character.'' (Internal quotation marks omitted.) Id., 399.

The court's action in the present case is similarly ambiguous. In its memorandum of decision, the court indicated that the state had failed to carry its burden of proof, suggesting that the court itself made factual findings and acquitted the defendant of capital felony murder.[8] The court, however, also stated in the memorandum of decision that it had ''exercis[ed] its discretion . . . [and] dismissed the death penalty proceedings,'' which suggests that the court intended to exercise its discretion to dismiss the death penalty proceedings pursuant to § 54-56. Keeping in mind that, if the court had acquitted, a second capital penalty hearing would be barred by double jeopardy, I would remand the case to the trial court for an articulation of its action.

Accordingly, I respectfully dissent.

[1] The majority notes two problematic statements made to the jury. ''If you continue to deliberate on this issue and at the final analysis you are not able to agree, then you report that, and in that event your deliberations

would cease and by your action I would be required to impose a sentence of life without the benefit of release.'' ''I've already told you, if you cannot agree, then I will impose a sentence which is in accord with the inability of the state to satisfy the burden of proof beyond all reasonable doubt in respect to the aggravating factor and your consideration of the mitigating factor.''

[2] General Statutes § 54-56 provides: ''All courts having jurisdiction of criminal cases shall at all times have jurisdiction and control over informations and criminal cases pending therein and may, at any time, upon motion by the defendant, dismiss any information and order such defendant discharged if, in the opinion of the court, there is not sufficient evidence or cause to justify the bringing or continuing of such information or the placing of the person accused therein on trial.''

[3] Practice Book § 42-40 provides in relevant part: ''After the close of the prosecution's case in chief or at the close of all the evidence, upon motion of the defendant or upon its own motion, the judicial authority shall order the entry of a judgment of acquittal as to any principal offense charged and as to any lesser included offense for which the evidence would not reasonably permit a finding of guilty. Such judgment of acquittal shall not apply to any lesser included offense for which the evidence would reasonably permit a finding of guilty.''

[4] Of the six Connecticut Supreme Court cases that have mentioned *Caldwell*, all are cases in which the defendant has been sentenced to death. *State* v. *Ross*, 269 Conn. 213, 344 n.79, 849 A.2d 648 (2004); *State* v. *Rizzo*, 266 Conn. 171, 228, 833 A.2d 363 (2003); *State* v. *Reynolds*, 264 Conn. 1, 123, 836 A.2d 224 (2003), cert. denied, U.S. , 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004); *State* v. *Cobb*, 251 Conn. 285, 454, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000); *State* v. *Breton*, 235 Conn. 206, 245, 663 A.2d 1026 (1995); *State* v. *Ross*, 230 Conn. 183, 230, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995).

[5] The United States Supreme Court stated that ''there are specific reasons to fear substantial unreliability as well as bias in favor of death sentences when there are state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court.'' *Caldwell* v. *Mississippi*, supra, 472 U.S. 330. The court gave four reasons for its concerns. First, it noted that ''[b]ias against the defendant clearly stems from the institutional limits on what an appellate court can do . . . .'' Id. Second, prosecutorial argument of this nature ''presents an intolerable danger of bias toward a death sentence'' because a jury, even if it is not convinced that the defendant actually deserves death, may wish to ''send a message'' of disapproval of the defendant's acts and may feel free to do so with the prosecutor's assurance that any error will be corrected on appeal. Id., 331. Third, a jury seeking to delegate responsibility for sentencing may return a sentence of death if it assumes, on the basis of argument, that only a death sentence is reviewable. Id., 332. Finally, such comments create ''an intolerable danger that the jury will in fact choose to minimize the importance of its role,'' especially in light of a jury's tendency to believe that an appellate court may be more well suited to make the decision. Id., 333.

[6] The majority relies on *State* v. *Sawyer*, 227 Conn. 566, 579, 630 A.2d 1064 (1993), for the novel proposition that '' '[t]he state . . . has a substantial interest, namely, its interest in securing a [determination of the imposition of the death penalty]' through the jury's thoughtful deliberation to a unanimous verdict.'' This court stated in *Sawyer*: ''The state also has a substantial interest, namely, its interest in securing a conviction on the most serious charge that the evidence will reasonably support.'' Id.

[7] The court apparently did not find that the jury was deadlocked. The court stated: ''I don't find the jury hung in your language. I find that they intelligently answered the question posed to them [on the revised verdict form] that they were unanimous in their ability to determine that they unanimously agreed they could not agree on the proof of the mitigating factor. . . . So I believe the case is over from that point of view . . . . [The jury] did their job, their sworn duty to determine whether or not the state has met its burden, and they found that they could not do that. That's not hung; that's a determination by the numbers allowed that the overwhelming evidence of the mitigating factor did not fail to rise to a level in the minds of one or more that outweighed the aggravating factor.''

[8] The court stated: ''[T]he court finds that the state failed to sustain its burden of proof.''