UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

United States	:	
	:	
v.	:	**No. 3:00cr13(JBA)**
	:	
Barry W. Hultman	:	

Ruling on Motion Under § 2255 [Doc. ##48, 52]

By motion brought pursuant to 28 U.S.C. § 2255, Barry Hultman seeks to vacate his convictions after guilty plea on two counts of embezzlement from a bankruptcy estate, in violation of 18 U.S.C. § 153, claiming ineffective assistance of counsel before his plea, at sentencing, and on direct appeal. Hultman's arguments lack merit and no hearing is necessary for disposing of them. According, his motion [Doc. #48] is DENIED and the Government's corresponding alternative motion to supplement the record [Doc. #52] is DENIED as MOOT.

I. Prior Proceedings and Hultman's § 2255 Motion

On January 26, 2000, a federal grand jury sitting in New Haven, Connecticut returned a four count indictment against Hultman, charging him with two counts of theft of federal funds, in violation of 18 U.S.C. § 666, and two counts of embezzlement against a bankruptcy estate, in violation of 18 U.S.C. § 153. On June 27, 2000, the grand jury returned a superseding indictment dropping the two § 666 counts and charging Hultman with 52 counts

of embezzlement against a bankruptcy estate, in violation of 18 U.S.C. § 153. On August 15, 2000, Hultman pled guilty before this Court to counts 6 and 44 of the superseding indictment. At his plea, Hultman was represented by Assistant Federal Public Defender Paul Thomas.

In summary form, the factual allegations of the superseding indictment regarding counts 6 and 44 are as follows: Hultman was the administrator, secretary, and a director of Countryside Manor, Inc. ("CSM"), a nursing facility located at 1660 Stafford Avenue, Bristol, Connecticut that was a Medicaid and Medicare provider and received the vast majority of its income every year from those federally funded assistance programs. Dorothy Hultman, Hultman's mother, owned CSM and was its president. By virtue of his position, Hultman controlled CSM's financial operations, had authority over CSM's bank accounts, and was authorized to and did issue checks on CSM's accounts. On November 18, 1994, CSM filed a voluntary bankruptcy petition under Chapter 11 of the Bankruptcy Code, which was signed on behalf of CSM by Hultman. CSM continued to operate as a debtor-in-possession with Hultman continuing as administrator and overseer of CSM's facility's operations. CSM filed periodic submissions with the bankruptcy court, some of which Hultman signed and certified as true. During his tenure as the administrator of CSM as debtor-in-possession, on September 11,

1995, Hultman caused a check in the amount of $8,415.76 to be written on CSM's bank accounts to pay New Haven Savings Bank for his and his parents' mortgage on a home in Avon, Connecticut, and, on March 9, 1996, a check in the amount of $4,750 to be written on CSM's bank accounts to pay Mersey Mold & Model Co, Inc. for funding a personal business venture. These two acts constituted embezzlement for Hultman's own use of money belonging to the bankruptcy estate of CSM, which money came into Hultman's charge as agent of the debtor-in-possession and trustee of the bankruptcy court.

On March 30, 2001, the Court sentenced Hultman to concurrent terms of 27 months imprisonment and three years of supervised release on each count of conviction and payment of restitution in the amount of $620,452.81. The Court's sentencing loss analyses included CSM's pre-bankruptcy petition losses on the grounds that Hultman's criminal conduct related thereto constituted theft of federal funds in violation of 18 U.S.C. § 666 and was part of Hultman's post-bankruptcy embezzlement scheme. On April 4, 2001, Hultman, still represented by Attorney Paul Thomas, timely filed a notice of appeal, challenging the merits of this Court's sentencing determination that Hultman's embezzlement from CSM before its bankruptcy satisfied the elements of a violation of § 666. On December 18, 2001, the Second Circuit affirmed by summary order. See U.S. v. Hultman, No. 01-1199, 2001 WL 1631223

(2d Cir. 2001).

On September 9, 2002, Hultman, represented by new counsel John R. Williams, filed the instant motion without supporting memorandum, affidavits, or any other supporting materials, claiming that Attorney Thomas provided ineffective assistance in the following three ways: 1) by failing to advise Hultman prior to his guilty plea that conduct not alleged in the superseding indictment (pre-CSM bankruptcy conduct constituting a violation of 18 U.S.C. § 666) could be considered by the Court in imposing sentence; 2) by failing to argue before this Court and on appeal that 18 U.S.C. § 666 is facially unconstitutional for failure to require a connection between federal funds and an accused's criminal conduct and that the statute was applied in an unconstitutional manner to Hultman because the Court found no such nexus; and 3) by failing to conduct "the reasonable and appropriate forensic accounting analysis," Motion to Vacate [Doc. #48] at 5, of CSM's books and records for, if he had done so, it would have demonstrated at sentencing that CSM in fact suffered no loss as a result of Hultman's conduct only that "there was a negative loss [sic] in the amount of $399,577," id. at 4. Hultman's motion makes no request for a hearing on these matters.

II. § 2555 Standards

A. General

Section 2255 provides in relevant part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255. "Because requests for habeas corpus relief are in tension with society's strong interest in the finality of criminal convictions, the courts have established rules that make it more difficult for a defendant to upset a conviction by collateral, as opposed to direct, attack." Ciak v. U.S., 59 F.3d 296, 301 (2d Cir. 1995) abrogated on other grounds by Mickens v. Taylor, 535 U.S. 162 (2002); see U.S. v. Frady, 456 U.S. 152, 165 (1982)("It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.")(quoting U.S. v. Addonizio, 442 U.S. 178, 184 (1979)). Moreover, the "concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas." U.S. v. Timmreck, 441 U.S. 780, 784 (1979); see also U.S. v. Dominguez-Benitez, 124 S.Ct. 2333, 2340 (2004). "Generally, relief is available under section 2255 only for a constitutional

error, a lack of jurisdiction in the sentencing court, or an error of law that constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Hardy v. U.S., 878 F.2d 94, 97 (2d Cir. 1989)(quotations omitted).

B. Hearing

"Unless the [§ 2255] motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. ... A court may entertain and determine such motion without requiring the production of the prisoner at the hearing." 28 U.S.C. § 2255. The Second Circuit approves disposing of a § 2255 motion without hearing where the case records demonstrate the petitioner's claims are bereft of merit or where the records, expanded by documentary evidence including, for example, letters and affidavits, render a full testimonial hearing unnecessary. See Chang v. U.S., 250 F.3d 79, 85-86 (2d Cir. 2001). The records in this case, as supplemented by the Government's submissions, conclusively establish that Hultman is not entitled to any relief. Accordingly, the expense and expenditure of resources attendant to a full evidentiary hearing are not required, nor has one been requested by Hultman.

III. Conduct Not Alleged in Superseding Indictment

Hultman's first claim of ineffective assistance is that his guilty plea was not knowing, voluntary, or intelligent because Attorney Thomas failed to advise him prior to his plea that conduct not alleged in the superseding indictment, specifically, embezzlement losses sustained by CSM pre-bankruptcy, could be considered by the Court in imposing sentence. At sentencing, under U.S.S.G. § 1B1.3(a)(2), the Court found by a preponderance of the evidence that Hultman had engaged in pre-CSM bankruptcy criminal conduct by fraudulently and intentionally misapplying $435,616 from CSM for his personal use and benefit in violation of 18 U.S.C. § 666 and that such conduct arose out of a common scheme or plan or was part of a common course of conduct with Hultman's post-CSM bankruptcy embezzlement, and therefore included the pre-bankruptcy embezzled funds in calculating that the loss amount for sentencing purposes was $800,000 and $1,500,000. The Court's calculation resulted in a 13 offense level increase bringing Hultman's offense level to 18 and, with a criminal history category I, a sentencing range under the applicable Federal Sentencing Guidelines of 27 to 33 months. Had the Court excluded the $435,616 of pre-bankruptcy embezzlement from the loss calculation, Hultman's total offense level would only have increased 12 levels to a total offense level of 17 with a resulting sentencing range of 24-30 months. The Court imposed

a sentence of 27 months imprisonment. Even if Hultman's assertion is true that Attorney Thomas failed to inform him that the Court could consider his pre-bankruptcy embezzlement from CSM, and the Court takes no view on the falsity or truth of the assertion, his claim fails as a matter of law to succeed as one for ineffective assistance.[1]

"[T]he representations of the defendant, his lawyer, and the prosecutor at [a plea hearing], as well as any findings made by the judge accepting the plea, constitute a formidable barrier in

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[1] Hultman's § 2255 motion, apart from a claim of ineffective assistance, also charges that his guilty plea was not knowing, voluntary, or intelligent because he did not know that his pre-bankruptcy conduct could be taken into account at sentencing. This claim is procedurally defaulted and cannot be raised here absent a showing of cause and prejudice or actual innocence because Hultman failed to raise it on direct appeal to the Second Circuit. See Bousley v. U.S., 523 U.S. 614, 621-22 (1998)("And even the voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review. ... Where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either cause and actual prejudice, ..., or that he is actually innocent." (quotations and citations omitted)). Hultman's claim of lack of knowledge is not one of actual innocence and he does not even attempt to show cause and prejudice for the failure to raise the claim on direct review. Hultman's related ineffective assistance claim, of course, cannot be procedurally barred. See Massaro v. U.S., 538 U.S. 500, 504 (2003)("We hold that an ineffective-assistance-of-counsel claim may be brought in a collateral proceeding under § 2255, whether or not the petitioner could have raised the claim on direct appeal.").

At no time at any stage of the proceedings has Hultman ever raised a claim under Apprendi v. New Jersey, 530 U.S. 466 (2000) related to the judicial fact finding in determining his sentence. The Court therefore does not address whether such claim would be procedurally barred for failure to raise on direct appeal, or whether such Apprendi claim if made now as applied by Blakely v. Washington, 124 S.Ct. 2531 (2004) would be barred under Teague v. Lane, 489 U.S. 288 (1989) and progeny, see e.g. Coleman v. U.S., 329 F.3d 77 (2d Cir. 2003)(holding under Teague and progeny that Apprendi does not apply retroactively to initial § 2255 motions). In this regard, it is worth noting that the Second Circuit has recently directed that its pre-Blakely Apprendi law continues with full force with respect to and Blakely does not apply to the Federal Sentencing Guidelines until the Supreme Court rules otherwise. See U.S. v. Mincey, - - F.3d - -, 2004 WL 1794717 (2d Cir. Aug. 12, 2004).

any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of verity. The subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible." Blackledge v. Allison, 431 U.S. 63, 73-74 (1979). Where, as here, a petitioner claims his plea was involuntary as a result of ineffective assistance of counsel, to succeed, petitioner must satisfy the two-part test of Strickland v. Washington, 466 U.S. 668 (1984) as applied to guilty pleas in Hill v. Lockhart, 474 U.S. 52, 58 (1985). The first part requires petitioner to show that the advice received was not within the range of competence demanded of attorneys in criminal cases, see id. at 57, to wit, that the "representation fell below an objective standard of reasonableness," id. (quoting Stickland, 466 U.S. at 687-88). The second part "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

Hultman's claim of error is that he was not informed prior to pleading guilty that the Court could factor into sentencing his embezzlement of funds from CSM before CSM's bankruptcy.

Hultman's allegations and record here are clearly insufficient to satisfy the "prejudice" requirement since Hultman nowhere claims that had Attorney Thomas informed him of the possibility that conduct not alleged in the superseding indictment would be considered at sentencing, he would have persisted with his plea of not guilty and insisted on going to trial. Hultman provides no allegations to support the notion that he would have placed particular emphasis on the inclusion of pre-bankruptcy embezzled funds at sentencing in deciding whether or not to plead guilty. Indeed, in light of Hultman's plea colloquy with the Court and his plea agreement, such allegations would be frivolous. Hultman confirmed that he had enough opportunity and enough information to discuss the case with his attorney and that there was no aspect of Attorney Thomas' representation with which he was not fully satisfied, that his understanding of his plea agreement was reflected by the AUSA's summary of it in open court including that there was no agreement as to the loss amount to be used for calculating his sentence, that no one had made any promises, representations, or threats influencing his decision to plead guilty, that no one had made any promises to him regarding what his sentence would be, that no one could know or bind the Court with respect to what his sentence might be, that he could not withdraw his plea if the Court did not accept his views or any of the parties' stipulations as to what the sentence might be, that

he understood the Court might sentence him to five years' imprisonment on each count of conviction, and that he could not withdraw his guilty plea if the Court did not calculate his guidelines in the way he anticipated. Ultimately, the Court found that Hultman's guilty plea was entered voluntarily, knowingly, and of his own free will.

Hultman's plea agreement, which he executed in open Court, is to similar effect. The agreement explicitly says that Hultman was exposed to a maximum penalty of 5 years per count charging a violation of 18 U.S.C. § 153, that the Court would consider but could depart from any applicable sentencing guidelines, that the Court would make all sentencing determinations, that Hultman had no right to withdraw his guilty plea if his sentence or the guideline application was other than he anticipated, that the stipulation of offense conduct into which the Government and Hultman entered did not purport to set forth all relevant conduct for sentencing purposes and was not binding on the Court, that both parties did not agree as to a loss amount for sentencing purposes and reserved their rights to argue the issue, that Hultman understood the Court was not bound by any guideline stipulation between the parties and that he would not be able to withdraw his guilty plea if the Court did not calculate his guideline range in accord with those stipulations, that Hultman acknowledged understanding of the nature of the offenses to which

he was pleading guilty and the corresponding penalties provided by law, and that Hultman was completely satisfied with the representation and advice of Attorney Thomas.

Hultman's own petition and the record both conclusively therefore establish that Hultman would not have insisted on a trial had he been aware at his plea of the potential for his sentence to increase by a maximum of three months based on his pre-bankruptcy embezzlement from CSM, particularly where, if his plea is to be taken seriously, he was willing to plead guilty knowing that he might receive as much as five years for each count not merely the extension based on pre-bankruptcy losses of his guidelines from 24-30 months to 27-33 months.

IV. Constitutional Attack on 18 U.S.C. § 666

Hultman's second charge of ineffective assistance is that Attorney Thomas should have argued to the Court at sentencing and on direct appeal that 18 U.S.C. § 666 is facially unconstitutional for failure to require a connection between federal funds and an accused's criminal conduct and that the statute was applied in an unconstitutional manner to Hultman because the Court found no such nexus, therefore precluding consideration of CSM's pre-bankruptcy losses in determining

Hultman's sentence.[2] This claim is meritless under the Strickland two-part inquiry.[3]

At the time of Hultman's plea, binding Second Circuit precedent interpreting 18 U.S.C. § 666(a)(1)(B) had held that the statute, to survive an as-applied constitutional challenge (and therefore a facial one as well, see Sabri v. U.S., 124 S.Ct. 1941, 1945 (2004)("... facial challenge ... the law can never be applied constitutionally....")), required "at least some connection between the bribe and a risk to the integrity of the federal funded program" such that the Government could not use "§ 666(a)(1)(B) to prosecute a bribe paid to a city's meat inspector in connection with a substantial transaction just because the city's parks department had received a federal grant of $10,000." U.S. v. Santopietro, 166 F.3d 88, 93 (2d Cir.

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[2] The Court does not read Hultman's § 2255 petition as also claiming the unconstitutionality of 18 U.S.C. § 666 constitutes a basis for concluding his sentence was imposed in violation of the Constitution. Even if his petition is read that way, however, such claim is procedurally defaulted for not having been raised before at sentencing and on direct appeal and therefore cannot be raised here absent a showing of cause and prejudice or actual innocence, a showing Hultman does not even attempt to make. See Bousley, 523 U.S. at 521-22. Moreover, as demonstrated by the discussion of Hultman's § 666 challenge in the context of Hultman's charge of ineffective assistance, this claim would fail on the merits.

[3] While Strickland expressly limited itself to counsel's assistance at trial or in a death penalty sentencing and did not consider "the role of counsel in an ordinary sentencing," Strickland, 466 U.S. at 686, the Supreme Court subsequently applied the prejudice prong to any increase in jail time although allowing that "the amount by which a defendant's sentence is increased by a particular decision may be a factor to consider in determining whether counsel's performance in failing to argue the point constitutes ineffective assistance," Glover v. U.S., 531 U.S. 198, 204 (2001). The Second Circuit has applied both prongs of Strickland to sentencing determinations made under the Federal Sentencing Guidelines. See Johnson v. U.S., 313 F.3d 815, 817-19 (2d Cir. 2002)(per curiam).

1999). This required nexus was satisfied in Santopietro where the federally funded program and the corrupt transaction concerned the same general subject matter and fell within the jurisdiction of a single agency. See Santopietro, 166 F.3d at 93-94 (connection established where bribe concerned real estate transactions under the purview of the same agency which administered federally funded housing and urban development programs). Moreover, in Salinas v. U.S., 522 U.S. 52 (1997), the Supreme Court rejected the argument that a § 666(a)(1)(B) bribe in some way had to affect federal funds, for example, by their diversion or misappropriation, see id. at 55-59, but declined to decide "whether the statute requires some other kind of connection between a bribe and the expenditure of federal funds," id. at 59, because the bribe at issue (designer watches and a pick up truck from federal prisoner in exchange for facilitation of illicit conjugal visits for that prisoner) was "related to the housing of a prisoner in facilities paid for in significant part by federal funds themselves," and "that relationship [was] close enough to satisfy whatever connection the statute might require." Id. Assuming, as Hultman and the Government now do, that the nexus requirement under Santopietro for § 666(a)(1)(B) was the same as that for § 666(a)(1)(A) at the time of Hultman's plea, the Court's finding at sentencing that a majority of CSM's funding was federal and that Hultman had stolen close to a half-

million of CSM's funds in his capacity as its administrator, secretary, and one of its directors, which gave him control over CSM's financial operations, clearly satisfied the required threat to a federal program to survive an as-applied constitutional attack under Santopietro. See Tr. [Doc. #40] 68:19-70:15.

Hultman, recognizing the extreme weakness of his position, says that Attorney Thomas should have argued to this Court and the Second Circuit panel on direct appeal that Santopietro was wrongly decided and the concurring opinion of Judge Bye in U.S. v. Morgan, 230 F.3d 1067, 1071-75 (8th Cir. 2000)(Bye, J., concurring), which concluded that Congress lacked power to enact § 666 as a federal crime, should be adopted. Hultman does not say that he asked Attorney Thomas to do this nor does he argue by what authority this Court could adopt this argument, particularly since Santopietro could only be overturned by the full en banc Second Circuit.[4] Thus, failure to make the argument caused no prejudice to Hultman. Moreover, in no way could Mr. Thomas' failure to have made the argument on appeal, even if Hultman had asked him to do so, be deemed deficient performance. Appellate counsel is not even required to raise "nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points," Jones v. Barnes,

[4] Judge Bye's views were subsequently rejected by the Eighth Circuit, see U.S. v. Sabri, 326 F.3d 937 (8th Cir. 2003)(2-1 decision with Bye, J., dissenting), and the Supreme Court, see Sabri, 124 S.Ct. 1941.

463 U.S. 745, 751 (1983), as "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues," id. at 751-52. Given this principle, it could be argued that had Mr. Thomas made such a frivolous argument, he actually would have been acting contrary to Hultman's interest. Be that as it may, Hultman's charge of ineffective assistance here fails.

V. Loss Calculation

Hultman's third claim of error begins with the assertion that the Court's loss calculation at sentencing, totaling an amount between $800,000 and $1,500,000, was "grossly overstated and inaccurate." Mot. [Doc. #48] at 4. He explains that three and a half months after his sentencing, "on July 13, 2001, the Connecticut Department of Social Services determined that the total loss attributable to the defendant for both pre-petition and post-petition conduct was $451,914.00" and that "[a]n accounting analysis of the data relied upon by the Department of Social Services in reaching its $451,914.00 determination reveals that in reality there was no loss during that period and that in fact there was a negative loss in the amount of $399,577.00." Id. (Emphasis in original). Hultman provides no evidence or other material to support such claims but assigns error to the

sentencing proceedings on grounds of ineffective assistance, asserting that Attorney Thomas should have conducted a "reasonable and appropriate forensic accounting analysis," id. at 5, of CSM's and Connecticut's books and records and that, if he had done so, it would have demonstrated CSM's "negative loss." There is no merit to Hultman's contention.[5]

With respect to the two-prong Strickland showing that Hultman must make, other than bare allegations, Hultman makes no showing and provides no evidence demonstrating how his counsel's review of CSM's and Connecticut's books should have been different or was deficient. The record demonstrates Attorney Thomas' thorough review and analysis of the evidence pertaining to the Court's loss calculation. At Hultman's plea, Thomas informed the Court that he had received and reviewed 50 boxes of discovery material from the Government and that delays in scheduling might be needed because of the voluminous and complex documentation he needed to review primarily for resolving disputes over the loss calculation. Sentencing was delayed

[5] To the extent Hultman's challenge to the Court's loss calculation under the Federal Sentencing Guidelines is raised as a separate challenge apart from his ineffective assistance claim, (and the Court does not so read Hultman's motion), it is not cognizable on a § 2255 motion absent "a complete miscarriage of justice" because he did not raise this challenge on direct appeal. See Graziano v. U.S., 83 F.3d 587, 589-91 (2d Cir. 1996). There is no miscarriage of justice here; Hultman was informed and confirmed he understood that he faced a five year sentence for each count of conviction, and with such understanding, he voluntarily entered a plea of guilty. Moreover, the alleged July 13, 2001 determination of the Connecticut Department of Social Services on which Hultman appears to rely occurred prior both to the due date for Hultman's brief on appeal, August 3, 2001, and the date of oral argument, November 29, 2001, and Hultman does not claim that he was not aware of the determination when it issued.

approximately five months to allow Thomas time for such document review and analysis relative to the proper loss calculation. Thomas described his work at sentencing: "And I would comment on the volume of documentation, ..., I know from the process of spending days reviewing boxes of documents and then distilling that down to fewer documents and to really analyze and then finally to have that in notebook form was a lot of work..." Finally, the sentencing transcript and Thomas' objections to the Presentencing Report dated December 14, 2000 reveal intimate knowledge of the documents relevant to the Court's loss calculation. There is thus no basis from which to conclude that Thomas' representation was deficient with respect to making a "reasonable and appropriate" analysis of the books and records relevant to the loss calculation. The sentencing transcript reveals the Court's independent review of the documents giving rise to its loss conclusions such that there is no basis for believing that the Court would have imposed a different sentence. See Tr. [Doc. #40] at 68:6-78:16. Thus, Hultman's third claim of ineffective assistance must be rejected.

VI. Conclusion

For the reasons set out above, Hultman's motion [Doc. #48] is DENIED and the Government's motion [Doc. #52] is DENIED as MOOT. No Certificate of Appealability will issue as no

"substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), has been made.

IT IS SO ORDERED.

/s/

Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 25th day of August, 2004.