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SULLIVAN, C. J., dissenting and concurring. The majority construes General Statutes (Rev. to 1997) § 53a-46a (e) and (f) to require that, in determining whether death is the appropriate punishment, the sentencer at the selection phase must be certain beyond a reasonable doubt that the aggravating factors outweigh any mitigating factors by a preponderance of the evidence. I agree with the majority's conclusion in part I E that the statute requires the sentencer to determine that the aggravating factors outweigh any mitigating factors by any amount or degree in order to impose the death penalty.[1] I disagree, however, with the majority's conclusion in part I F that the jury must be instructed that it ''must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors . . . .'' I further disagree with the majority's conclusion in part II that the alleged prosecutorial misconduct in the present case rises to the level of reversible constitutional error. Accordingly, I respectfully dissent. Because I agree with the remainder of the majority opinion rejecting the defendant's remaining claims, I would affirm the judgment of the trial court.

I

In reaching its conclusion that the jury must be persuaded beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, the majority first notes that the defendant's brief fairly can be read to make the alternative claims (1) that the state constitution requires that the balance of the aggravating factors against the mitigating factors must tip greatly in favor of the aggravating factors and (2) that, even if there is no such constitutional requirement, the legislature has left a gap in the statute by failing to specify the level of certitude that the jury must have in making its determination, which this court must fill by declaring that the jury must be certain beyond a reasonable doubt. Addressing the defendant's first claim, the majority concludes, as a matter of statutory interpretation, that the statute requires that the jury determine that the aggravating factors outweigh the mitigating factors only by any amount or degree. Applying the framework for the analysis of state constitutional claims set forth in *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), the majority then rejects the defendant's constitutional claim, largely on the basis of its conclusion that, as a general jurisprudential principle, ''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.'' Rephrasing this conclusion, the majority states that the reasonable doubt standard ''is simply inapt to measure the balance between the aggravating

factors and the mitigating factors.''[2]

Turning to the defendant's alternative claim, that the legislature has left a gap in the statute that this court must fill, the majority agrees with the defendant that ''because the legislature was silent as to the required level of certitude imposed on the jury's weighing determination, there is a statutory lacuna . . . .'' It also concludes, without the benefit of an analysis under *Geisler*, that ''there would be a potentially significant state constitutional question about our capital sentencing scheme'' if the statutory gap were not filled by requiring the trial court to instruct the jury that ''it must be persuaded that death is the appropriate penalty in the case, and that its level of certitude in arriving at that ultimate weighing judgment must be beyond a reasonable doubt.''

I believe that this chain of reasoning is flawed. Specifically, I do not agree (1) that the reasonable doubt standard focuses solely on the fact finder's level of certitude, (2) that there is a gap in the statute that must be filled or (3) that the statute is of questionable constitutionality under our state constitution.

I first address the majority's conclusion that the reasonable doubt standard does not focus on the quantum of the evidence produced by the state, but on the fact finder's subjective degree of certitude. I believe, to the contrary, that, although a fact finder's subjective degree of certitude is conceptually distinct from the quantum of evidence, it is, in the context of ordinary fact-finding, a *function* of the quantum of evidence.[3] The standard that we apply to insufficiency of the evidence claims makes this clear.[4] In considering such claims, we do not inquire into the fact finder's subjective degree of certitude, but, instead, ask whether the *cumulative* force of the evidence was *sufficient* to establish the defendant's guilt beyond a reasonable doubt. The terms ''cumulative'' and ''sufficient'' are, in their very nature, quantitative. Therefore, I believe that the defendant's first claim is inapt, not because he mistakenly believes that the reasonable doubt standard focuses on the relative weight of the cases made by each side, but because he mistakenly believes that our state constitution requires a larger quantitative margin between the weight of the aggravating factors and the weight of the mitigating factors than is provided by the statute.[5] Conversely, I believe, as I discuss more fully later in this dissenting opinion, that the defendant's alternative claim, that the jury must be instructed that it be certain beyond a reasonable doubt that the aggravating factor outweighs the mitigating factor, is inapt because applying the reasonable doubt standard to the moral determination of whether the defendant deserves death distorts the standard by severing the level of certitude from any quantitative evaluation of evidence, and is both confusing and unnecessary.

I next address the majority's conclusion that there is a gap in the statute that makes it constitutionally suspect. The majority reaches this conclusion by comparing the current weighing statute to our former statute. As the majority correctly notes, this court concluded in *State* v. *Daniels*, 207 Conn. 374, 383–86, 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), that, under our former statute, after the state had proved beyond a reasonable doubt that the defendant had committed a capital offense and an aggravating factor existed, to avoid a sentence of death, the defendant was required to establish the existence of a mitigating factor by a preponderance of the evidence. Thus, under that statute, if the defendant established that there was up to a 50 percent probability that a mitigating factor existed, he would be sentenced to death, whereas, if he established a 51 percent probability of mitigation, he would be sentenced to life in prison. The only difference that I can discern between that statute and our current statute is that, formerly, if the jury found a mitigating factor, it was required to impose a life sentence even if the aggravating factor greatly outweighed the mitigating factor.[6]

The majority concludes, however, that there is a gap in our current statute because, unlike under our former statute, the state is not ''required to carry its ultimate burden of persuasion in support of the imposition of the death penalty by the standard of beyond a reasonable doubt . . . .'' Under our former statute, however, as under our current statute, the state was required to establish beyond a reasonable doubt only that the defendant was *eligible* for the death penalty. It is implicit in the majority's reasoning, therefore, that it believes that, under our former statute, the jury's determination that the defendant was eligible for death amounted to a default determination that the defendant deserved death beyond a reasonable doubt. In other words, once an aggravating factor had been found, the defendant presumptively deserved death unless he could establish that he deserved mercy. If that was the case under our former statute, however, I fail to see why it should not also be the case under our current statute. The fact that, under our current statute, the jury may not grant mercy if it determines that the aggravating factors outweigh the mitigating factors should not change the fact that, by having found an aggravating factor, it already has determined beyond a reasonable doubt that the defendant presumptively deserves death. Put another way, the fact that our former statute went beyond the requirements of justice—and the federal constitution—by allowing the jury to grant mercy even in cases where the aggravating factors outweighed, and even greatly outweighed, the mitigating factors, did not somehow render the jury's determination that the

defendant presumptively deserved death more reliable. Rather, it rendered the jury's determination that the defendant deserved mercy *less* reliable.

Conversely, if the majority believes that the determination under our former statute that an aggravating factor existed did *not* constitute a default determination that the defendant deserved death, then it must concede that the ultimate determination by the jury as to whether the death penalty should be imposed was not made under a reasonable doubt standard. Indeed, the jury was not required to have any particular level of certitude that the defendant had failed to establish a mitigating factor by a preponderance of the evidence. We repeatedly have concluded there was no constitutionally significant gap in our former statute. See *State* v. *Cobb*, 251 Conn. 285, 459–60, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000); *State* v. *Ross*, 230 Conn. 183, 254–55, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995). Accordingly, I cannot perceive why there is such a gap in our current statute.

Having divined this purported gap, however, the majority concludes that the only way to bridge it, consistent with our state constitution, is to require the trial court to instruct the jury that it must be certain beyond a reasonable doubt that the aggravating factor outweighs the mitigating factor by a fair preponderance of the evidence. As I have indicated, this conclusion is not based on an analysis under *Geisler*, which heretofore has provided the analytical framework for our consideration of state constitutional claims. Instead, the majority apparently adopts a new analytical framework for state constitutional claims involving the death penalty, under which this court considers: ''(1) the nature of the death penalty; (2) an overarching need for reliability and consistency in the imposition of the death penalty; and (3) the nature of the jury's determination to render a verdict requiring the penalty.''[7] The majority then states repeatedly and emphatically that death is different, that both this court and the United States Supreme Court have repeatedly recognized that due process requires that the death penalty be imposed consistently and reliably, and that the jury's decision ''necessarily calls upon the intellectual, moral and emotional resources of the jurors in a way that far exceeds any factual determination of guilt or innocence.'' I do not disagree with any of these propositions. I do not believe, however, that they compel the majority's conclusion.

First, as the majority recognizes, it is well established as a matter of federal constitutional doctrine that the due process requirement for consistency and reliability in the imposition of the death penalty focuses primarily on the eligibility phase and can be achieved without imposing any ''specific standards for balancing aggravating against mitigating circumstances'' during the

selection phase. *Zant* v. *Stephens*, 462 U.S. 862, 875 n.13, 103 S. Ct. 2733, 77 L. Ed. 2d 235 (1983).[8] The majority's insistence that this requirement for consistency and reliability is a constitutional minimum and that ''[s]tates are free to structure and shape consideration of mitigating evidence in an effort to achieve a more rational and equitable administration of the death penalty''; (internal quotation marks omitted) *State* v. *Ross*, supra, 230 Conn. 234, quoting *Boyde* v. *California*, 494 U.S. 370, 377, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990); mixes apples and oranges. The requirement for consistency and reliability during the eligibility phase serves to *narrow* the class of offenders eligible for the death penalty, while the principle enunciated in *Boyde*, that states constitutionally may limit the exercise of the sentencer's discretion in considering mitigating factors during the selection phase, serves to *broaden* the class of offenders actually sentenced to death by channeling the sentencer's discretion to grant mercy. In other words, the court in *Boyde* simply recognized that states, i.e., state *legislatures*, may do precisely what our legislature has done, namely, require the sentencer to impose the death penalty even if it finds a mitigating factor, if it determines that the aggravating factor outweighs the mitigating factor. See *Boyde* v. *California*, supra, 377. Moreover, *Boyde* could not, as the majority suggests, have ''left open'' the possibility that states, i.e., state *constitutions*, may provide greater protection to capital defendants during the selection phase for the simple reason that that possibility can never be foreclosed by the articulation of federal constitutional doctrine. Accordingly, I see nothing in any of the portions of *Ross* quoted by the majority to support its conclusion that our state constitution provides greater protection in the selection phase than does the federal constitution.

Second, with regard to the majority's statement that the jury's decision ''necessarily calls upon the intellectual, moral and emotional resources of the jurors in a way that far exceeds any factual determination of guilt or innocence,'' and that the statute must ''give due deference to the awesome and wrenching nature of the jury's task,'' I note that the United States Supreme Court ''has always premised its capital punishment decisions on the *assumption* that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility.' '' (Emphasis added.) *Caldwell* v. *Mississippi*, 472 U.S. 320, 341, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985). The *Caldwell* court stated that its ''Eighth Amendment jurisprudence has taken *as a given* that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State.'' (Emphasis added.) Id., 329. To ensure that the jury is aware of the gravity of its task, we previously have concluded that ''any instruction by the trial court indicating that the court rather than the jury

will actually impose sentence should also repeat the instruction that the court is bound to impose sentence in accordance with the jury's findings on mitigating and aggravating factors and, consequently, that the responsibility for deciding whether the defendant will receive a sentence of death or life imprisonment without the possibility of release rests with the jury.'' *State* v. *Breton*, 235 Conn. 206, 249, 663 A.2d 1026 (1995). I am no less confident than the Supreme Court that, upon being properly instructed pursuant to *Breton*,[9] the jury will understand its awesome role and that it will bring to this most wrenching of decisions the requisite moral seriousness. Accordingly, I see no need to build into the weighing statute an additional instructional layer to ensure that the jury does not approach its task casually.

Moreover, I believe that the instruction required by the majority in this case is not only unnecessary, but will also be confusing to a jury, particularly if the jury previously has applied the reasonable doubt standard in the guilt phase. As I have indicated, in the fact-finding context, the standard requires a high level of certitude based on the quantum of evidence produced. I believe that instruction required by the majority will create a risk that the jury will apply the standard in the same way during the penalty phase proceeding and conclude that a high level of certitude requires a great disparity between the relative weights of the aggravating factor and the mitigating factor, thereby undermining the intent of the statute.[10]

II

The majority concludes that certain improper statements made by the prosecutor during the state's final, rebuttal argument, viewed in the context of the entire penalty phase, ''so infected the trial with unfairness as to make the resulting conviction a denial of due process.'' (Internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 161, 824 A.2d 611 (2003). I disagree.

There is no question that this prosecutor's remarks were improper and that such behavior does a disservice to the office of state's attorney, to the dignity of the court and to the people of this state. Nevertheless, we must be mindful that ''[t]he touchstone of due process analysis on cases of alleged prosecutorial misconduct is the fairness of the trial, *not the culpability of the prosecutor*.'' (Emphasis added; internal quotation marks omitted.) *State* v. *Couture*, 194 Conn. 530, 562, 482 A.2d 300 (1984), cert. denied, 469 U.S. 1192, 105 S. Ct. 967, 83 L. Ed. 2d 971 (1985). Focusing on the fairness of the proceeding, I cannot conclude that the defendant was deprived of a fair penalty phase hearing. Although this prosecutor has engaged in conduct apparently calculated to come as close as possible to the constitutional line without crossing it, I believe he did not cross that line in this case and deprive the defendant of a fair trial. First, the improper remarks were confined to the

state's final, rebuttal argument, which constituted a small portion of the overall penalty phase hearing. Moreover, as the majority notes, the state's case for its aggravating factor was very strong. Because I believe that there was overwhelming evidence to support the aggravating factor and relatively little to support the mitigating factors, I would conclude that the ultimate verdict would have been the same absent the prosecutor's conduct. Accordingly, I would not reverse the judgment on this ground.

[1] I continue to disagree, however, with the method of statutory interpretation set forth in *State* v. *Courchesne*, 262 Conn. 537, 816 A.2d 562 (2003). Because I believe that the language of General Statutes (Rev. to 1997) § 53a-46a (f) is plain and unambiguous, I would not consult the legislative history of the statute.

[2] In this regard, I find it curious that, at the *end* of its *Geisler* analysis, the majority concludes that the defendant's constitutional claim is simply inapt because the beyond a reasonable doubt standard simply does not mean what the defendant says it means. If that were the case, I do not understand why that fact, standing by itself, would not be dispositive of the claim.

[3] The majority notes that New York's weighing statute applies the reasonable doubt standard solely to the fact finder's subjective level of certitude and applies a substantiality factor to the outcome of the weighing process. In my view, this statute shows only that it is *possible* conceptually to separate the level of certitude from the quantum of proof, not that the reasonable doubt standard, as it is typically applied in a criminal fact-finding context, focuses solely on the level of certitude. Although I agree that, for example, it would be conceptually possible to require a fact finder to be intellectually certain that something is probably true, I do not believe that, as a general rule, fact finders are required to engage in such epistemological hairsplitting. In other words, I believe that the New York statute does not embody the reasonable doubt standard as it is typically applied, but distorts it.

[4] See *State* v. *Luurtsema*, 262 Conn. 179, 200, 811 A.2d 223 (2002), in which this court stated: "The standard of review employed in a sufficiency of the evidence claim is well settled. [W]e apply a two part test. First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts so construed and the inferences reasonably drawn therefrom the [finder of fact] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt." (Internal quotation marks omitted.)

[5] Although I believe that the weighing process is essentially a moral determination that does not easily lend itself to a quantitative analysis, I also believe that the legislature rationally could have required, as has the New York legislature, that the aggravating factor substantially outweigh the mitigating factor, rather than provide, as it did, that the aggravating factor outweigh the mitigating factor by any amount, no matter how small. In my view, such a provision would require the jury to make the purely moral determination that the defendant deserves death and the quantitative determination that he would deserve death even if the aggravating factor were much less aggravating or the mitigating factor much more mitigating. In other words, the provision essentially would build a buffer zone into the jury's determination that the defendant deserves death.

[6] It is well established that this difference is of no constitutional significance under the federal constitution. As the United States Supreme Court repeatedly has recognized, " 'the state may shape and structure the [capital sentencer's] consideration of mitigation [as it sees fit] so long as it does not preclude the [sentencer] from giving effect to any relevant mitigating evidence. *Johnson* v. *Texas*, 509 U.S. 350, 362 [113 S. Ct. 2658, 125 L. Ed. 2d 290] (1993); *Penry* [v. *Lynaugh*, 492 U.S. 302, 326, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989)]; *Franklin* v. *Lynaugh*, 487 U.S. 164, 181 [108 S. Ct. 2320, 101 L. Ed. 2d 155] (1988).' " *State* v. *Cobb*, 251 Conn. 285, 484, 743 A.2d 1 (1999), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000), quoting *Buchanan* v. *Angelone*, 522 U.S. 269, 276–77, 118 S. Ct. 757, 139 L. Ed. 2d 702 (1998).

[7] I agree with Justice Zarella's response to the majority's argument that a *Geisler* analysis is not required in this case. See Justice Zarella's dissenting opinion. After this opinion, parties will be able avoid the strictures *Geisler*

by claiming that they are not asking this court to resolve a state constitutional question, but are merely pointing to a possible constitutional infirmity. The standard that will be applied to determine whether such a possible constitutional infirmity exists in any particular case is open to conjecture.

[8] See also *State* v. *Cobb*, supra, 251 Conn. 484 (‘‘It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the [sentencer's] discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination.' ''); *State* v. *Ross*, supra, 230 Conn. 232 (‘‘statutory requirement that, before death may be imposed, the sentencer must find at least one statutorily mandated aggravating circumstance is a constitutionally permissible response to the need to avoid standardless sentencing discretion''). Thus, the selection phase is concerned purely with individualized sentencing, not with consistency and reliability. See also *Walton* v. *Arizona*, 497 U.S. 639, 662, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) (Scalia, J., concurring) (criticizing *Woodson* v. *North Carolina*, 428 U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 [1976], and *Lockett* v. *Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L. Ed. 2d 973 [1978] [plurality opinion], because, in those cases, ‘‘uniform treatment of offenders guilty of the same capital crime [during the selection phase] was not only not *required* by the Eighth Amendment, but was all but *prohibited*'' [emphasis in original]), overruled on other grounds, *Ring* v. *Arizona*, 536 U.S. 584, 597–609, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002).

[9] In this case, for example, the trial court instructed the jury that ‘‘[a]lthough the jury does not expressly decree the death penalty shall be imposed, the jury does make . . . specific findings on aggravating and mitigating factors . . . from which the imposition of the death penalty, or, in the alternative, a sentence of life without the possibility of release necessarily follows.'' It also instructed the jury that ‘‘[y]ou must recognize that your decision is not one of simply making objective findings, rather you are in fact and in the law actually making a decision whether the defendant should be sentenced to life imprisonment without possibility of release or death.'' Finally, the court instructed the jury that the ‘‘[p]enalty of death is qualitatively different from a sentence of imprisonment no matter how many years. From the point of view of [the defendant] it is different both in its severity and clearly in its finality. From the point of view of society the action of the state taking the life of a person differs dramatically from any other state action. It is of vital importance to the defendant and the community that any decision to impose the death penalty would be based on reason rather than caprice or emotion. The responsibility for determining the existence of factors upon which the imposition of the death penalty depends is exclusively yours, not mine. And indeed the responsibility of deciding whether death or life imprisonment without possibility of release should be imposed is yours within the confines of the law I have described. Remember that in capital cases the jury is to serve as the link between contemporary community values and standards of decency. And that no man is to be condemned to death unless his fairly selected jury unanimously agrees that he should be.''

[10] Contrary to the majority's suggestion, I do not believe that it is conceptually impossible to assign a particular level of subjective certitude to a moral determination. I do believe, however, that, as it is typically applied, the reasonable doubt standard imposes a requirement for a high level of certitude *based on* a quantitative evaluation of the evidence and, therefore, an instruction requiring that level of certitude divorced from any quantitative evaluation is likely to cause confusion.