CV-05-4006524	:	SUPERIOR COURT
MICHAEL C. SKAKEL	:	JUDICIAL DISTRICT OF STAMFORD
V.	:	AT STAMFORD
STATE OF CONNECTICUT	:	SEPTEMBER 14, 2007

STATE'S RESPONSE TO PETITIONER'S POST-TRIAL MEMORANDA OF LAW AND PROPOSED FINDINGS OF FACT

The state hereby responds to, and refutes, petitioner's claims of fact and law contained in the two volumes of memoranda of law, and the seven volumes of proposed findings of fact and conclusions of law he has filed. The state's disagreements with the petitioner on what the evidence at the original trial and on this petition established are too numerous to mention individually. It would serve no purpose to go line by line and page by page pointing out where the state believes petitioner has misstated the record. The inferences petitioner asks this court to draw from the evidence are flawed both because their premise is faulty (i.e. the record does not support what petitioner contends it does) and because the inferences themselves are unreasonable. As an example, the scenario petitioner constructs as to how Bryant and his friends may have remained unseen in Belle Haven the night of the murder, and hid in the Byrne's house or on the Skakel grounds is based on nothing but speculation and a vivid imagination. Not a single witness claimed to have seen the trio in Belle Haven or testified that Hasbrouck and Tinsley spent the night.

For a refutation of petitioner's rendition of the facts, therefore, the state relies on the record itself. An examination of the record of the criminal trial, and of the hearing on the petition, aided by the factual recitations and citations in the state's brief, fully refutes petitioner's

version of events.

Petitioner's conclusions of law are also, for the most part, fully refuted by the state's arguments in its post-trial brief. The state will address herein a few matters of disagreement, but by not refuting each individual assertion made by the petitioner the state does not intend to signal agreement. Rather, the state maintains that the legal principles which should guide this court's determination were accurately set forth in the state's initial brief.

For the convenience of the Court, the state has prepared the following Table of Contents:

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As explained in the state's post-trial brief, under the *Asherman* standard, a "petitioner must demonstrate, by a preponderance of the evidence, that: (1) the proffered evidence is newly discovered, such that it could not have been discovered earlier by the exercise of due diligence; (2) it would be material on a new trial; (3) it is not merely cumulative; and (4) it is likely to produce a different result in a new trial. . . . This strict standard is meant to effectuate the underlying `equitable principle that once a judgment is rendered it is to be considered final,' and should not be disturbed by post-trial motions except for a compelling reason. . . . In determining the potential impact of new evidence, the trial court must weigh that evidence in conjunction with the evidence presented at the original trial. . . . It is within the discretion of the trial court to determine, upon examination of all the evidence, whether the petitioner has established substantial grounds for a new trial, and the judgment of the trial court will be set aside on appeal only if it reflects a clear abuse of discretion." *Asherman v. State*, 202 Conn. 429, 434, 521 A.2d 578 (1987).

In his memorandum concerning counts one, two, six and nine, petitioner misconstrues this standard. He asserts that the "different result" required under the fourth prong would be satisfied if one juror harbored a reasonable doubt causing a hung jury. See e.g. Petitioner's Post- Hearing Memorandum of Law in Support of Counts One, Two, Six and Nine of Petitioner's Revised Substitute Petition for New Trial, (hereinafter Memorandum I) at 124, n. 70. He argues that decisions of our Supreme Court such as *Shabazz v. State*, 259 Conn.

811, 823-24 (2002); and *Lombardo v. State*, 172 Conn. 385, 390-91 (1977) construing a "different result" as an acquittal do not comport with the express language of General Statute §52-270 (a). *Id*.

Petitioner fails to identify any language within §52-270 (a) supporting his position. General Statutes §52-270 (a) does not contain the term "different result" or set forth any of the *Asherman* factors. Rather, it simply states the causes, such as new evidence or want of actual notice to a defendant, for which the Superior Court may grant a new trial. [1]

In addition to finding no support in the statute on which he relies, petitioner's argument finds no support in Connecticut jurisprudence as a whole. First, as petitioner himself recognizes; Memorandum I at 124 n. 70*;* Connecticut case law describes the "different result" or "different verdict" required under *Asherman's* fourth prong as a judgment of acquittal.[2] In *Lombardo v. State,* 172 Conn. 385, 390-91 (1977) our Supreme Court stated the following:

> Whether a new trial should be granted does not turn on whether the evidence is such that the jury *could* extend credibility to it. . . . The [petitioner] must persuade the court that the new evidence he submits will *probably*, not merely possibly, result in a different verdict at a new trial. . . . It is not sufficient for him to bring in new evidence from which a jury *could* find him not guilty - it must be evidence which persuades the judge that a jury *would* find him not guilty." (Citations omitted).

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[1] General Statutes §52-270(a) provides:
The superior court may grant a new trial of any action that may come before it, for mispleading, the discovery of new evidence or want of actual notice of the action to any defendant or of a reasonable opportunity to appear and defend, when a just defense in whole or part existed, or the want of actual notice to any plaintiff or the entry of a nonsuit for failure to appear at trial or dismissal for failure to prosecute with reasonable diligence, or for other reasonable cause, according to the usual rules in such cases. The judges of the Superior Court may in addition provide by rule for the granting of new trials upon prompt request in cases where the parties or their counsel have not adequately protected their rights during the original trial of an action.

[2] A conviction of a lesser included offense may also qualify. See *Shabazz v. State*, 259 Conn. at 826 (recognizing petitioner's interest in ensuring that he is not wrongfully convicted of a more serious crime than is justified by the facts of the case).

This oft-quoted language from *Lombardo*, thus specifies that petitioner must demonstrate the likelihood of an acquittal in view of the newly-discovered evidence. Neither the state's research, nor apparently the petitioner's, has revealed any suggestion that the likelihood of a mistrial is sufficient to upset a prior verdict.

Nor would any such suggestion comport with society's considerable interest in finality or with the crucial differences between a verdict and a hung jury. It is well-established that a valid jury verdict in a criminal case must be unanimous. *State v. Peeler*, 271 Conn. 338. 410-411 (2004); *State v. Sawyer*, 227 Conn. 566, 580, 630 A.2d 1064 (1993); *State v. Aparo,* 223 Conn. 384, 388, 614 A.2d 401 (1992), cert. denied, 507 U.S. 972 (1993); *State v. Daniels*, 207 Conn. 374, 388, 542 A.2d 306, cert. denied, 489 U.S. 1069 (1989); *State v. Stankowski*, 184 Conn. 121, 147, 439 A.2d 918, cert. denied, 454 U.S. 1052, 102 S. Ct. 596 (1981); *State v. Gannon*, 75 Conn. 206, 229-30, 52 A.2d 727 (1902). "[T]he requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict." *State v. Peeler*, 271 Conn. at 411. Unless a jury achieves unanimity, it cannot render a verdict and does not render any finding of fact. *State v. Daniels*, 207 Conn. at 388.

Thus, because a nonunanimous jury makes no finding, and cannot render a verdict, the probability that a new trial will result in a hung jury is not sufficient to outweigh the state's interest in maintaining a verdict rendered by a unanimous jury. A unanimous verdict should not be cast aside because of evidence that may influence one person out of twelve. Moreover, because a mistrial is not a final judgement, but would result in yet another trial in the quest for a verdict, it is not a legal result or outcome. *See Webster's Encyclopedic Unabridged Dictionary of the English Language*, (1989 dilitium Press) (defining "result" as, *inter alia*, "that which results; outcome . . . to terminate or end in a specified manner or thing"). In sum, a

verdict should not be overturned when the most that can be said is that a retrial will probably be inconclusive.

In addition to finding no support in Connecticut's jurisprudence, petitioner's suggested standard is unworkable. There are no standards which can reliably identify evidence sufficient to induce reasonable doubt in one presumably reasonable juror, but not in the other eleven. If the evidence were sufficient to produce a reasonable doubt in one reasonable juror, then it would presumably have the same effect on all other, equally rational jurors. Therefore, the standard petitioner proposes is actually standardless.

For these reasons, petitioner's attempt to recast the fourth prong of *Asherman* must be rejected.

II. PETITIONER'S ASSERTION THAT HE WOULD BE ABLE TO PRESENT THE TESTIMONY OF BRYANT, HASBROUCK AND TINSELY IN A SUBSEQUENT TRIAL BY COMPELLING EITHER THE STATE OR THE COURT TO GRANT IMMUNITY TO OVERCOME THEIR FIFTH AMENDMENT PRIVILEGE FINDS NO SUPPORT IN CONNECTICUT LAW

In advancing his contention that the evidence presented under Count One would likely result in an acquittal on retrial, petitioner faces an obvious problem: because of their invocation of the fifth amendment, it is unlikely that either Bryant, Hasbrouck or Tinsley would be available to testify in any subsequent trial. In this proceeding, petitioner attempts to fill the lacuna left by their assertion of the privilege by urging this court to draw an adverse inference against the state.[3]

Perhaps in recognition of the fact that no adverse inference may be drawn from a witness' invocation in a criminal case; *State v. Dennison*, 220 Conn. 652, 660-61, 600 A.2d

[3] The state's objection to that procedure has been fully briefed in its initial brief and will not be repeated here.

1343 (1991); petitioner asserts that, in a new criminal trial, he will "immediately move for the State to grant immunity to all three men in accordance with the fifth and fourteenth amendments to the U.S. Constitution, Article I, §8 of the Connecticut Constitution, and the court's general supervisory power over the fair administration of justice to grant use immunity[.]" Memorandum I at 128 n. 73. Petitioner presents no authority for his proclamation as, indeed, there is none to be found in Connecticut.

To the contrary, our appellate courts have held repeatedly that there is no authority, statutory or otherwise, enabling a trial court to grant immunity to defense witnesses. *State v. Giraud*, 258 Conn. 631, 636-7, 783 A.2d 1019 (2001); *State v. Holmes,* 257 Conn. 248, 254, 777 A.2d 627 (2001);*State v. McIver,* 201 Conn. 559, 566-67, 518 A.2d 1368 (1986); *State v. McLucas,* 172 Conn. 542, 561, 375 A.2d 1014, cert. denied, 434 U.S. 855, 98 S.Ct. 174, 54 L.Ed.2d 126 (1977); *State v. Simms,* 170 Conn. 206, 211, 365 A.2d 821, cert. denied, 425 U.S. 954, 96 S.Ct. 1732, 48 L.Ed.2d 199 (1976); *State v. Morant*, 68 Conn. App. 137, 165, 802 A.2d 93 (2002); *overruled on other grounds*, *Shabazz v. State*, 259 Conn. at 828-30; *State v. Reis,* 33 Conn.App. 521, 526-27, 636 A.2d 872, cert. denied, 229 Conn. 901, 640 A.2d 118 (1994).

Although a minority of jurisdictions have recognized the federal constitution may require the immunization of a defense witness in certain narrow circumstances; *see e.g. United States v. Burns*, 684 F.2d 1066 (2d Cir. 1982), cert. denied 459 U.S. 1174 (1983);[4] *Government of the*

[4] Under *Burns*, in order to require that use immunity be granted, the court must find that (1) the government has engaged in discriminatory use of immunity to gain a tactical advantage or, through its own overreaching, has forced the witness to invoke the Fifth Amendment; and (2) the witness' testimony will be material, exculpatory, and not cumulative and is not available from any other source. *State v. Giraud*, 258 Conn. at 637.

Virgin Islands v. Smith, 615 F.2d 964, 974 (3d Cir. 1980);[5] our courts have declined to decide the merits of theories embraced elsewhere in the absence of circumstances giving rise to their application. *See State v. Giraud*, 258 Conn. at 638; *State v. Holmes,* 257 Conn. at 255.

The same position should prevail here. There is no reason to consider the theories under which a few jurisdictions confer immunity because petitioner has presented nothing in the way of argument or evidence suggesting that the circumstances which might support a grant of immunity exist.

Therefore, in considering the likelihood that the evidence claimed under Count One would result in an acquittal at a new trial, that evidence must be assessed without the benefit of either an adverse inference, or any anticipated testimony from Hasbrouck, Tinsely, or Bryant.

III. PETITIONER CANNOT RELY ON "REASONABLE CAUSE" AS A BASIS FOR RECOVERY

a. Petitioner expressly disavowed any reliance on "reasonable cause" in his pleadings

Proceedings for procuring a new trial, whether civil or criminal, are controlled by statute. *State v. Grimes*, 154 Conn. 314, 324, 228 A.2d 141 (1967). In addition to permitting a new trial for, *inter alia*, the discovery of new evidence, General Statutes §52-270 permits the court to grant a new trial for "other reasonable cause, according to the usual rules in such cases."[6]

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[5] Under the Third Circuit's "effective defense theory" a trial court may grant use immunity when "`it is found that a potential defense witness can offer testimony which is clearly exculpatory and essential to the defense case and when the government has no strong interest in withholding . . . immunity. . . .'" *State v. Morant*, 68 Conn. App. at 166 *quoting Government of the Virgin Islands v. Smith*, 615 F.2d at 974.

[6] See n. 1, *supra*.

In his petition, petitioner included language in each count suggestive of both "newly discovered evidence" and "reasonable cause" as a basis for recovery. In its Request to Revise, the state asked that these distinct bases for recovery be relegated to separate counts. For example, with regard to the Sixth Count, concerning the profile reports, the state requested the following:

a) Portion of the Pleading to be Revised

Sixth Count, Paragraphs 70-73:

"70. The profile reports constitute newly discoverable (sic) evidence that was not available to the Petitioner or his counsel at the time of his trial, nor could they have been discovered by the exercise of due diligence; they would be material on a new trial and not merely cumulative, and they are likely to produce a different result in a new trial or in any reasonable likelihood have affected the judgment of the jury.

71. The failure of the State to provide copies of the profile reports to the Petitioner prior to the trial constitutes reasonable cause for a new trial since it was obligated to disclose them under the state and federal constitutions and based upon a prior discovery order of the trial court.

72. The failure of the State to disclose the profile reports resulted in Mr. Skakel suffering an injustice.

73. Therefore, since the verdict and judgment against Mr. Skakel are unjust and his imprisonment is illegal, reasonable cause exists for a new trial."

b) Requested revision

Separate the distinct causes of action alleged in paragraphs 70-73 into separate counts.

c) Reasons for the Requested Revision

The causes of action represented by plaintiff's allegations in paragraphs 41-43 are separate and distinct. *See e.g. Daniels v. State* , 88 Conn. App. 572, 870 A.2d 1109 (2005)(to prevail on a petition for new trial on the basis of newly discovered evidence, plaintiff must prove by a preponderance of the evidence, that: (1) the proffered evidence is newly discovered, such that it could not have been discovered earlier by the exercise

> of due diligence; 2) it would be material on a new trial; 3) it is not merely cumulative; and 4) it is likely to produce a different result in a new trial.); Fitzpatrick v. Hall-Brooke Foundation, 72 Conn. App. 692, 807 A.2d 480, cert. denied 262 Conn. 914, 811 A.2d 1291 (2002)(The basic test of "reasonable cause" for purposes of a petition for new trial, is whether a litigant, despite the exercise of due diligence, has been deprived of a fair opportunity to have a case heard on appeal.) Because these causes of action are legally and conceptually distinct they are improperly joined in one count. Connecticut Practice Book § 10-35(3).

Request to Revise, October 26, 2005, p. 55-6, Fourth Requested Revision to Sixth Count (profile reports); see also *id*. at 8-9 (Fifth Requested Revision to First Count); *id.,* at 23-4 (Fifth Requested Revision to Second Count); *id*., at 31-2 (Fourth Requested Revision to Third Count); *id.,* at 35-6 (Third Requested Revision to Fourth Count); *id*., at 48-9 (Fourth Requested Revision to Fifth Count)(Morganti sketch); *id*., at 64-5 (Fifth Requested Revision to Seventh Count); *id*., at 71-2 (Fifth Requested Revision to Eighth Count).

Petitioner filed an identical response to each of the above requests. In it, he expressly disavowed any reliance on "reasonable cause" as a basis for recovery distinct from his claims of newly-discovered evidence:

> The Petitioner's claim in this count need not be separated into distinct causes of action because there is only one cause of action. The Petitioner is claiming in the count that a new trial should be granted only because of the discovery of new evidence. Although Petitioner uses the words "reasonable cause" in stating that a new trial should be granted, review of the count as a whole demonstrates that it is based solely upon the discovery of new evidence and that the words "reasonable cause" are used in conjunction with only that claim. The Petitioner has plainly set forth in this count that a new trial should be granted because the newly discovered evidence was not available at the time of trial, nor could it have been discovered at that time. This is clearly the standard for a claim based upon the discovery of new evidence. *See Asherman v. State*, 202 Conn. 429, 434 (1987).
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> In contrast, a claim for a new trial based upon "reasonable cause" is a claim where the petitioner is arguing that he has a meritorious defense and was deprived of the reasonable opportunity of presenting it at trial. *Jacobs v. Fazzano*, 59 Conn. App. 716, 722 (2000). "The basic test of reasonable cause is whether a litigant, **despite the exercise of due diligence**, has been deprived of a fair opportunity to have a case heard on appeal . . . . A new trial may be granted to prevent injustice in cases where the usual remedy by appeal does not lie or where, if there is an adequate remedy by appeal, the party has been prevented from pursuing it by fraud, mistake or accident." *Id*. at 723-24 (emphasis in original). For example, in *Fazzano*, the petitioner claimed that he was prevented from presenting a defense because he did not get notice of a hearing in damages. *Id*. at 719.

> A review of Petitioner's allegations in this count clearly demonstrates that he is not claiming fraud, mistake, or accident prevented him from presenting a defense at trial and that he has no adequate remedy by appeal. Rather, the allegations clearly show that the Petitioner is petitioning for a new trial only on the basis of newly discovered evidence. Thus, there is nothing to separate into a distinct count and the State's request should be denied.

Objection to Request to Revise, February 2, 2006, at 95-6 (Objection to the Fourth Requested Revision to the Sixth Count) (profile reports); see also *id*., at 15-17 (Objection to Fifth Requested Revision to First Count); *id*., at 39-40 (Objection to Fifth Requested Revision to Second Count); *id*., at 53-4 (Objection to Fourth Requested Revision to Third Count); *id*. at 59-60 (Objection to Third Requested Revision to Fourth Count); *id.,* at 83-84 (Objection to Fourth Requested Revision to the Fifth Count)(Morganti sketch); *id.* at 112-13)(Objection to Fifth Requested Revision to Seventh Count); *id*. at 124-25 (Objection to Fifth Requested Revision to the Eighth Count).

It is clear, therefore, that petitioner unequivocally disavowed any reliance on "reasonable cause" as a distinct basis for recovery under General Statute §52-270. Despite this, and despite the fact that petitioner never amended his pleadings or otherwise retreated from these explicit statements, petitioner presents "reasonable cause" as a separate basis for relief in his post-trial brief. See Memorandum I at 144-72, 199-213.

Petitioner's attempt to rely on "reasonable cause" for the first time in his post-trial brief after expressly assuring the court and the state he was not relying on this ground for recovery, should not be countenanced. Petitioner should not be permitted, post-trial, to fashion a new claim in violation of the limits he himself placed on his pleadings. As noted in the state's initial brief with regard to petitioner's attempted expansion of the Ninth Count, a petitioner may not allege one cause of action and recover on another. *Covey v. Comen*, 46 Conn. App. 46, 49-50, 698 A.2d 343 (1997); see *State's Post-Trial Brief*, July 16, 2007 at 85-93. Further, any claim not expressly included in his original petition is barred by the statute of limitations. General

Statutes § 52-582.[7]

b. Even if considered, petitioner's claims under "reasonable cause" must be rejected

Even if petitioner's claims are considered, however, they have no merit. As petitioner's response to the State's Request to Revise, quoted *supra*, recognizes, the standards for recovery under a claim of "newly-discovered evidence" and those for "reasonable cause" are distinct. Again, drawing from petitioner's response, *supra*, "'[t]he basic test of reasonable cause is whether a litigant, despite the exercise of due diligence, has been deprived of a fair opportunity to have a case heard on appeal . . . . A new trial may be granted to prevent injustice in cases where the usual remedy by appeal does not lie or where, if there is an adequate remedy by appeal, the party has been prevented from pursuing it by fraud, mistake or accident.' *[Jacobs v. Fazzano* 59 Conn. App.] at 723-24." *Objection to Request to Revise*, February 2, 2006, at 95-6 (Objection to the Fourth Requested Revision to the Sixth Count) (profile reports) (emphasis omitted).

Here, petitioner took full advantage of his right of appeal. In fact, claims of suppressed evidence were presented in his appeal and rejected. *See State v. Skakel*, 276 Conn. 633, 694-

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[7] Although the state did not request that allegations of "reasonable cause" and those of newly-discovered evidence be separated in the Ninth Count, that count, as argued previously; State's Post-Trial Brief at 85-93; contains no distinct "claim" at all – it is merely an amalgamation of the first eight counts and an attempt to leave the door open to new claims that might be fashioned. Because the state had already requested that the two distinct bases be separated in Counts One through Eight, and because the General Statutes § 52-582 barred the addition of new claims, there was no need to request a division of grounds in the Ninth Count.

Further, because, as petitioner himself explained, he used the term "reasonable cause" throughout his petition as an adjunct to his new evidence claim, it is reasonable to assume it was used in the same limited fashion in Count Nine. Any contrary contention would be implausible in light of the pleadings as a whole and petitioner's objections to the state's Request to Revise.

99, 707-10, 888 A.2d 985 cert. denied, 127 S. Ct. 578 (2006). They should not be revisited here.

Further, as argued in the state's initial brief, petitioner's claims of suppression, whether analyzed as "newly-discovered evidence" or as "reasonable cause," find no support in the record. *See State's Post-Trial Brief* at 76-83, 103-11, 112-121. The state relies on the arguments made in its initial brief to refute all of petitioner's suppression claims, whether based on the assertion of newly-discovered evidence, or a pattern of nondisclosure providing "reasonable cause."

In addition to relying on the arguments already made, however, the state would like to emphasize one important aspect of the record that petitioner's argument obfuscates. It is important to note that at no time did the original trial court, or the Connecticut Supreme Court, find that the state suppressed evidence or violated its discovery obligations.

Further, petitioner fails to mention the trial court's discovery orders or its findings on certain of the claims he is making. An understanding of those orders and findings is essential to the resolution of petitioner's claims. For example, after reviewing the profile reports *in camer*a, the criminal trial court found they qualified as work product, and hence were exempt from the normal discovery rules. See T. 8/28/02 at 58-59, 88-89. Petitioner never challenged this determination on appeal. He cannot now claim that the profiles were subject to discovery.

Moreover, as argued in our initial brief, the "raw data" (i.e. police reports, witness statements) from which the profiles were prepared had been provided to petitioner well before trial. The only things petitioner identified in this hearing as "new" are the opinions and conclusions of the writer. These, of course, are either inadmissible; see e.g. Conn. Evidence. Code § 7-1; or of little evidentiary value. See State's Post-Trial Brief at 76-84. Therefore,

because petitioner had all of the information in the profile reports prior to trial, the state did not violate its obligation to turn over exculpatory evidence. Further, because the court found the profiles to be work product; see P.B. § 40-14; the profiles cannot be considered under petitioner's "pattern of nondisclosure" claim.[6]

As for the time lapse chart, Sherman admitted that he was aware, through pre-trial discovery, that Solomon had investigated the possibility Littleton was a serial killer. PT 4/19/07 at 228. He also admitted that Solomon had spoken to him at length about the crimes he believed Littleton may have committed. PT 4/19/07 at 13-14. In fact, the petitioner was aware of Solomon's attempt to link Littleton to other homicides well before Sherman became involved in the case. Levitt stated that Solomon gave all the "serial killer stuff" to Sutton Associates when he met with them sometime after 1991. PT 4/20/07 at 150-51; see State's Post-Trial Brief at 76-81.

As to the Tommy Skakel affidavit, the trial court's discovery orders did not require that it be disclosed because it was unsigned and never led to the arrest of petitioner's brother. As argued in the state's post-trial brief, the court required only that information regarding others arrested for this or similar offenses be disclosed. See Post-trial Brief at 112-120; see Resp. Exh. S (Tr. of August 15, 2001) at 11-12, 21-22. Further, the affidavit qualified as work product exempt from discovery because it was essentially a "draft" in that it was never signed by a state's attorney or presented to a court. See P.B. § 40-14. Nor did it contain any exculpatory information not previously disclosed to defendant. See PT 4/20 at 1-5 (Sherman concedes the

[6] In addition, Sherman testified that he knew about the profile reports prior to trial because Solomon had told him about them. PT 4/19/07 at 154; see State's Post-Trial Brief at 79.

affidavit contained no new evidence he had not previously received, other than officers' opinions); see Exh. S (Transcript of 8/15/01 at 11-12, 21-22 - Discovery Orders).

As to the sketch, the trial court found that the state had not suppressed this document. T. 8/28/02 at 89-91. It noted that petitioner conceded he had reports referring to the sketch. The Court found that the state fulfilled its discovery obligation by providing notice of the picture's existence and an opportunity to inspect it. *Id*. at 89-90. As for the Supreme Court, it assumed for purposes of appeal that petitioner had not been provided a copy of the sketch prior to trial. *State v. Skakel*, 276 Conn. at 701. This was not, however, a finding of fact on the part of the Supreme Court. Rather, the Court merely used its assumption as a starting point for its analysis. Further, as the trial court found and Supreme Court acknowledged, petitioner knew of the existence of the sketch prior to trial and, if it was not among the items available to petitioner, all he had to do was ask for it.

As to the Garr/Levitt allegations, although they were not brought to the attention of either the trial or appellate court, they are impacted by the trial court's original discovery orders. As pointed out in the state's initial brief, petitioner's request for information on any state employee or agent who had a financial interest in the outcome of the case, including any "book deal," was denied by the court as requested. The court did, however, find that the pecuniary interest of a *witness* would be relevant for impeachment purposes. See State's Post-Trial Brief at 95, citing T. 8/15/01 at 10 (Resp. Exh. S); PT 4/25 at 147-152. Thus, because Garr was not an anticipated witness (his only testimony came outside the presence of the jury in a motion hearing) there would have been nothing for the state to disclose *even if* Garr had such an expectation. Importantly, however, both Garr and Levitt testified there were no financial discussions until the case was over. See PT 4/20 at 147, 153; PT 4/24 at

206.

In sum, because petitioner never relied on "reasonable cause" as an independent basis for recovery, and, in fact, affirmatively disavowed any such reliance, he cannot do so now. Even if permitted, however, he cannot prevail. There is no evidence the state failed in its discovery obligations or its constitutional obligations with regard to any of the matters petitioner asserts. *A fortiori*, none support petitioner's claimed "pattern of nondisclosure."[7]

IV. THERE IS NO EVIDENCE TO SUPPORT PETITIONER'S ALLEGATIONS OF WRONGDOING CONCERNING GARR, LEVITT AND THE BOOK *CONVICTON*

Petitioner levels a barrage of accusations against Inspector Frank Garr, accusing him of misconduct, ethical breaches, and bias. He claims that Garr's alleged bias led him to threaten witnesses and that it influenced the course of his investigation. As to how this alleged wrongdoing affected the fairness of his trial, petitioner contends that but for his alleged bias, Garr would have discovered certain tax liens against Coleman and his wife, and would have found Simpson, James and Gruben prior to trial. See Memorandum I at 176-214.

Upon examination, the evidence does not support petitioner's accusations. The state reviewed the evidence relating to Garr and Levitt in its initial brief. It will not repeat that review here, but will respond to some of the accusations made by petitioner, pointing out their lack of foundation.

a. Petitioner incorrectly argues that the state failed to respond to his discovery request, ignoring the fact the request as written was denied by

[7] In addition to claiming an alleged "pattern of nondisclosure" providing "reasonable cause" for a new trial, petitioner claims the alleged withholding of documents by the state violated his confrontation rights under the federal and state constitutions. *See* Memorandum I at 158-172. Inasmuch as petitioner has not proven that any of these documents was wrongfully withheld or suppressed, or that he was unaware of any material information prior to trial, he has not laid a foundation requiring analysis under either charter.

the court

As noted in the previous section, petitioner repeatedly asserts that the state breached its discovery obligations. He repeats those assertions in relation to his Garr/Levitt claim. See Memorandum I at *e.g.* 182, 190. In so arguing, however, petitioner fails to bring the trial court's discovery orders to this court's attention, and persists in arguing this claim as if the orders never existed.

State's Exhibit S from the hearing, which is the August 15, 2001 transcript of the trial court's discovery orders, indicates that although petitioner requested information about any pecuniary interest of an agent of the state, including "book deals", the trial court denied that request as written. What the court (Kavanewsky, J.) ordered instead was recounted in the state's original brief but bears repeating here:

> THE COURT: All right; my thinking is that information regarding the pecuniary interest of a witness in the outcome of the case, a witness, is relevant for impeachment purposes, to show possible bias or motive. But, I don't see the same rationale applying to non-witnesses.
>
> So your –
>
> MR. SHERMAN: Excuse me, may I ask the court, how about rebuttal witnesses?
>
> THE COURT: Witnesses, I am including chief and rebuttal witnesses in the same group. I don't think Mr. Benedict would have an objection to that if there is a rebuttal witness later disclosed that has such claims. So, I am denying the request in its present form, granted as amended to witnesses in both chief and rebuttal only. That's my ruling as to number 13.

T. 8/15/01 at 10. (Resp Exh S); PT 4/25 at 147-152.

When the petitioner's accusations are considered in light of the court's ruling, which limited discovery to information about *witnesses*, it is apparent the state could not have violated

the court's order as petitioner suggests. Because Garr was not an anticipated witness,[8] and only testified in a motion hearing outside the presence of the jury, the state was not required to reveal anything about an alleged book deal during the course of discovery. When Garr was on the stand, at the close of defendant's examination, the following exchange occurred:

MR. SHERMAN: Have you got a book deal?

MR. BENEDICT: Objection, irrelevant.

MR. SHERMAN: Nothing further.

THE COURT: Anything further?

T. 5/10/02 at 156.

In light of the court's earlier order, it is apparent that if petitioner had pursued a ruling from the court, the state's objection would have been overruled. It is also apparent, from the undisputed evidence in this case, that Garr's answer would have been "No."

b. There is no evidence that Garr hid information from his supervisor "even when directly asked about it" as petitioner contends

On page 180 of his Memorandum, and again at page 190, petitioner alleges that Garr refused to disclose that he was or would be receiving compensation from Levitt "*even when his supervisor directly asked him about it*." Memorandum I at 180 (emphasis in original); see also Memorandum I at 190 ("Mr. Garr neglected to tell his supervisor or anyone from the ethics commission about his agreement with Mr. Levitt. . . .Even when he was directly asked about

[8]Garr was not listed on either the state's or the defendant's witness lists from the criminal trial. See Record in FST00-135792T, State's (undated) list of witnesses and (undated) list of Elan witnesses (both filed in January 02); and Supplemental Lists of Prospective Witnesses dated 2/6/02; 2/20/02; 3/6/02; and 4/26/02; see also Defendant's (undated) Prospective Witness List (filed in January 02) and Supplemental Lists dated 4/2/02; 4/23/02 and 5/23/02.

it by his own supervisor, he still said nothing.") In support of these assertions, petitioner cites pages 108-110, 112; 214 of Garr's testimony in the transcript of April 24, 2007. None of these references support petitioner's assertion. For the convenience of the court, the state has appended these pages to this brief. See Appendix at A1-A5.

On pages 108-110, petitioner's counsel questioned Garr about a letter his office had sent to Garr's supervisor, State's Attorney Benedict, asking that Garr be removed from the case. Garr indicated that Benedict had told him about the letter. When asked when Benedict knew that Garr was being compensated for his work with Levitt, Garr stated he did not know. T. 4/24/07 at 109. When asked if he told Benedict, Garr responded, "there was no conversation. This wasn't a major issue. I'm sure at some point after that period of time, it may have been discussed, I don't know." *Id*. at 109. As petitioner continued to press the point, Garr stated that he could not remember "any specific conversations." *Id*. at 110. He stated that "I don't think I ever sat down and had a conversation with him. He – I believe, and I don't mean to speak for him, but I believe he was aware of that, but I don't remember ever having a specific conversation concerning that." *Id*. at 110.

The other pages cited by petitioner similarly fail to support his claim that Garr refused to divulge information when asked by his supervisor. At pages 111-112, petitioner again asked Garr if he disclosed "that you were being paid for the book to Mr. Benedict" after meeting with a lawyer who helped draft the contract with Levitt. Garr responded: "Again, I don't remember a specific conversation regarding that, no."

At page 213, petitioner's counsel again returned to the letter his office had written seeking Garr's removal. He asked Garr if he discussed the content of the letter with Benedict. Garr replied: "I believe he mentioned it to him (sic). I don't know if we had a discussion about

it but I seem to remember him mention (sic) this to me." *Id*. at 213. Petitioner then asked Garr whether, after Benedict mentioned the letter, he told him about his contract with Levitt. Garr replied "No." *Id.* at 214. When petitioner next asked if he was deliberately hiding this information from Benedict, Garr said "No." *Id.* at 214.

As is apparent from any reasonable reading of the transcript, there is no evidence that Garr refused to reveal his financial arrangement with Levitt to his supervisor or even that he was ever directly asked about it.

c. There is no evidence Garr performed any work related to Levitt's book on state time

Petitioner alleges at pages 185 and 189 of his Memorandum that Garr performed work related to Levitt's book on state time. Petitioner cites nothing to support his accusations, as indeed, there is nothing in this record that would support them. Garr testified that his meetings with Levitt about the book did not take place during his regular work hours. P T. 4/24/07 at 202-3. No evidence was presented to the contrary.[9]

d. There is no evidence that Levitt was given unfettered access to the state's office during the trial

On page 186 of his Memorandum, petitioner asserts that Garr was useful to Levitt because he gave him "unfettered access to the prosecutor's basement office." Again, the evidence in this case is to the contrary. Levitt testified that he was not given free access to the state's office. He stated that while he walked down stairs to the office by himself, he was never in the office when no one was there. Further, he testified that Garr never gave him access to

[9] While this court, as the trier of fact, is free to reject testimony even if uncontradicted, in so doing, it may not infer that the opposite is true. *State v. Hart*, 221 Conn. 595, 605 (1992) (recognizing the rule's application in both civil and criminal cases).

any evidence or files in the office at any time. PT 4/20 at 158; see also PT 4/20 at 119-20.

e. There is no evidence Garr gave Levitt any information not available to the public at large prior to the conviction and sentencing

On page 187 of his Memorandum, petitioner claims that Garr gave Levitt information before and during the trial. In support of this accusation, petitioner cites PT 4/24 at 101-2, PT 4/20 at 98-105, and the book *Conviction*.[10]

No evidence supports this assertion. Both Garr and Levitt testified that Garr never gave Levitt information, not available to the general public, prior to the conclusion of this case. PT 4/24 at 206-7; PT 4/24 at 104-5 (Garr: "I discuss (sic) nothing with him that he would not have already known from other sources."); PT 4/20/07 at 111, 154-57. (Levitt: "I was always pushing him, but I never got anywhere"). In fact, Levitt expressed his frustration over this, saying as a reporter he was constantly trying to get information from Garr but never could. PT 4/20 at 157.

f. There is no evidence that Garr and Levitt discussed remuneration for the book before the case was over

Levitt stated that there were no financial discussions regarding the proceeds of the book until the case was over. PT 4/20 at 145-46, 147, 153; see also PT 4/24 at 206 (Garr). The section of Levitt's testimony petitioner cites to insinuate that Levitt may have been unclear on

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[10] Again, petitioner's citations do not support his assertions. There is no discussion of information shared with Levitt on pages 101-102 of Garr's 4/24 testimony. The topic discussed on those pages is the profile reports. See Appendix at A6-A7. (Pages 101-02 appended). Levitt's testimony on page 98 of the 4/20 transcript concerns the theme of his book proposal with Judith Regan, not information shared by Garr. Finally, on page 105 of the same transcript, Levitt is asked whether he and Garr bonded and became "like brothers." Levitt responded that he would not say "brothers," but they were "'close' up to a point. I mean, we're basically professional, but yes, we were close." See Appendix at A8-A9. (pages 98, 105 of PT 4/20/07 reproduced). As for petitioner's citation to *Conviction*, the book cannot be considered sworn testimony. Even so, the sections cited by petitioner do not support his assertion.

this point does not undermine this testimony. Levitt was asked whether in the course of his association with Garr, up until the time of Skakel's sentencing in 2002, there were any discussions concerning remuneration for any help Garr might one day give him in writing his book. Levitt replied: "I don't think so. As I said, money was not the issue here." PT 4/20 at 153. [11]

g. There is no credible evidence that Garr threatened witnesses

There is no credible evidence to support petitioner's allegation that Garr threatened witnesses. As noted in the state's original brief, when asked about the passage in his book in which he wrote that Garr "pursued, cajoled, harrassed and threatened" witnesses, Levitt explained that what he meant was Garr would tell witnesses they would be subpoenaed to testify if they did not come voluntarily. PT 4/20 at 110-111 (Appendix at A10-A11).

Despite this unequivocal explanation by Levitt, which Garr corroborated; PT 4/24 at 168, 203-4; petitioner insists Garr threatened witnesses. Not only is this not supported by Levitt's testimony, it is unreasonable to assume that Garr threatened witnesses and yet not a single witness testified to that either at the original trial or here.

Sherman's testimony on this point should be viewed with caution. Sherman testified that at the time of trial he believed Garr was "heavy-handed" in his treatment of witnesses; T. 4/24 at 33. In addition, he claimed that if he had known Levitt admitted that Garr "cajoled, harassed and threatened" witnesses, he would have "blown it up as big as I could." T. 4/24 at 41. He attempted to explain away his failure to bring any of Garr's allegedly strong-arm tactics to the attention of the trial court, or at least develop it through the affected witness' testimony,

[11] Levitt was emphatic throughout his testimony that his desire to write this book was not about money. PT at 4/20 at 139, 153.

by claiming that although he knew it was happening, he did not know the motive. PT 4/24 at 39.

This explanation should be rejected as implausible. It is unrealistic to think that counsel had information Garr was threatening witnesses, and yet did nothing because he did not know why it was happening. As far as the affect on the witnesses and the fairness of the trial, the fact that someone had influenced or attempted to influence testimony is far more important than the reason it occurred.

A more reasonable inference to draw from Sherman's testimony is that he may have heard from witnesses that Garr was, as Garr himself admitted, persistent in his efforts to secure their testimony, perhaps to the point of annoying some persons. See PT 4/24 at 203. Sherman's over-dramatization may be attributed to his desire to help his former client and his interest in forestalling the need for further proceedings at which his representation would be challenged.

h. Petitioner presented no evidence indicating that Garr was biased or his investigation tainted by an alleged expectation of financial gain, but even if he had, he has not proven how that alleged bias adversely affected the fairness of his trial

As argued here and in the state's original brief, petitioner presented no evidence indicating Garr had an expectation of financial gain from Levitt's book prior to the conclusion of the criminal trial. Therefore, there is no basis on which to argue that he was biased or his investigation tainted as a result of such expectation.[12]

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[12] In addition, petitioner argues that if such a bias existed it would make Garr want to get a conviction at all costs, because a conviction would supposedly make a future book more marketable. This is a dubious assumption. An acquittal, and the public outrage that may have followed an acquittal, may well have made anything connected to the case *more* marketable.

Nevertheless even if petitioner had proven that Garr was motivated (beyond the motivation that comes from wanting to see justice done) to get a conviction in the hope of financial gain, he has not proven how any such bias rendered his trial unfair.

He contends that but for his alleged bias Garr would have discovered that Gregory Coleman and his wife had tax liens at around the time they gave information to the authorities. See Memorandum I at 194. Yet, petitioner produced no evidence to suggest that a search for liens is routinely done with regard to state's witnesses. Without some evidence that Garr's investigation of Coleman's background deviated from the norm, there is no reason to believe his investigation of Coleman was affected by any alleged bias.

Moreover, even if the jury had heard about the liens, it would not have changed the outcome. The jury was well aware of Coleman's drug habit and criminal record. He was extensively cross- examined on it and the cross, as well as the direct, from the hearing in probable cause was read to the jury. See T. 5/17/02 at 142-3, 152, 167-69, 172-77; T. 5/20/02 at 36-41. In addition, Sherman cross examined Coleman on a letter he had written Garr prior to trial seeking money. See T. 5/17 at 22-26; T. 5/20/02 at 33-35; see also PT 4/24 at 157-58; see also PT 4/24 at 191. Thus, the jury was well aware of Coleman's lifestyle and his greater than average need for money.

Although no similar cross was undertaken with regard to Elizabeth Coleman, as the wife of a lifelong drug addict who had served time in prison, the jury could reasonably assume that she too needed money. Therefore, this new evidence regarding tax liens would hardly be sufficient to produce a different outcome on retrial.

Petitioner also argues that but for his alleged bias, Garr may have found James, Simpson, and Gruben prior to trial. This supposition has nothing to support it. There is no

indication that Garr was told to find these persons by his supervisor. Garr did state, however, that he felt the names Coleman provided did not comprise an "exclusive list" of who may have been present. PT 4/24 at 180. Garr also stated that, prior to the probable cause hearing, Coleman may have mentioned that someone may have been with him when petitioner confessed, but he was uncertain who it was. PT 4/24 at 216. At any rate, as argued in the state's brief, none of these men would have provided material evidence making an acquittal likely on retrial.[13]

Response to Petitioner's Memorandum re: State's Motion in Limine, the Bryant Allegations

The state has only two quick points to make in response to petitioner's argument on the admissibility of the Bryant evidence. The first is that petitioner is wrong to analogize Bryant's delay in coming forward with the delay in reporting petitioner's admissions of some of the state's criminal trial witnesses. See Petitioner's Post-Hearing Memorandum of Law in Opposition to Respondent's Motion in Limine Re: Hearsay Statements of Gitano Bryant, Adolph Hasbrouck and Burton Tinsley (hereinafter Memorandum II) at 359. The two situations are not at all alike.

Most importantly, all of the state's trial witnesses were cross examined extensively, some on multiple occasions. For example, petitioner's counsel cross examined John Higgins, three times: at the juvenile transfer hearing, at the hearing in probable cause, and again at trial. See Juv. Tr. 6/20/00 at 74-159; HPC Tr. at 123-95; T. 5/16/02 at 177-234. Petitioner had two

[13] Garr testified that he thought he had spoken to James prior to trial, but James did not want to get involved and indicated he had no information to share. PT 4/24 at 160-161. He also said he was not certain, but he may have tried unsuccessfully to locate Simpson, and seemed to recall information that another Elan resident, possibly Gruben, was living abroad. *Id*.

opportunities to cross examine Coleman: at the juvenile transfer hearing and at the hearing in probable cause. See Juv. Tr. 6/20/00 at 160-84, 6/21/00 at 2-65; HPC Tr. 4/18/01 at 87-131, 4/19/01 at 2-122.[14] Petitioner was free to question these and other witnesses about any delay in reporting what petitioner had told them. In addition, although there was a delay in the state becoming aware of petitioner's admissions to many witnesses, the witnesses told others of petitioner's admissions much earlier. Coleman, for example, told Jennifer Pease while still at Elan, and his wife shortly after they met in the 1980's. See T. 5/29/02 at 103-8; T. 5/20/02 at 89-94.

Bryant, by contrast, refused, even prior to his fifth amendment invocation, to be interviewed by the state. And, of course, the state had no opportunity to cross examine Bryant. Thus, although Bryant offered his own explanation of why he withheld information regarding a homicide, even after petitioner's conviction, the state had no opportunity to cross examine him on this or any other point. Further, the first person he apparently told of his claim that he was in Belle Haven the night of the murder was Crawford Mills. It is telling that this revelation occurred as the two men were talking about collaborating on a play based on the murder. Bryant may have sought to make their play more marketable by adding "sensational" new information, all the while hoping to remain anonymous.

The second point the state would like to make is in response to the two out -of- state cases cited by petitioner in which videotaped statements were held admissible, one under the residual exception to the hearsay rule; *State v. Demby*, 695 A.2d 1152 (Del. 1997); and one

[14] In addition, both Higgins and Coleman testified before the Grand Jury. Their Grand Jury testimony was available to petitioner to review and use in cross if desired. See Grand Jury Tr. 9/23/98 at 4-31 (Coleman); Grand Jury Tr. 8/5/98 at 4-28 (Higgins).

under due process principles. *Alonzo v. State,* 67 S. W. 3d 346 (Tex. 2002); see Memorandum II at 366, 371-2. The crucial difference between both of these cases and the instant case is the reliability of the out-of-court statements.

In *Alonzo*, the Texas Court of Appeals held that the trial court erred in excluding a videotaped statement by K claiming to have been present when D killed the victim. The court determined that the exclusion of this and related evidence violated the defendant's right to present a defense. In so doing, however, the court noted the considerable evidence of the statement's reliability. This evidence included the fact that K took the police to the murder scene shortly after it occurred and supplied details (such as the number and location of the victim's wounds, the fact that the victim was found without shoes, and why one of the three shell casings was missing from the scene) that only an eyewitness would know. In addition, witnesses other than K corroborated K's account. These witnesses provided evidence that D bought drugs from the victim the night before the murder, was dissatisfied with their quality, and left, armed with a gun, to "take care of" the matter. The court also found it significant that although both K and D invoked the fifth amendment at trial, the state had the opportunity to talk with K extensively prior to trial. Indeed, K gave his video taped statement to the police. On the basis of these facts, the Texas court concluded that the trial court violated petitioner's due process right to present a defense by excluding the evidence. *Id*. at 355-362.

The next case in which the Texas Court of Appeals considered a similar claim, however, underscores *Alonzo's* dependence on an extraordinary coalescence of factors bolstering the reliability of the out-of- court statement. In *Hall v. Texas,* 2005 W.L. 1706304 (Tex App. Dallas, 2005) (copy attached at Appendix A12-A-14), the court distinguished the hearsay at issue there from that proffered in *Alonzo* by noting that in *Alonzo* the statement came from an

alleged eyewitness who knew details only an eyewitness would know, while the statement under consideration was in conflict with other evidence of the killing. *Id*., at 13. *Hall* upheld the trial court's exclusion of the statement as unreliable hearsay.

The present case has more in common with *Hall* than *Alonzo*. As argued in the state's initial brief, nothing connects Bryant, Hasbrouck and Tinsley to the murder other than Bryant's statements. No witness corroborated Bryant's claim that the trio was in Belle Haven that night. No witness corroborated Hasbrouck's alleged obsession with Moxley, or testified that the two had ever even met. Thus, the extraordinary level of corroboration and trustworthiness found in *Alonzo* is lacking here.

This case is distinguishable from *Demby* on similar grounds. In *Demby*, the Supreme Court of Delaware found that an out-of-court statement implicating a third party should have been admitted under Delaware's residual hearsay exception. As in *Alonzo*, however, the statement at issue in *Demby* was highly corroborated. Importantly, witnesses placed F, the person implicated in the videotaped statement, with the victim and the defendant right before the shooting. One witness stated that while F and the defendant were arguing with the victim, F pulled a gun but was told by Demby to put it away. *State v. Demby*, 695 A.2d at 1159. In addition, F gave a statement to the police in which he implicated himself in the murder, claiming he was in a car with the defendant and another man just prior to the shooting. According to F's statement, the defendant exited the car, shots rang out, and defendant ran back to the car, asking for a ride to Philadelphia. F also stated the defendant discarded a gun *en route* to Philadelphia. In addition, F's attire the night of the shooting fit the description of the shooter. Finally, L, the person who gave police the videotaped statement implicating F, did so approximately two weeks after the shooting. *Id*. at 1155.

Thus, as in *Alonzo*, and in contrast to the present case, the videotaped statement in *Demby* was given shortly after the crime, and was corroborated by witnesses other than the person giving the statement. Other witnesses placed F with the victim and even pulling a gun on the victim shortly before the shooting. Even F implicated himself in the crime to some extent. Petitioner has presented no similar corroboration in this case.

Therefore, as argued in the state's opening brief, this court should find the Bryant evidence unreliable, inadmissible hearsay.

CONCLUSION

For all of these reasons, and the reasons given in the state's initial brief, the State of Connecticut respectfully urges this Court to deny the petition and the relief requested therein.

Respectfully submitted,

THE STATE OF CONNECTICUT

SUSANN E. GILL
Senior Assistant State's Attorney
Fairfield Post Conviction Remedy Unit
1061 Main Street
Bridgeport, Connecticut 06604
Telephone: (203) 579-6506
Facsimile: (203) 382-8401
Juris. Number 409671

JONATHAN C. BENEDICT
State's Attorney
for the Judicial District of Fairfield

CERTIFICATION

I hereby certify that a copy of this Response To Petitioner's Post-Trial Memoranda of Law and Proposed Findings of Fact was mailed and e-mailed to Attorney Hubert J. Santos and Attorney Hope C. Seeley, 51 Russ Street, Hartford, Connecticut 06106, telephone number (860) 249-6548, fax number (860) 724-5533 on September 14, 2007.

SUSANN E. GILL
Senior Assistant State's Attorney