MCDONALD, J., dissenting. I continue to adhere to my dissent in *State* v. *DeCaro*, 252 Conn. 229, 745 A.2d 800 (2000). In that case, I would have ordered a new trial upon a finding that the trial court improperly quashed the defendant's subpoena seeking highly relevant written building permit procedures and guidelines. The majority, to the contrary, ordered a further hearing before the trial court, which was held in 2001.

The majority now holds that the quashing of the subpoena was harmless because the defendant, Rita DeCaro, did not dispute receiving the requested material from the senior assistant state's attorney (state's attorney). I disagree because there is a real difference between obtaining all of the town's documents on the subject directly from the town building supervisor by subpoena and acquiring from the state's attorney all of the documents that, upon the state's attorney's request, the town gave to the state's attorney. Simply because the state's attorney gave the defendant all of the documents that the state's attorney had received does not mean that the town necessarily turned over everything it had. Defense counsel stated to the trial court in 2001 that the documents made available to the defendant "seemed to be in compliance," and that he had "no factual basis on which to dispute" the state's attorney's representation and therefore accepted it. Defense counsel also stated, however, that he did not know whether he "did" or "didn't" receive all of the information. Because the defendant did not refute the state's attorney's representations regarding the subpoenaed documents, the court found that there was full compliance with the subpoena. This was not a reasonable finding as the defendant could not dispute the town's full compliance without a subpoena and cross-examination of town officials. The defendant faced a "Catch-22"[1] from which there was no escape.

Donald Miklus, the town controller, testified before the jury that there had been adequate cash and check management controls in place. The defendant nevertheless was restricted from asking Stephen Smith, the defendant's supervisor, before the jury whether he, in response to the subpoena, had searched for and found any written building procedures or guidelines regarding the handling of cash. Thus, no evidence was presented to the jury from the witness under subpoena to produce such records to show that no such written procedures or guidelines existed.[2] Smith testified before the jury only that he was "not aware" of any written policies or procedures, thus giving an equivocal answer.[3] Documents that are not produced when required by subpoena would be, of course, the strongest evidence of their nonexistence. I would conclude that the defendant

was entitled to present such testimony and was prejudiced because she could not.

It cannot be claimed that disclosure by the state is a bar to a subpoena seeking the material to be presented to the jury. I would conclude that the sixth amendment guarantee of the right to compulsory process for obtaining witnesses in a criminal defendant's favor was not met by such disclosure of documents obtained from a secondary source not subject to the subpoena.

I would finally conclude that the restrictions on compulsory process deprived the defendant of testimony from witnesses that plausibly would have been material and favorable to her defense. See, e.g., *United States* v. *Valenzuela-Bernal*, 458 U.S. 858, 868, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982). Accordingly, I would order a new trial.

[1] Catch-22 is defined as "[a] situation in which a desired outcome or solution is impossible to attain because of a set of inherently illogical rules or conditions . . . ." American Heritage Dictionary of the English Language (4th Ed. 2000).

[2] Defense counsel stated at the 2001 hearing that there were no such procedures or guidelines in the disclosed material, and the court stated that it would have to "bother" the state's attorney about that, after which the state's attorney did not reply or dispute defense counsel's statement.

[3] See footnote 11 of the majority opinion.